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BY THE ASSOCIATE EDITORS

OF THE LATE

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VOLUME 140

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(15)

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

DAVIDSON v. STATE.

[167 Ala. 68, 52 South. 751.]

CRIMINAL LAW—Reasonable Doubt.—An Instruction, "This court charges the jury that if, upon consideration of all the evidence, they have a reasonable doubt of defendant's guilt, arising out of any part of the testimony, they must find the defendant not guilty," asserts a correct legal proposition, and of necessity is apt in most, if not all, criminal trials. It could hardly be abstract in any criminal case. (p. 17.)

Davidson was convicted of murder in the second degree and appeals.

Leith & Gunn and L. D. Gray, for the appellant.

Alexander M. Garber, attorney general, for the state.

⁶⁸ **MAYFIELD, J.** This case must be reversed for the refusal of the trial court to give charge H as it was requested by the defendant. The charge was: "This court charges the jury that if, upon consideration of all the evidence, they have a reasonable doubt of defendant's guilt, arising out of any part of the testimony, they must find the defendant not guilty." This charge has ⁶⁹ been time and again held proper, and many cases have been reversed by this court because it was refused at the request of the defendant. As has been often decided by this court, it asserts a correct legal proposition, and of necessity is apt in most, if not all, criminal trials, and could hardly be abstract in any criminal case.

As was pointed out by Chief Justice Stone, in *Hurd v. State*, 94 Ala. 100, 10 South. 528 (the first, so far as we are aware, that was reversed for the refusal of this charge), the charge does not single out a part of the evidence and re-

quest a verdict upon that part. It hypothesizes a consideration of all the evidence, and a failure to produce conviction of guilt. If the jury entertain a reasonable doubt of the defendant's guilt, after considering all the evidence, it is their duty to acquit, though the doubt arises from a part only of the evidence. "It is certainly the duty of the jury, in pronouncing on issues submitted to them, to consider and weigh all the testimony in the case. This does not mean that all, or any part of it, shall be believed. The law exacts no such rule as that. It must be considered, and given such weight as the manner of giving it in its intrinsic nature and the other testimony in the cause entitle it to. This much, and nothing more. This the jury must and will do, as the only way of performing their highest, sworn duty of rendering a true verdict according to the evidence": *Hurd v. State*, 94 Ala. 100, 10 South. 528. Hurd's case has been followed and reaffirmed in many cases, among which may be cited the following: *Walker v. State*, 117 Ala. 42, 23 South. 149; *Riddle v. Webb*, 110 Ala. 599, 18 South. 323; *Miller v. State*, 107 Ala. 40, 19 South. 37; *Prince v. State*, 100 Ala. 144, 46 Am. St. Rep. 28, 14 South. 409; *Forney v. State*, 98 Ala. 19, 13 South. 540; *Williams v. State*, 129 Ala. 659, 30 South. 910; *Hale v. State*, 122 Ala. 85, 26 South. 236.

The other charges refused to defendant were properly refused. Some were argumentative, some requested a verdict based upon a part of the evidence only, some invaded the province of the jury, some were abstract, some were in bad form, some did not state any correct proposition of law, and some had duplicates among the given charges requested by defendant.

As the case must be reversed on account of charge H, and as the other questions may not arise on another trial, it would subserve no useful purpose to discuss them in this opinion.

Reversed and remanded.

Simpson, McClellan and Evans, JJ., concur.

Reasonable Doubt and Instructions Concerning the Same is the subject of a note to *Burt v. State*, 48 Am. St. Rep. 566. An instruction which states, "By the term 'reasonable doubt' is meant a doubt that has a reason for it; it is a doubt you can give a reason for," is erroneous and cause for reversal of a judgment: *Abbott v. Territory*, 1 Okl. Cr. 1, 20 Okl. 119, 129 Am. St. Rep. 818. The following charge has been held not erroneous: "The defendant is presumed to be innocent until he is proved to be guilty beyond a reasonable doubt. He is entitled to every reasonable doubt arising from the evidence, and a reasonable doubt is one conformable to reason, a doubt which a reasonable man would entertain. It does not mean a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a

moral certainty of the truth of the charge": *Vasquez v. State*, 54 Fla. 127, 127 Am. St. Rep. 129. It is best to simply follow the language of the statute, "If there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal": *Jolly v. Commonwealth*, 110 Ky. 190, 46 Am. St. Rep. 429, and see *Smith v. State*, 133 Ala. 145, 91 Am. St. Rep. 21, and the cases cited in the cross-reference note thereto.

Each Juror, as Distinguished from the Jury as a Whole, must be convinced beyond a reasonable doubt of the guilt of the defendant, before the jury can convict, and a refusal to give an instruction to this effect is error: *Bell v. State*, 89 Miss. 810, 119 Am. St. Rep. 722.

JOHNSON v. STATE.

[167 Ala. 82, 52 South. 652.]

LARCENY—Evidence—Character of Money Stolen.—Upon a trial under an indictment for the larceny of one twenty dollar gold piece, one ten dollar gold piece, one ten dollar bill and other coins, all money of the United States, where the evidence shows the larceny of money of the denominations alleged, but fails to show it was money of the United States, or of any other sovereign power, it is open to the jury to infer, if it is not their duty to do so, that the money stolen was lawful money of the United States. (p. 20.)

WORDS AND PHRASES.—"Money," in its strict technical sense, is coined metal, usually gold or silver, upon which the government stamp has been impressed to indicate its value; in its more popular sense, any currency, token, bank-notes or other circulating medium in general use as the representative of value; a generic term, covering everything which by consent is made to represent property and passes as such currently from hand to hand. The word designates the whole volume of the medium of exchange, regardless of its character or denomination. (p. 20.)

S. W. Frierson, for the appellant.

Alexander M. Garber, attorney general, for the state.

⁸³ **MAYFIELD, J.** The defendant was indicted for the larceny of one twenty dollar gold piece, one ten dollar gold piece, one ten dollar bill, four silver dollars, and ninety cents in silver specie, which denominations are otherwise unknown to the grand jury, all money of the United States, and the property of Charlie Cowan, of the value of forty-four dollars and ninety cents. The evidence conclusively showed that money of the denominations and value alleged was stolen from Charlie Cowan, and it tended to show that the defendant was the thief; in fact, he admitted getting a part of the money of Cowan alleged to have been stolen. No witness, however, testified that the money was stolen, or that found in the possession of the defendant claimed to have been stolen, was money of the United States of America; but it

was certainly open to the jury to infer, from all the evidence, that it was such. We do not think that there was such an entire failure of proof as to this description of this money as would warrant the giving of the affirmative charge for the defendant.

There is no question of variance in the case. There was no proof to show that it was the money of any other sovereign or government than that of the United States. It is simply a question of sufficiency of proof as to the averment. Money is defined as follows: "Money, in its strict, technical sense, is coined metal, usually gold or silver, upon which the government stamp has been impressed to indicate its value; in its more popular sense, any currency, token, bank-notes, or other circulating medium in general use as the representative of value; a generic term, covering everything which by consent is made to represent property, and passes as such currently from hand to hand. The word designates the whole volume of the medium of exchange, regardless of its character or denomination": *State v. Downs*, 148 Ind. 324, 47 N. E. 670; *Hopson v. Fountain*, 5 Humph. 84 (Tenn.) 140; *Graham v. State*, 5 Humph. (Tenn.) 40; *State v. Hill*, 47 Neb. 456, 66 N. W. 541; *United States v. Lucius Beebe & Sons*, 122 Fed. 762, 58 C. C. A. 562. This court has held that the generic term "money" is understood to include notes as well as the authorized coin of the country, since the introduction and free use of bank and treasury notes as a circulating medium and standard of value: *Noble v. State*, 59 Ala. 73. This court has also decided that, when a decree provides for the payment of money, that term imports a constitutional currency: *Shackelford v. Cunningham*, 41 Ala. 203.

It was therefore open for the jury to infer that the money stolen was lawful money of the United States of America, if it was not their duty so to do; it not appearing that it was the money of any other sovereign or government than that of the United States of America, and the proof being abundantly sufficient in all other respects to support a conviction.

The court properly refused to give the affirmative charge for the defendant, or to direct a verdict in his favor. This being the only exception or question reserved or presented for review on appeal, the judgment must be affirmed.

Anderson, Sayre and Evans, JJ., concur.

The Possession of Stolen Money, and what must be shown in connection therewith to constitute larceny, are discussed in the note to *State v. Drew*, 101 Am. St. Rep. 506.

The Larceny of Money borrowed is the subject of a note to *Grunson v. State*, 46 Am. Rep. 183. The larceny of money received to be changed is the subject of a note to *Shipply v. State*, 40 Am. Rep. 553; and the larceny of money received by mistake is the subject of

a note to State v. Ducker, 34 Am. Rep. 591. Greenbacks and national bank-notes are the subject of larceny: Ex parte Prince, 27 Fla. 196, 26 Am. St. Rep. 67.

Money is a Generic Term and covers everything which by consent is made to represent property, and passes as such currently from hand to hand: Crutchfield v. Robins, 5 Humph. 15, 42 Am. Dec. 419, and see cases cited in the cross-reference note thereto.

CLEANEY v. PARKER.

[167 Ala. 134, 51 South. 951.]

MASTER AND SERVANT—Tort of News Agent on Train.—

A Rule of a News Company requiring the discharge of a train agent upon complaint by a conductor can in no way tend to exculpate it from a wrong of the agent or exempt it from liability for the acts of the agent committed before his discharge. (p. 23.)

MASTER AND SERVANT—Tort of News Agent on Train.—

A train agent of a news company is acting within the general scope and line of his authority when he compels a passenger to pay the second time for articles purchased, using threats and an attempt to retake the articles to compel such payment, so as to render his principal or master liable for the tort, although he may have exceeded his authority and violated the instructions of his principal. (p. 23.)

MASTER AND SERVANT—Tort of News Agent on Train.—

Damages.—In an action for damages for the tort of a train agent of a news company in compelling a passenger to pay twice for articles purchased, the damage to the estate of the plaintiff is the amount so paid, and the question whether he is entitled to any other actual damage is for the jury under all the evidence in the case. (p. 23.)

The oral charge of the court, referred to in the opinion, was: "If you find after this transaction he (Elrod) said nothing more to her about the payment until she, after receiving the lemons, and paying the dime which had been received, said to Elrod, the news agent, 'Was that a sufficient sum to pay you?' and Elrod by that inquiry was induced to practice a fraud upon her by saying 'No,' and she, after that, paid him another dime, then I charge you that in the collection of the second dime Elrod was not acting within the line and scope of his authority. If you believe from the evidence that he was collecting the second dime, intending to appropriate it to his own use, and not to the use of the Parker Railway News Company, the defendant would not be responsible; for in that event the fraudulent collecting of the dime was Elrod's individual tort. . . . If you believe from the evidence that after the sale of the lemons and the receipt of the dime Elrod, the defendant's agent, was talking to a lady in the car, and then turned to Mrs. Cleaney and said that she had not paid for those lemons and demanded the money a second time, I charge you that in the receipt

of the money the first time Elrod was acting within the line and scope of his authority, and that his authority ended after collecting the dime, and that if you believe from the evidence that, after collecting the first dime, he turned back to Mrs. Cleaney and demanded the money a second time, he was not acting within the line and scope of his authority as the defendant's agent, and the defendant would not be liable for his so doing. . . . I charge you that, if the plaintiff was entitled to recover at all, the only damages she sustained would be the extra dime she paid for the lemons."

D. H. Riddle, for the appellant.

Lackey & Bridge, for the appellee.

¹³⁶ MAYFIELD, J. The appellant, a woman, was a passenger on board the train of the Central of Georgia Railway Company. The appellees were conducting what is commonly known as a "news butch business" on said train. Appellant bought some lemons from the "butch," appellees' agent, in charge of their business on said train, and, as she claims, paid the price of ten cents therefor. Appellant claims that she was not certain that she had paid the "butch" for the lemons, and again asked him the price; that he replied ten cents; that the "butch" again demanded of her the price, which she declined to pay, saying she had paid him once; that he denied this, and insisted upon her paying the dime, which she refused to do; that the "butch" then attempted to take the lemons from her; that she thereupon threw up her hands to ward him off, telling him she would pay him the dime rather than have him take the lemons from her; that she then paid him the dime, ¹³⁷ and he, putting it in his pocket, replied that he was in a dime and that this was his profit. The appellant sued to recover the damages and losses suffered to her estate and feelings.

The loss to her estate was one dime, which, under all the evidence, if true, she was entitled to recover. Whether she was entitled to recover as for an assault, insult, or injury to her pride or feelings was clearly a question for the jury, and they seem to have decided it against her.

If there was any error in sustaining demurrers to the original complaint, it was clearly without injury, because the same evidence, which is practically without dispute, would have supported a verdict under either count as amended, if it would have supported one under either count of the original complaint. The complaint as amended, and as to which demurrers were overruled, was not practically or materially different from the original as to which the demurrers were sustained.

The trial court erred in allowing defendants to prove, over plaintiff's objection, their rule with news agents, where a complaint is made by a conductor. The plaintiff was not shown to have any knowledge, actual or constructive, of such rule, nor was it binding upon her, and it could not tend to exculpate the defendants from the wrong of the agent. Such a rule as was shown, of discharging agents upon the complaint of conductors, could not exempt the defendants from liability for the acts of agents before they were so discharged.

We also think the trial court erred in those parts of its oral charge to which exceptions were reserved, in so far as the court instructed the jury that the agent of defendants was not acting within the line and scope of his authority in collecting the second dime from plaintiff. ¹³⁸ While, in collecting the second dime, he may have exceeded—probably did exceed—his authority and violated instructions from his principals, yet it was clearly within the line and scope of his authority in such manner as to render the defendants liable to plaintiff for such tort of the agent; while it was the tort of the agent as between him and his principals, it was the tort of both as between them and the plaintiff.

While it is true and correct, as stated by the court in its instructions to the jury, that the damage to plaintiff's estate was only one dime, yet it was a question for the jury, under all the evidence, as to whether she was entitled to any other actual damages.

The effect of the court's instructions was that plaintiff could only recover back the dime which she was wrongfully required to pay by the defendant's agent. This was probably an invasion of the province of the jury.

The judgment is reversed, and the cause remanded.

Dowdell, C. J., and Simpson and McClellan, JJ., concur.

As to the Master's Liability for the Malicious Acts and Torts of His Servant, see *Ploof v. Putnam*, 83 Vt. 252, 138 Am. St. Rep. 1085, and the cases cited in the cross-reference notes thereto.

The Liability of the Master for the Negligence or Misconduct of his servant is considered in the notes to *Blake v. Ferris*, 55 Am. Dec. 317; *Ware v. Barataria etc. Canal Co.*, 35 Am. Dec. 192; *Goodloe v. Memphis etc. R. B. Co.*, 54 Am. St. Rep. 71.

When a Master or Employer is Liable in Exemplary Damages for the act of his employee or servant, is the subject of an extended note to *Crane v. Bennett*, 101 Am. St. Rep. 730, and of a note to *Hagan v. Providence etc. R. B. Co.*, 62 Am. Dec. 377.

WALLS v. SMITH & CO.

[167 Ala. 138, 52 South. 320.]

HIGHWAY OBSTRUCTION—Action by Individual.—For the obstruction of a public and common right of way no private action will lie, unless it is alleged and shown that the plaintiff has thereby suffered injury peculiar to himself; that is, different in kind and degree from that suffered by the public. (p. 26.)

HIGHWAY OBSTRUCTION.—If One's Access from His Property to the highway is so materially impaired by the obstruction of the highway as to affect its value, an action therefor will lie. (p. 26.)

HIGHWAY OBSTRUCTION—Injury to Person or Property.—If, while attempting to use a public highway, one sustains a direct injury to his person or property by reason of an obstruction therein, an action will lie. (p. 26.)

HIGHWAY OBSTRUCTION—Damages for Change of Route.—Where an obstruction of a highway merely drives one to a circuitous route on a longer road, the interference is only with the common right of passing and repassing, and there is no such peculiar injury as will justify a private suit. (p. 26.)

HIGHWAY OBSTRUCTION—Loss of Business and Profits.—Damages for loss of business, the employment of extra teams and employees, and the building of a new road, are too speculative and remote to be recovered in an action for damages occasioned by the obstruction of a highway and the consequent interference with the plaintiff's business. They amount to nothing more than a claim for the profits of the business which might have been done without such additional aids, but for the obstruction. (p. 27.)

PLEADING—General and Special Damages.—Where a complaint sets forth a valid claim for general or nominal damages, it is not laid open to demurrer by the addition of a claim for special damages, though the special damages are not recoverable. Defendant's response to the improper element of damages claimed should be by motion to strike, objections to evidence, or by requests for instructions to the jury. (pp. 27, 28.)

HIGHWAY OBSTRUCTION—Private Suit—Pleading and Proof.—The gist of an action by an individual for the obstruction of a highway is the peculiar private injury. The entire claim is for special damages, and if no special damages are alleged in the complaint, nominal or general damages will not be presumed from the mere wrongful act alleged. (p. 28.)

Action by O. C. Walls and others against C. D. Smith & Co., and others for damages. From a judgment for defendants, the plaintiffs appeal.

The first count, as finally amended, follows: "(1) Plaintiffs claim of defendants the sum of five thousand dollars damages, and allege: That on, to wit, May, 1907, the defendants, in the construction of a roadbed or railway line through Reeder's Gap into the city of Bessemer, Jefferson county, Alabama, and across the public road known as the Eastern Valley public road, graded, filled, and excavated said railway across said road, which said Eastern Valley public road was a highway. The construction of said railway continued from, to wit, May, 1907, for the entire period up to and including

the date of the institution of this suit, to wit, December, 1907. That during said time plaintiffs occupied and had in operation a merchandise business in a store or building situated at the intersection of said Eastern Valley road and Fairfax avenue of the city of Bessemer. That they had sundry customers living along from said store down said Eastern Valley road south of said store for a radius of some distance. That their homes were situated in Jonesboro, and that they used and traveled to and from said store said Eastern Valley road, which was a public road, and that they used and traveled said road to deliver their merchandise and drinks to customers and to their homes, and that customers used and traveled said road to purchase of plaintiffs their goods at said store up to and until, to wit, May, 1907, at which time they aver defendants constructed across Eastern Valley public road an archway immediately across or over said road, and made and excavated in said Eastern Valley road deep and dangerous depressions, and filled in on each side of said archway with dirt, stones, timbers, and other materials, until it completely obstructed said Eastern Valley road. That during the construction of said road it became filled in with trees, logs, large stones, and other substances at or near the intersection of said Eastern Valley road with Fairfax avenue, and that they maintained said obstacles as aforesaid, in said Eastern Valley road, and across same, from the period of, to wit, May, 1907, and the remaining part of said year up to and including the date of filing this suit as aforesaid. Plaintiffs aver that owing to and as a proximate consequence of obstructing said Eastern Valley road, they were greatly inconvenienced in their travels from their said store to their homes at Jonesboro, that they were deprived of ingress and egress to and from their store, and to deliver their goods and merchandise to their customers; that they incurred expense for wagons, teams, and employees to haul and deliver their goods at a different and very inconvenient route, and owing to said inconvenience from the obstacles in the said Eastern Valley road, placed there by the defendants aforesaid, they were deprived of getting a number of customers and lost trade, and their said business was greatly damaged, to their damage as aforesaid."

The second count alleged substantially the same facts as stated in the first count, and further that by the obstruction of the highway the defendants wantonly, willfully, or intentionally damaged the plaintiffs.

Pinkney Scott, for the appellant.

Tillman, Bradley & Morrow and E. H. Dryer, for the appellee.

¹⁴² SAYRE, J. The text-books and adjudicated cases are agreed that for an obstruction of a public and common right of way no private action will lie, unless it be alleged and shown that the plaintiff has thereby suffered injury peculiar to himself; that is, different in kind and degree from that suffered by the public. The reason for this rule, accepted from the beginning as sufficient, is that the offender should be punished by indictment as for the maintenance of a common nuisance, or the nuisance be abated by bill in equity in the name of the state; for otherwise suits would be multiplied intolerably: *Stetson v. Faxon*, 19 Pick. (Mass.) 147, 31 Am. Dec. 123, note; *Wood on Nuisances*, sec. 646; *Joyce on Nuisances*, sec. 218 et seq., where many cases are cited. See, also, *Baker v. Selma Street Ry. Co.*, 135 Ala. 552, 93 Am. St. Rep. 42, 33 South. 685, and *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144, 59 L. R. A. 399. ¹⁴³ The reported cases show that the courts have been much vexed in the application of this general principle to particular cases. Thus much, however, seems clear: That if one's access from his property to the highway be so materially impaired as to affect its value, or if, while attempting to use the highway, one sustains direct injury to his person or property, an action will lie. And here we note the absence from the complaint in this case of any averment of injury of either kind. But where the obstruction is so remote from plaintiff's property as not to affect its permanent or rental value—and in this case there is no allegation that the value of plaintiff's property was impaired—so that the plaintiff is merely driven to a circuitous route or a longer road, the authorities hold that no peculiar injury is shown, but only an interference with the common right of passing and re-passing.

Thus in the modern English case of *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316, it was held, upon consideration of many cases, that if the plaintiff proves no special damage to himself beyond being delayed on several occasions in passing along a highway, and being obliged, in common with all others who would use the way, either to go by a less direct road or to remove the obstruction, he cannot maintain an action. It was urged that actual delay was a cause of action. But the court said: "In this case, where the plaintiff, on one or more occasions, merely went up to the obstruction and returned, and on other occasions went and removed the obstruction—that is to say, he suffered an inconvenience common to all who happened to pass that way—I think that to hold the action maintainable would be equivalent to saying it is impossible to imagine circumstances in which such an action could not be maintained." In the Massachusetts case of *Blackwell v. Old Colony* ¹⁴⁴ R. R. Co., 122 Mass. 1, plaintiff complained

that the defendant had prevented the use of his wharf in his business of selling, shipping, and storing merchandise, by building a bridge across a navigable stream and arm of the sea, and sought to recover the loss of income and profits from his business. The court said: "The fact that the plaintiff alone now navigates the stream, or has a wharf thereon at which he carries on business, only shows that the present consequential damage to him may be greater in degree than to others, but does not show that the injury is different in kind, or that other riparian proprietors and the rest of the public may not, whenever they use the stream, suffer in the same way. The case has no analogy to those in which an obstruction in a navigable stream sets back the water upon the plaintiff's land, or, being against the front of his land, entirely cuts off his access to the stream, and thereby causes a direct and peculiar injury to his estate, or in which the carrying on of an offensive trade creates a nuisance to the plaintiff." And a demurrer was sustained. To the same general effect are the following, among other cases which might be mentioned: *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332; *Clark v. Chicago etc. Ry. Co.*, 70 Wis. 593, 5 Am. St. Rep. 187, 36 N. W. 326; *Shaubut v. St. Paul etc. R. R. Co.*, 21 Minn. 502; *McCowan v. Whitesides*, 31 Ind. 235; *O'Brien v. Norwich etc. R. R. Co.*, 17 Conn. 372; *Stufflebeam v. Montgomery*, 3 Idaho, 20, 26 Pac. 125.

In another line of cases special and peculiar damages have been found and allowed, as where the defendant obstructed a navigable creek over which plaintiff was then moving his goods in barges, whereby plaintiff was compelled to carry his goods overland at great expense (*Roes v. Miles*, 4 M. & S. 101); as where the plaintiff was actually detained four hours with three ¹⁴⁵ loaded asses (*Greasly v. Codling*, 2 Bing. 263); and as where the plaintiff was prevented from performing a contract which he had (*Dudley v. Kennedy*, 63 Me. 456). These were cases in which peculiar and special damages flowed proximately from the act complained of. The Massachusetts case from which we have quoted, and other cases of that character, on the other hand, are to be justified, as we think, upon the ground that the damages claimed were speculative, remote, and not capable of positive proof. And the ruling of the trial court in this case must be sustained, for the reason that, in so far as the complaint shows mere inconvenience in traveling to and fro, the plaintiff suffered no injury different in degree and kind from that suffered by the general public. As for those damages which are claimed for the loss of business, and the employment of additional wagons, teams, and employees, and the building of a new road, they are speculative and remote. They amount to nothing more than a claim for the profits of the business which

plaintiffs might have done, without these additional aids, but for the obstruction. They cannot be recovered.

If the complaint had set forth a valid claim for general or nominal damages, it would not have been laid open to demurrer by the addition of the special damages claimed, though the special damages were not recoverable. In that case defendants' response to the improper elements of damage claimed should have been by motion to strike, objections to evidence, or by requests for instructions to the jury: *Treadwell v. Tillis*, 108 Ala. 262, 18 South. 886. But the principles considered as determining the nature of plaintiff's right in the premises lead to the conclusion that plaintiff could not maintain his suit as for nominal damages only. The gist of the action in cases of this class is the peculiar ¹⁴⁶ private injury, which must be alleged and proved: *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332. The entire claim being for peculiar damages, which are special also, and necessarily so, and no such recoverable damages being averred in the complaint, no room is left for presuming the existence of nominal or general damages from the mere wrongful act alleged: *Nichols v. Rasch*, 138 Ala. 372, 35 South. 409. The demurrer was therefore well sustained.

Affirmed.

Dowdell, C. J., and Anderson and Mayfield, JJ., concur.

A Public Nuisance, Such as the Obstruction of a Highway, if it occasions an individual damage differing in kind and degree from that suffered by the general public, entitles him to an injunction or an action to abate: *Hulet v. Wishkah Boom Co.*, 54 Wash. 510, 132 Am. St. Rep. 1127, and see the earlier cases cited in the cross-reference note thereto.

A Person Seeking to Restrain the Obstruction of a Highway is not limited to that part of the roadway in front of his property: *Morse v. Whitcomb*, 54 Or. 412, 135 Am. St. Rep. 832.

BOGGS v. ALABAMA CONSOLIDATED COAL AND IRON COMPANY.

[167 Ala. 251, 52 South. 878.]

EMPLOYER'S LIABILITY—Assumption of Risk—Fellow-servants.—Except as modified by the employers' liability act, a servant undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of injury caused by the negligence of a fellow-servant while acting within the scope of his employment. But a servant stands in the position of assuming the risk only when he has received injury while acting in his master's service by a fellow-servant also so acting; both must have been engaged in a common employment. (pp. 30, 31.)

EMPLOYERS' LIABILITY ACT.—It was No Part of the Purpose of the employers' liability act to codify the whole law as to the liability of employers or to destroy any common-law right of servants. All servants are still entitled to maintain actions against their employers in all cases where they could formerly have done so. (p. 31.)

EMPLOYERS' LIABILITY ACT—Fellow-servants.—The employers' liability law was not intended to deprive servants injured by the negligence of other servants of any right of action they had at common law. A servant injured by the negligent act of another servant acting for the common master within the scope of his employment cannot be denied the right of recovery in an action under the statute, on the ground that he was not employed in a common employment with the delinquent, without conceding to him the right to recover under the common law as a stranger. (p. 32.)

EMPLOYERS' LIABILITY ACT—Fellow-servants.—The employers' liability law deals only with those cases which at the common law were affected by the doctrine of common employment, for only in such cases was the servant denied the right to recover of the master for the negligence of another servant. Unless they were engaged in a common employment, as affecting the master's liability, they stood to each other in the relation of strangers, although they may have been employed by a common master. (p. 32.)

EMPLOYERS' LIABILITY ACT—Purpose and Construction.—The employers' liability law (sec. 3910, Code 1907) does not make that negligence which was not negligence before; it does not make the master responsible for acts or things which do not constitute a breach of duty; it does not create a cause of action where none previously existed; it merely adds a remedy against a person other than the actual wrongdoer; it takes away from the master one defense, placing the employee, where the conditions of the statute have been satisfied, in the position of one of the public. (p. 33.)

EMPLOYERS' LIABILITY ACT—Constitutionality—Class Legislation.—It may be that section 5 of the employers' liability law affects employees only who are engaged in the operation of railroads, as only those persons, natural or artificial, operating railroads, make use of signals, locomotives, cars and the like upon railways, but the classification is based upon the fact that the operation of railroads, by whomsoever operated, involves great and peculiar hazards. The statute is in part a police regulation. It does not violate the constitution. (p. 36.)

EMPLOYERS' LIABILITY—Fellow-servants—Railroad Employees.—Employees engaged in or about a railroad, including therein employees brought by their employment into such close relation to the operation of the railroad as that it may be said, in a reasonable sense, that danger therefrom constitutes an ordinary danger of the service in which they are engaged, though they are not strictly railroad employees, as well as those engaged in the actual operation of the railroad, are fellow-servants with those employees who operate signals, locomotives, trains, etc., on the railroad, and fall under the influence of subdivision 5 of the employers' liability law. (p. 37.)

EMPLOYERS' LIABILITY ACT—Pleading.—In Declarations under the employers' liability law it seems to have been the rule to treat an allegation of employment by a common master as a sufficient allegation of an employment common in respect to the risk assumed under the common-law status, and it has been required that a complaint so framed must exclude the master's defense arising at the common law out of the relation, by stating with some particularity a case falling under some subdivision of the statute. (p. 37.)

EMPLOYERS' LIABILITY ACT—Pleading.—Where It is Uncertain just what the relation between the plaintiff and the negligent employee was at the time of the injury complained of, or rather, how the facts will turn out, good practice seems to require that, to avoid a variance, counts under the statute be joined with others on the common-law liability of the master as to a stranger. (pp. 37, 38.)

Action by Boggs, as administrator, against the Alabama Consolidated Coal & Iron Company, for damages for the death of his intestate, an employee. From a judgment for the defendant, plaintiff appeals.

Daniel Collier and Allen & Bell, for the appellant.

Tillman, Grubb, Bradley & Morrow, for the appellee.

²⁵² SAYRE, J. There were twelve counts in the complaint, to all of which, in their final shape, demurrers were sustained. The complaint alleges that plaintiff's intestate and the engineer of whose negligence he complains were both in the employment of the defendant and engaged at the time of the injury in the discharge of duties imposed upon them by their employment. No doubt the effort of the pleader was to state a case within the fifth subdivision of the employers' liability act (Code 1907, sec. 3910). No doubt, also, the court below ²⁵³ felt constrained by the decision of this court in *Alabama Steel & Wire Co. v. Griffin*, 149 Ala. 423, 42 South. 1034, subsequently approved by a majority of the court in *Woodward Iron Co. v. Curl*, 153 Ala. 215, 44 South. 969, and in *Pear v. Cedar Creek Mill Co.*, 156 Ala. 263, 47 South. 110, to hold that the complaint stated no cause of action under the statute; this for the reason that the complaint showed that the plaintiff's intestate was employed as a carpenter in and about the defendant's mine, so that he was not of that class of railroad employees for whose benefit the statute was said in *Alabama S. & W. Co. v. Griffin*, 149 Ala. 423, 42 South. 1034, to have been enacted. It is now insisted that the cases referred to were based upon a misconception of the meaning of the statute, and a formal dissent by one member of the court, and the reluctant acceptance of those cases by some members of the bar who appear to have given the question special attention, as well as the earnest protest of the appellant in this case, seem to justify some further examination of the subject.

It is familiar law that, except as modified by the employers' liability act, a servant undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of injury caused by the negligence of a fellow-servant while acting within the scope of his employment. And this court, in *Central of Georgia Ry. Co. v. Lamb*, 124 Ala. 172, 26 South. 969, held that the employee

assumed also the risk of injury resulting from the wanton or willful wrongdoing of fellow-employees except in the instances provided for in the act. The reason assigned for this rule is that the servant knows when he enters the service that he will be exposed to the hazard of injury from negligence on the part of his fellow-servants, and he must be supposed to have contracted on the terms that as between himself ²⁵⁴ and the master he would assume the risk. In *Smoot v. Mobile & M. Ry. Co.*, 67 Ala. 13, it is stated by the court that there is also a higher reason for relieving the master from liability for such injuries, founded in the policy of encouraging and compelling the servant to exercise diligence and caution in the discharge of his duties, which, while protecting him, affords protection also to the master; such diligence being properly esteemed a better security against injury from the negligence of a fellow-servant than recourse against the master for damages, when the injury has been received. The cogency and sufficiency of the reason stated in the *Smoot* case has been much doubted. It occurs to us that the assumption of risk by implied contract is the juristic basis of the doctrine of common employment, while the encouragement and compulsion of the servant to the exercise of diligence, thus fostering industrial enterprises, constitute its justification as an economic policy. However that may be, the common-law doctrine of the contract assumption of risk, including the risk of injury from the negligence of coemployees, is too firmly established to be disturbed by the courts. But every legislative enactment on the subject implies an upturning of the supposed policy because not justified by experience, and compels a narrowed and restricted application of the juristic theory.

It is proper at this point to remark that the servant stands in the position of assuming the risk only when he has received injury while acting in his master's service by the act of a fellow-servant also so acting. In other words, the injured and the negligent servants or employees must have been engaged in a common employment. If the injured person was not so acting, he was one of the public; if the act which caused the injury was not within the scope of the negligent servant's employment, ²⁵⁵ the master is not responsible. The employers' liability act has wrought certain changes in the law stated. But it is well enough to remember that it was no part of the purpose of the act to codify the whole law as to the liability of employers or to destroy any common-law right of servants. All servants are entitled to maintain actions against their employers in all cases where they could formerly have done so: *Robts. & Wall. Duty and Liability of Employers*, 207; *Ryals v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; *Colorado Milling Co. v. Mitchell*,

26 Colo. 284, 58 Pac. 28. It is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely requires. Such has been the language of the courts in all ages: 1 Kent's Commentaries, 464. This court has repeatedly announced the general principle. The statute, however, is remedial and ought to be construed so as to advance the remedy. In *Mobile & B. Ry. Co. v. Holborn*, 84 Ala. 133, 4 South. 146, it is said that, while a narrow and restricted view of the statute should not be taken, the court, considering its objects, having regard to the intention of the legislature, and taking a broad view of its provisions, commensurate with its proposed purposes, would not enlarge the term further than may be necessary to effectuate its manifest ends. In any view, there is no reason to suppose an intention to deprive servants injured by the negligence of other servants of any right of action they had at the common law. A servant injured by the negligent act of another servant acting for the common master within the scope of his employment cannot be denied the right of recovery in an action under the statute on the ground that he was not engaged in a common employment with the delinquent without conceding to him the right to recover under the common ²⁵⁶ law as a stranger, for he must have a place in one category or the other. There can be no sufficient reason for marooning servants of the master who are fellow-servants of a delinquent, but who do not engage in the operation of a railroad, in a class to themselves where, alone of all the world, they may not maintain a suit against the master for injurious negligent act of another servant having charge or control of any special point, locomotive, engine, electric motor, switch, car, or train upon a railway, or any part of the track of a railway. It seems, however, to be supposed, and the demurrer in this case asserts, that this has been the effect of the decisions to which we referred in the outset.

The statute deals only with those cases which at the common law were affected by the doctrine of common employment, for only in such cases was the servant denied the right to recover of the master for the negligence of another servant. Unless the negligent and the injured employees were engaged in a common employment, as affecting the master's liability, they stood to each other in the relation of strangers, although they may have been employed by a common master. "If the contract implied on the part of the servant is to bear the risk only of the business in which he is engaged, and not the risk of another business, he would not be prevented by his contract from maintaining an action against the master, if he were injured by the negligence of another servant of the same master, engaged in other business. His remedy would be restricted by the contract only as to the negligence of

fellow-servants engaged in the same general service, or those employed in the conduct of one common enterprise, or undertaking, or those whose employment is such that, by their negligence in the usual line of their duty, he might reasonably expect to be endangered, or those whose negligence might be understood ²⁵⁷ to be incident to his service": *Fifield v. Northern R. R. Co.*, 42 N. H. 225. "As a laborer on a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply": *Northern Pac. R. R. v. Hamby*, 154 U. S. 349, 14 Sup. Ct. Rep. 983, 38 L. ed. 1009. "The principle underlying those decisions which hold a master liable to a servant for the negligent act of another servant in a separate and distinct department of the service is that a servant only assumes the risk from the negligence of those so closely associated with him that he is presumed to have contracted with reference to such work": *Louisville & N. R. R. Co. v. Stuber*, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696. There are many other cases to the same effect. To state the proposition in the language of Mr. Labatt: "There may be a disconnection of duties so great that it would be wholly unreasonable to infer that the risk of the negligent servant's act was one which the injured servant contemplated and accepted": Sec. 499. Further, he says that there is a complete unanimity as to the points that, in order to let in the defense of common employment, it must appear that, at the time of the accident in suit, the negligent and injured servants were not only under the control of the same master, ²⁵⁸ but were also engaged in the discharge of duties which may be said, in a reasonable sense, to have been directed to the attainment of the same end: Sec. 493. It is to be noted, also, that the statute does not make that negligence which was not negligence before; it does not make the master responsible for acts or things which do not constitute a breach of duty; it does not create a cause of action where none previously existed; it merely adds a remedy against a person other than the actual wrongdoer; it takes away from the master one defense, placing the employee, when the conditions of the statute have been satisfied, in the position of one of the public: *Robts. & Wall. Duty and Liability of*

Employers, pp. 180, 242, 243. The result is that the position of an employee injured by the negligence of another employee of the same master, but not in the common employment, is unaffected.

In *Alabama Steel & Wire Co. v. Griffin*, 149 Ala. 423, 42 South. 1034, speaking of those counts of the complaint in which recovery was sought under subdivision 5 of the employers' liability act, it was said: "Ex vi termini, in order for the plaintiff to recover under said subdivision, the pleading and proof must show that at the time he was injured he was employed in and about the railroad. It is not sufficient that he was employed at a plant by the same master, who also owned and controlled a railroad, which may be operated in furtherance of the business of the plant. His duties must be in and about the railroad." This ruling was based upon the finding that subdivision 5 of the act was enacted for the protection of those engaged in the hazardous business of operating a railroad only, and this finding, in turn, was based upon the proposition that to give it any other construction would render the subdivision unconstitutional, and in support of that proposition the opinion of the supreme court of Iowa in *Foley v. Chicago etc. R. R. Co.*, 64 Iowa, 644, 259 21 N. W. 124, is quoted, as follows: "The manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited, it is constitutional. When extended further, it becomes unconstitutional." We will notice as briefly as may be the authorities cited to sustain the position.

In *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, 32 L. ed. 107, the supreme court held that the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety to the public. The statute of Kansas there under consideration was in terms directed against railroad companies. In view of the latter utterances of that court, it may well be that the statute of Kansas offended against the constitution of the United States, for that, discriminating between corporations and natural persons operating railroads, it denied to the former the equal protection of the laws: *Smith v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418; 42 L. ed. 819. As for the rest, that decision clearly recognized the right of the states to legislate for the protection of employees as well as the public against the special dangers incident to the operation of railroads. The statute in that case was upheld.

Missouri Pac. Ry. v. Humes, 115 U. S. 512, 6 Sup. Ct. Rep. 110, 29 L. ed. 463, and *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923, had to do, the one with

a statute requiring railroad corporations to erect and maintain fences and cattle-guards on the sides of their roads and the other with a municipal ordinance prohibiting washing and ironing in public laundries and washhouses within defined territorial limits and within ²⁶⁰ certain hours. So far as we are now able to see, these cases do not touch the question involved in the case at hand.

In the case of *Foley v. Chicago R. I. & Pac. Ry. Co.*, 64 Iowa, 644, 21 N. W. 124, the court had under consideration a section of the code of Iowa which was in this language: "Every corporation operating a railroad shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or of omission, of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed." Consideration of the language of the statute seems to show that its purpose was to deny to railroad companies the defense of common employment only in the event both the injured and the negligent employees are employed on or about the railroad. That also seems to have been the view of the court. The plaintiff sued as an employee. The decision was that he could not recover for the reason that he had nothing to do with the running of trains, and was therefore not engaged at the time of his injury in the service of the defendant in such capacity that he was entitled to recover under the statute damages for an injury by reason of the negligence of a co-employee. At an earlier time there had been in Iowa a statute in these words: "Every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employee of the corporation, to any person sustaining such damage." In speaking of this statute in *Deppe v. Chicago* ²⁶¹ *R. I. & Pac. R. R. Co.*, 36 Iowa, 52, the court used the language quoted in *Alabama Steel & Wire Co. v. Griffin*, 149 Ala. 423, 42 South. 1034, as follows: "The manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited, it is constitutional. When extended further, it becomes unconstitutional." To illustrate its view the court said: "Suppose a railroad company employs several persons to cut the timber on its right of way where it is about to extend its road, and the land owner employs a like number of persons to cut the timber on a strip of equal length alongside of such right of way. If one of each set of employees shall

be injured by the negligence of a coemployee, and the employee of the railroad company can, under the statute, maintain an action against his employer and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation." And the statute was held to be an effort at class legislation. In order to avoid that operation of the statute, it was held that it gave its benefits to employees engaged in operating railroads only. So far as concerns the result reached in that case, we have no need to quarrel with the decision. It might have been put upon the ground that the statute, applied in strict accordance with its language, would work a discrimination against railroad companies as such, because natural persons operating railroads were not put in the same category. The statute of Iowa considered in *Deppe v. Chicago etc. R. R. Co.*, 36 Iowa, 52, had been passed in 1862. The legislature of that state seems to have been of the opinion that the real trouble with it was as we have suggested, for in 1872 it enacted a similar statute extending, however, its provisions to persons as well as to corporations owning or operating a railroad: 2 Labatt on Master and Servant, sec. 758a. It is to be observed that our statute ²⁶² makes no discrimination in the class of employers or employees affected by it. It may be that only those persons, natural or artificial, operating railroads, make use of signals, locomotives, cars, and the like, upon railways, and hence that subdivision 5 affects employers only who are engaged in the operation of railroads; but the classification here is based upon the fact that the operation of railroads, by whomsoever operated, involves great and peculiar hazards. The statute is in part a police regulation.

No satisfactory brief quotation can be made from the case of *Indianapolis Ry. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787, cited to support *Alabama S. & W. Co. v. Griffin*, 149 Ala. 423, 42 South. 1034. The case supports that view of the statute we now take. The argument of counsel concludes with the statement that the Alabama statute creates a liability for the negligence of those in charge of signals, engines, etc., in favor of all coemployees.

In *Ditberner v. Chicago etc. R. R. Co.*, 47 Wis. 138, 2 N. W. 69, the doctrine of the Iowa cases is disapproved. Minnesota got its law from Iowa. Mr. Labatt refers to their decisions with evident disapproval in this language: "In order to save the Iowa and Minnesota acts from the imputation of being repugnant to the constitutional provision which prohibits class legislation, it has been deemed necessary to hold that, although the words employed by the legislature were perfectly general, they should be construed as being applicable only to servants engaged in the actual operation of the road."

We do not doubt that our statute is entirely free from constitutional objection, and must receive a broader application in respect to the class of employees affected than it was permitted to have in Griffin's case. That case is modified accordingly. We hold that employees ²⁶³ engaged in or about a railroad, including therein employees brought by their employment into such close relation with the operation of the railroad as that it may be said, in a reasonable sense, that danger therefrom constitutes an ordinary danger of the service in which they are engaged, though they be not strictly railroad employees, as well as those engaged in the actual operation of the railroad, are fellow-servants with those employees who operate signals, locomotives, trains, etc., on the railroad, and fall under the influence of the subdivision. Employees otherwise circumstanced are entitled to sue as members of the public having no particular relation with the railroad—as strangers.

Probably what has been said extends the influence of the statute in practical application to but few cases in which the injured employee is not immediately engaged in the operation of a railroad—the case considered with approval in *Alabama Steel & Wire Co. v. Griffin* being of the number—and it does not at all affect the fact that railroads are responsible in one form or the other for all injuries proximately caused by the negligence of their employees operating locomotives, etc., along their tracks, as was the case here alleged. Where the negligence occurs in the operation of signals or points, the rule may be different, for possibly, as to them, a railroad company owes no duty to strangers. It affects only the framing of the complaint. It seems to have been the rule in dealing with declarations under the employers' liability act, to treat an allegation of employment by a common master as a sufficient allegation of an employment common in respect to the risk assumed under the common-law status, and it has been required that a complaint so framed must exclude the master's defense, arising at the common law out of the relation, by stating with some particularity a case falling under some ²⁶⁴ subdivision of the statute. Community of employment is necessarily implied between an employee who inspects for use and one who uses the appliances inspected. So between a superintending employee and one superintended. So between an employee who gives orders and directions and him who must conform. Subdivision 4 is more difficult. But no such implication arises in respect to a servant injured by the negligent act or omission of another operating a railroad train. Where it is uncertain just what the relation between the plaintiff and the negligent employee was at the time of the injury complained of, or rather, how the facts will turn out, good practice would seem to require that, in order to

avoid a variance, counts under the statute be joined with others on the common-law liability of the master as to a stranger: *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667. That seems to have been the effort of the pleader in the beginning. Later on, all counts were put in the same category.

As we understand the record, the demurrer to the various counts as amended, aside from some grounds which cannot be considered because they are merely general, asserted in various phrases that the plaintiff should not be allowed to recover on the case stated for two reasons: (1) Plaintiff's intestate and the delinquent engineer were fellow-servants, and therefore plaintiff cannot recover on any principle of law; (2) plaintiff's intestate was not engaged in operating a railroad, and therefore plaintiff cannot recover under subdivision 5 of the employers' liability act. In other words, the demurrer sets up a class of fellow-servants who are not entitled to the benefits of that subdivision of the statute. But, as we think we have shown, this proposition of the demurrer is untenable. And that is all we are undertaking at this time. We do not affirm that plaintiff's ²⁶⁵ intestate and the negligent employee were fellow-servants. In dealing with the case we have assumed that relation to have existed between them because the demurrer does not question it. The demurrer does not question the sufficiency of the complaint for any other reason than that we have indicated. It should have been overruled.

Reversed and remanded.

Simpson and Evans, JJ., concur. Anderson and McClellan, JJ., concur in the conclusion. Mayfield, J., dissents.

ANDERSON, J. While I concur in the conclusion reached by the majority that some of the counts were not subject to the grounds of demurrer interposed thereto, I do not wish to be understood as extending subdivision 5 of the employers' liability act any further than it was extended in the *Griffin and Curl* cases, *supra*. In other words, I think the complaining servant must be a fellow-servant with the one charged with the damnifying act or omission, and, as the latter is charged with being an employee in and about a railroad, the former must of necessity have been engaged in the discharge of some duty in and about the same general or common business in order to be a fellow-servant with the latter. If he was not he cannot be a fellow-servant. The fact that they have the same common master does not constitute them fellow-servants, as it must appear that their duties are in and about the same common or general business, and, unless such is the case, there is no field of operation for and no need of subdivision 5, and

the injured servant would doubtless have his remedy under the common law. Independent of the statute, one who was injured through the misconduct of one other than a fellow-servant had his recourse, and the ²⁶⁶ statute was intended to modify the rigor of the common law in favor of one who was injured by a fellow-servant. If they are not fellow-servants, there is no need for the statute, and it does not and cannot apply. In order to invoke the statute, the plaintiff's intestate must have been a fellow-servant with the one causing the death or injury. If the derelict servant is employed in and about the business of operating a railroad, how can the injured or complaining servant be his fellow-servant, unless his duties also required him to be connected in some manner in and about the operation of a railroad? Here we have a case charging the dereliction to one engaged in and about a railroad, yet in some of the counts describing the plaintiff's intestate as a carpenter engaged in and about the defendant's plant. Could it be seriously contended that a carpenter employed to build or work upon houses and buildings situated upon defendant's premises, and which was a part of its plant, was a fellow-servant with a person working on a railroad of the same defendant, simply because defendant operated said railroad in connection with its plant? I think not. Can it be seriously contended that, if the defendant used mules and horses or oxen in connection with its plant and a railroad as well, the man who fed, watered, or drove the stock would be a fellow-servant with the one who fired or operated the engine upon the railroad track? Subdivision 5, if extended to a carpenter or blacksmith, unless his duties in some way required him to work in and about the railroad, could as well apply to the hostler or gardener. It is true, some of the counts in the case at bar made it the duty of plaintiff's intestate to work upon trestles on defendant's railroad, and while there he would doubtless have been a fellow-servant with the trainmen and other employees of the railroad; but there are other counts which ²⁶⁷ do not charge him with any duties in and about a railroad. To disturb the holding in the Griffin case (149 Ala. 423, 42 South. 1034) would, in effect, extend subdivision 5 to servants of the same master notwithstanding their respective duties would be dissociated from those of the others. It would make the railroad operatives fellow-servants with the men who worked in the mine of the same master, as well as those who built and repaired his houses, fed his mules and horses, drove his oxen, and cooked his breakfast.

All that was decided in the Griffin case was that counts 5 and 6 were within subdivision 5, inasmuch as they averred that the plaintiff's intestate was killed while in the discharge of his duty in loading a car upon the defendant's railroad,

and that counts 9 and 11 were not within said subdivision, as they merely stated that the intestate was engaged in the discharge of his duty in and about the defendant's plant and did not make it his duty to be engaged in and about a railroad. A careful reading of the counts, as well as what is said in the opinion in reference thereto, is earnestly invited. It was not insisted or considered as to whether or not counts 9 and 11 were or were not good under the common law.

I do not object to the criticism of the Griffin case, in so far as it may quote approvingly from Mr. Reno and the Iowa case as to the constitutionality of the law, if not limited to railroad employees. It could have been well omitted from the opinion and was merely arguendo. The constitutionality of the act was not questioned in the Griffin case, and the only question that should have been considered, and which was really decided, was whether or not counts 5, 6, 9 and 11 were good under subdivision 5. It was held that 5 and 6 were good, and that 9 and 11 were not, as they did not show that the ²⁶³ plaintiff's intestate was killed or injured while in the discharge of any duty in and about a railroad. The said quotations can easily be eliminated from the opinion, and the result will be the same. On the other hand, extend subdivision 5 any further than it was extended in the Griffin case, and the fellow-servant doctrine will be made to embrace all servants of a common master, whether there is or is not any identity or community of work or duty. The Griffin case simply holds that, as the negligence charged was to defendant's servants upon a railroad, in order for the plaintiff to sue under subdivision 5, his intestate must have been a fellow-servant with the ones charged with the damnifying act or omission, and must therefore have been killed or injured while in the discharge of some duty in and about a railroad. If not so engaged or employed, he was not a fellow-servant with the derelict one and could not come within the influence of subdivision 5.

I concur in the conclusion and in the opinion in so far as it may question the soundness of the quotation in the Griffin case; but, if it modifies, in the slightest, the real holding in said case, I dissent.

Constitutionality of Employers' Liability Law.—The Nebraska employers' liability act of 1907, providing that every railway company, operating a railway engine, car or train in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car or train for said company, for all damages which may result from the negligence of any of its officers, agents or employees, is a valid law under the state constitution and is not repugnant to the fourteenth amendment of the federal constitution:

Swoboda v. Union Pacific R. R. Co., 87 Neb. 200, 138 Am. St. Rep. 483, and see the cases cited in the cross-reference note thereto as to the constitutionality of statutes making railroad and other corporations liable for injuries to their employees resulting from the negligence of coemployees.

BRYANT v. WHISENANT.

[167 Ala. 325, 52 South. 525.]

SCHOOLS—Free Tuition.—Chapter 41 of the Code of 1907, which relates to the public school system of the state, contemplates that tuition shall be absolutely free to all minors of the state over the age of seven. (p. 42.)

SCHOOLS—Free Tuition—Incidental Fees, Right to Exact.—There is a well-defined distinction between tuition and a reasonable incidental fee for heating and lighting the school-room, and when the statute makes no provision for a fund for this purpose, the county boards have the right to prescribe a reasonable method for the raising and collecting of such fund. (p. 42.)

SCHOOLS—Incidental Fees—Reasonableness and Enforcement. The assessment of an incidental fee of thirty-five cents against each of the pupils, except those of indigent parents, attending a public school, to provide a fund for lighting and heating the school-room, is a reasonable regulation, and the making of the payment thereof a condition precedent to attendance is a reasonable method of enforcing the same. (p. 42.)

Action for damages for declining to permit plaintiff to attend a public school in district No. 23, in Calhoun county, of which the defendants were the district trustees. The pleas follow: “(2) That in, to wit, the month of October, 1908, the county board of education of Calhoun county adopted rules and regulations for public schools of Calhoun county, and amongst other rules it was provided ‘that they (the district trustees of public schools) are authorized to assess and collect an incidental fee from each pupil of not less than twenty-five cents nor more than one dollar; provided that children of indigent parents may be excused from paying this fee.’ And said rule of said county board of education was in force and effect on, to wit, the fifteenth day of February, 1909, and subsequent and prior thereto, and at the time of the matters complained of in said complaint. That acting under and by authority of said rule the said defendants as such district trustees assessed an incidental fee of, to wit, thirty-five cents against each of the pupils attending said public school in district No. 23, in Calhoun county, and the said plaintiff was one of the pupils in said school; and on the fifteenth day of February, 1909, as a condition precedent to the instruction of said plaintiff, it was required by said defendants that said

incidental fee be paid to the said teacher, Miss Whiteside, and the said plaintiff and her father, her next friend, failed and refused to pay such incidental fee, and thereupon, in order to enforce such rule and regulation, these trustees, defendants herein, instructed the said teacher not to hear the lessons of the plaintiff until said incidental fee was paid, and the nonpayment of the said incidental fee was the sole cause of said instruction to said teacher. These defendants say that said incidental fee of thirty-five cents from each pupil attending said school was strictly necessary for the purpose of providing wood and water, in order that said school might be conducted, that the children there attending might be comfortable while attending said school, and that the instruction might be properly given them; and these defendants further aver that there was no other source of obtaining said necessities than assessing said incidental fee."

O. M. Alexander and Tate & Walker, for the appellant.

Blackwell & Agee, for the appellee.

327 ANDERSON, J. It is manifest that chapter 41 of the Code of 1907, which relates to the public school system of the state, contemplates that tuition shall be absolutely free to all minors of the state over the age of seven. We think, however, there is a well-defined distinction between tuition and a reasonable incidental fee for heating and lighting the school-room: *State v. University of Wisconsin*, 54 Wis. 159, 11 N. W. 472. And when the statute makes no provision for a fund for this purpose, the county boards have the right to prescribe a reasonable method for the raising and collection of this fund, and to delegate the authority to the district boards and teachers to enforce said rules. We also think that the requirement of a reasonable incidental fee for this purpose, as a condition precedent **328** to attendance, is contemplated by the statute, in the absence of any special provision for same, and that the rule set up in special pleas 2 and 4 was a reasonable one, and a good defense to the plaintiff's action. The trial court properly overruled the demurrers to these pleas, and the judgment must be affirmed.

Dowdell, C. J., and Simpson, McClellan and Sayre, JJ., concur in the opinion and the conclusion. Mayfield, J., concurs in the conclusion, but does not think that the law contemplates free tuition.

Schools.—*A Statute Providing a Local Tax for the support of a common school, to provide a better school than the common school fund alone would afford, does not change the character of the school or infringe the constitutional provisions requiring a uniform system of common schools: Smith v. Simmons*, 129 Ky. 93, 130 Am. St. Rep. 426.

Causes for Which Children may be Excluded from the Public Schools are discussed in the note to Board of Education v. Purse, 65 Am. St. Rep. 330.

As to the Right of School Boards to Prescribe Rules for the conduct and discipline of pupils, see State v. District Board of School District No. 1, 135 Wis. 619, 128 Am. St. Rep. 1050, and cases cited in the cross-reference note thereto.

McALLISTER-COMAN COMPANY v. MATHEWS.

[167 Ala. 361, 52 South. 416.]

APPEAL—Error not Shown by Record.—The Overruling of a Demurrer to an amended plea cannot be reviewed where the amended plea is not set out in the record. (p. 44.)

SALES—Rescission by Buyer—Delivery.—Upon a sale of jewelry and a showcase, the purchaser is not entitled to rescind or repudiate the sale for a failure of the seller to deliver the showcase at the same hour or on the same day the jewelry is delivered, in the absence of a provision or stipulation to that effect. (p. 44.)

SALES—Action for Price—Plea of Rescission.—In an action of assumpsit a plea that the debt was contracted for certain jewelry, and that as a part of the contract the plaintiffs agreed to furnish the defendants a showcase, which agreement induced the defendants to make the purchase; that the plaintiffs failed to ship the showcase with the jewelry, and that the defendants thereupon returned the jewelry; that plaintiffs then sent to defendants a showcase, which they refused to accept, is subject to demurrer as not showing any sufficient ground for a rescission of the contract of sale. (p. 44.)

CONTRACTS—Rescission and Repudiation, How Made.—A contract is made by the joint will of two parties and can be rescinded only by the joint will of the two parties; but one party may so wrongfully repudiate the contract as to authorize the other to renounce it and refuse to be longer bound thereby. (p. 44.)

CONTRACTS—Rescission and Repudiation, When Authorized. One party may renounce and refuse to be longer bound by a contract when the acts and conduct of the other party evinces an intention to no longer be bound by it. (pp. 44, 45.)

Assumpsit by McAllister-Coman Company against Mathews and others. From a judgment for defendants, the plaintiff appeals. The fourth plea, as amended, follows: "The defendants say that the alleged debt, the foundation of this suit, is based upon an account which was for a lot of jewelry, and as a part of the contract the plaintiff agreed to furnish the defendants a showcase, said contract being in writing, and same being set out in the fourth count of the amended complaint; and, relying upon such, the defendants agreed to purchase said jewelry, the foundation of this suit, and that when the plaintiff shipped the defendants said jewelry, it failed to furnish said showcase, and defendants thereupon returned plaintiff the jewelry shipped to defendants, and

after defendants returned the jewelry to plaintiff that plaintiff then sent to defendants a showcase, which defendants declined to accept."

McGaugh & Houghton, for the appellant.

Powell, Hamilton & Lane, for the appellee.

³⁶³ MAYFIELD, J. The only errors assigned are to the overruling of demurrers to pleas 3 and 4 as last amended. We cannot review the overruling of the demurrer to plea 3 as last amended, for the reason that the plea as last amended does not appear of record. By the judgment entry it is made to appear that demurrer was sustained to the plea as it here appears of record. The judgment entry shows that the plea was subsequently amended, and that the demurrer was thereafter overruled; but this last amendment is not shown, nor is the plea set out as last amended. So we cannot review this last ruling on plea 3.

³⁶⁴ Plea 4 was held bad on the former appeal of this case: 150 Ala. 167, 43 South. 747. We then said of this plea: "The demurrer to the fourth plea should have been sustained. Said plea does not set out the contract, either in words or by reference, nor does it allege that the showcase was not furnished, nor that the plaintiff had failed or refused to furnish it, but only that the plaintiff failed to ship it with the jewelry."

There was an attempt to amend this plea in accordance with the above decision; but the attempt is a failure. It does refer to the contract of sale which is set out in one count of the complaint; but it wholly fails to show any sufficient ground for a repudiation of the contract of sale by the defendant. It merely alleges that, when "the plaintiff shipped the defendant said jewelry, it failed to furnish said showcase." This, without more, is not sufficient to authorize a repudiation. No actual fraud, whatever, is alleged. A mere failure to deliver the showcase the very moment or day or hour the jewelry was delivered is not of itself sufficient to warrant a rescission, in the absence of a provision or stipulation to that effect. It does not appear that there was any refusal to deliver; but it affirmatively appears that it was subsequently delivered. It was not shown to be necessary that the jewelry and the showcase should arrive on the same day, or that the showcase should precede the jewelry. The demurrer should have been sustained to this plea as amended.

A contract is made by the joint will of two parties, and can only be rescinded by the joint will of the two parties; but one party may so wrongfully repudiate the contract as to authorize the other to renounce it and refuse to be longer bound thereby. This happens when the acts and conduct of

one of the parties evinces an intention to no longer be bound by the contract. Merely ³⁶⁵ because a given act or course of conduct of one party to a contract is inconsistent with the contract is not sufficient; it must be inconsistent with the intention to be longer bound by it. Every breach of a contract is, of course, inconsistent with the contract; but every breach by one party does not authorize the other to renounce it in toto.

The plea, of course, did not show a rescission of the contract, nor did it allege facts which would authorize the defendant to renounce it, and hence it was insufficient, as before decided.

Reversed and remanded.

Dowdell, C. J., and Simpson and McClellan, JJ., concur.

A Written Contract Made by Parties for the Sale, delivery and payment of certain goods is binding on both, and cannot be legally dissolved and rendered nugatory except with the consent of each: Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 94 Am. St. Rep. 112.

The Countermand of an Executory Contract of Sale is the subject of a note to Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 94 Am. St. Rep. 112.

The Right of One Party to Proceed to Execute a Contract after his adversary declines to do so on his part, is the subject of a note to Davis v. Bronson, 33 Am. St. Rep. 791.

Where a Buyer Wrongfully Neglects or Refuses to Accept and pay for goods under an executory agreement of sale, the seller may maintain an action against him for damages: Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co., 86 Neb. 623, 136 Am. St. Rep. 710, and see cases cited in the cross-reference note thereto.

How and Within What Time the Right of Rescission must be Exercised is the subject of a note to Bryant v. Isburgh, 74 Am. Dec. 657.

RICHARDSON v. OLANTHE MILLING AND ELEVATOR COMPANY.

[167 Ala. 411, 52 South. 659.]

BROKERS—Commission on Sales, When Earned.—When a broker has found a customer ready, able and willing to purchase at the price fixed by the seller, he has earned his commissions; but when the result of the broker's labors is a mere order for goods, which is revocable at the pleasure of the party making the order, a revocation of the order is conclusive evidence that the purchaser is not willing to purchase the goods. (p. 46.)

BROKERS—Commission.—If the Seller Refuses to Deliver the property, or by any improper action on his part prevents the consummation of the purchase, he is liable for the broker's commission, but merely making a candid and honest statement of the quality of the goods, leaving the purchasers the option either to reaffirm the order, to change it to a better quality, or to revoke it, is not improper or a refusal to consummate the sale. (p. 46.)

Ernest Lacy, for the appellant.

Sterling A. Wood and A. F. Fite, for the appellee.

⁴¹² SIMPSON, J. The suit is by the appellant against the appellee, to recover commissions claimed to be due the plaintiff for services in selling a certain quantity of flour. The evidence is without conflict that plaintiff was authorized to take orders from merchants for flour to ⁴¹³ be furnished by the defendant; that plaintiff did take orders from two mercantile firms for a quantity of flour at prices which had been fixed by defendant; that the defendant, thinking from the size of the orders that said merchants had not understood the quality of the flour, wrote to them explaining that it was an inferior quality of flour, and they countermanded the orders.

It is true, as contended by the appellant, that when a broker has found a customer ready, able, and willing to purchase at the price fixed by the seller, he has earned his commissions; yet it is also true that when the result of the broker's labors is a mere order for goods, which is revocable at the pleasure of the party making the order (*McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740, 13 N. W. 485; *Gould v. Cates Chair Co.*, 147 Ala. 629, 41 South. 675), a revocation of said order is conclusive evidence that the purchaser is not willing to purchase the goods.

The seller, in this case, did not refuse to fill the order, but merely made a candid and honest statement of the quality of the flour, leaving the purchasers the option either to reaffirm the order, to change it to a better quality, or to revoke the order.

It is true also that if the seller refuses to deliver the property, or by any improper action on his part prevents the consummation of the purchase, he would be liable for the commissions, but we cannot consider the action of the seller in this case as improper. To hold otherwise would be to place a man in fault for telling the truth.

The court properly gave the general charge in favor of the defendant, and the judgment of the court is affirmed.

Anderson, Mayfield and Sayre, JJ., concur.

When a Broker has Earned His Commissions is considered in the note to *Chaffee v. Widman*, 139 Am. St. Rep. 225.

BIXBY-THEIRSON LUMBER COMPANY v. EVANS.

[167 Ala. 431, 52 South. 843.]

CONTRACTS—Special Damages for Breach.—If the special, ulterior purposes of one of the parties in making a contract are disclosed, they then become an element of the duty thereby imposed upon the other party, and afford a substantial basis for the assessment of special damages. (p. 48.)

CONTRACTS.—Damages for Breach of Contract to Loan Money are in ordinary cases no more than nominal; money, like the staples of commerce, being in contemplation of law always in the market and procurable at the lawful rate of interest. (p. 49.)

CONTRACTS—Special Damages for Breach of Contract to Pay Money.—Where the obligation to pay money is special, and has reference to other objects than the mere discharge of a debt, special damages may be recovered, according to the actual injury suffered, for breach of the obligation. (pp. 49, 50.)

CONTRACTS—Special Damages for Breach of Contract to Advance Money.—Where one party to a contract agrees to advance to the other money necessary to build a dam, and to furnish certain logs, by sawing which at a stipulated price the other party should repay the advance, and other logs which he might saw at a profit, a breach of the obligation to advance the money involves by necessity a breach of the collateral agreement in respect to the manner of repayment, and the other party owes no duty to take up the additional burden of going into the market for money, or to expend money in hand in order to complete the dam, where it already appears that he would lose in any event a material advantage for which he contracted, and he is entitled to such damage as would be the equivalent of a restoration of his status quo ante. (pp. 50, 51.)

CONTRACTS—Breach of Contract to Advance Money.—Profits which the plaintiff may have expected to realize from the operation of a mill, and which the parties doubtless contemplated as a result of their contract, are nevertheless speculative, remote, and incapable of that clear and satisfactory proof which the law requires to constitute recoverable damages in an action for breach of a contract to advance money to construct a dam and mill. (p. 51.)

CONTRACTS—Special Damages for Breach of Contract to Advance Money.—Under a contract by which one party agrees to advance money to build a dam, etc., the other party to advance the difference only in case the sum agreed upon is insufficient, the latter cannot recover money spent in the work, as special damages, in an action for breach of the contract in failing to advance the money. (p. 51.)

John A. Lusk, for the appellant.

Street & Isbell, for the appellee.

⁴³³ SAYRE, J. Plaintiff in the court below, appellee here, recovered judgment for the breach of a contract by which defendant agreed to lend him sufficient money, in no event to exceed two thousand dollars, with which plaintiff was to construct a dam of stone and concrete across Town creek where he then had a wooden dam which furnished power for the operation of a gristmill. Plaintiff undertook, also, with

the money to be advanced, to purchase and set up in readiness for operation a turbine wheel and band sawmill, guaranteeing that the sum named would be sufficient for the improvements specified, and that he would complete them out of his own purse in the event it proved insufficient. To secure the loan defendant was to have, and did get, a mortgage upon plaintiff's water power and surrounding tract of land. The contract also contained a provision that for a fixed period after the completion of the improvements plaintiff was to saw logs for defendant at a fixed schedule of prices, giving preference to defendant's logs at any and all times. Defendant was to furnish logs enough to make the bill for sawing equal to the amount of money advanced. Payment was to be made in that way. After defendant had furnished money to an amount between four hundred and five hundred dollars, it refused to furnish more or to go further with the performance of the contract. Defendant, however, contended that it had fully complied with its contract by purchasing a mill for plaintiff by plaintiff's direction, the price of which, along with the money furnished, made up the sum agreed upon. Meantime plaintiff had torn away the ⁴³⁴ wooden dam and a water-house, which constituted a part of the plant, and had expended several hundred dollars of his own money in procuring and preparing stone for the proposed dam. He claimed damages on account of the diminished value of his property, loss of time, labor, and money expended in tearing away the old structure preparing for the erection of the new, and for loss of profits.

Notwithstanding Judge Stone's criticism of the leading case of *Hadley v. Baxendale*, 9 Ex. 341, in *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435, and his refusal to apply the doctrine of that case to the peculiar facts of the case he had in hand—a case in which the defendant company had failed to correctly transmit a cipher telegram—he assented, and the courts generally assent, to the proposition that if the plaintiff's special, ulterior purposes in making the contract are disclosed, they then become an element of the duty thereby imposed upon the defendant, and afford a substantial basis for the assessment of special damages. The rule is clearly stated by the supreme judicial court of Massachusetts in the following language: When the special circumstances are known to both parties, it is obvious that each may have contracted with reference to them; and that, if such was in fact the case, the party in fault may be held justly to make good to the other whatever damages he has sustained which were the reasonable and natural consequences of a breach under the circumstances so known and with reference to which the parties acted. In such cases the larger damages may be recovered as having been in the contempla-

tion of both parties and as naturally resulting, under the special circumstances, from the breach itself: *Loneragan v. Waldo*, 179 Mass. 135, 88 Am. St. Rep. 365, 60 N. E. 479. The rule here stated requires that ⁴³³ both parties shall have contracted with reference to the special circumstances. In New York it is held that bare notice of special consequences which may result from a breach of contract will not suffice, unless under circumstances involving the implication that it formed the basis of the agreement: *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487. In *Daughtery v. American N. T. Co.*, 75 Ala. 168, 51 Am. Rep. 435, it was said that if the special circumstances are communicated, they become an implied element of the contract. And in *Reed Lumber Co. v. Lewis*, 94 Ala. 626, 10 South. 333, it was held, in effect, that the engagement must have been entered into with reference to the special damages. Money, like the staples of commerce, is, in contemplation of law, always in the market and procurable at the lawful rate of interest. For the breach of a contract to pay, the principal with interest is the measure of damages. Such is the invariable measure in a creditor's action against his debtor: 1 *Sutherland on Damages*, sec. 76. It seems to follow, as was noted in *Gooden v. Moses*, 99 Ala. 230, 13 South. 765, that ordinarily the damages for the breach of a contract to lend money cannot be more than nominal. Recognizing the rule just stated, plaintiff invokes an application of the principle of *Hadley v. Baxendale*, 9 Ex. 341, for the recovery of special damages by alleging in the third count of his complaint his inability to get from other sources money with which to replace his dam, and that defendant knew the fact, and knew that plaintiff was to use the money for the purpose of tearing away the improvements then on the land and erecting others in their stead. And special damages for the destruction of his improvements under these circumstances, and other special damages, as we have already noted, are claimed.

The principle on which special damages are recoverable for breaches of contract have been applied on correct ⁴³⁶ theory and evident justice to cases in which the contract was for the loan of money. In *Gooden v. Moses*, 99 Ala. 230, 13 South. 765, Moses sold Gooden a lot upon the installment plan, and as part of the contract agreed to advance money with which the purchaser might build a house. Gooden sued for a breach in failing to advance the money. It was conceded by the court that plaintiff might have recovered special damages but for the fact that she failed to show that she might not have protected herself against loss, as she was bound to do, if she could. The following authorities will be found to support the proposition that where the obligation to pay money is special, and has reference to other objects than the

mere discharge of a debt, special damages may be recovered according to the actual injury suffered: *Lowe v. Turpie*, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; *Turpie v. Lowe*, 114 Ind. 37, 15 N. E. 834; *McGee v. Wineholt*, 23 Wash. 748, 63 Pac. 571; *Western Union Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478; *New York Life Ins. Co. v. Pope* (Ky.), 68 S. W. 851; 1 *Sutherland on Damages*, sec. 77; 3 *Page on Contracts*, sec. 1593.

In *Lowe v. Turpie*, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233, and *Western Union Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478, it was held that the plaintiff suing for the breach of a contract to lend money, and seeking to recover special damages, must allege, not only the peculiar facts causing the damages and notice of the same to the party guilty of the breach, but that all reasonable means within the power of the plaintiff had been adopted to prevent loss. In *Baxley v. Tallassee & Montgomery R. R. Co.*, 128 Ala. 183, 29 South. 451, this court held that the complaint should contain an averment of the special circumstances and that defendant had notice. Further the court did not go because the exigencies of the case did not require it to do so. There may be good reason for the rule of the Indiana and Texas cases requiring ⁴³⁷ an allegation of plaintiff's ability to prevent loss where the breach is of a contract to lend money. But, however that may be, there is in the contract in the present case a feature which it would seem ought to relieve the plaintiff of the burden of proving that he was unable to go into the market and borrow the money with which to complete the contemplated improvement or that he had not in hand the funds necessary for that purpose. Such a course would not have made him whole. The contract provided, not only that defendant was to advance money with which plaintiff was to construct a dam of stone and concrete in place of the wooden dam he already had, but that defendant was to furnish logs by sawing which at a stipulated price plaintiff was to be enabled to repay the money advanced, and that defendant would furnish other logs which, we will assume, the plaintiff might saw with a profit. It does not appear that but for the last-mentioned stipulation plaintiff would have entered upon the contract. Presumptively he would not. Defendant's breach of the contract to advance money, unless it were excusable on some ground set up in special pleas, involved by necessity a breach of the collateral agreement in respect to manner of repayment and the furnishing of other logs. After the breach plaintiff owed defendant no duty to take up the additional burden of going into the market for money, or to expend money in hand, in order to complete the dam in the manner contemplated by the contract when it already appeared that he would lose in any

event a material advantage for which he had contracted. Thereupon he was entitled to be made whole, to compensation, to such damages as would be the equivalent of a restoration of his status quo ante.

Profits such as the plaintiff may have expected to realize from the operation of the mill in its improved form, ⁴⁸⁸ and which the parties doubtless contemplated as one result of the contract, were nevertheless speculative, remote, and incapable of that clear and satisfactory proof which the law requires to constitute recoverable damages: *Reed Lumber Co. v. Lewis*, 94 Ala. 626, 10 South. 333; *Moulthrop v. Hyett*, 105 Ala. 493, 53 Am. St. Rep. 139, 17 South. 32; *Nichols v. Rasch*, 138 Ala. 372, 35 South. 409; *Southern Ry. Co. v. Coleman*, 153 Ala. 266, 44 South. 837. The contract speaks for itself, and conclusively, as to the expenditure by the plaintiff of money other than that to be advanced by defendant. It contemplated such expenditure in the event only that the sum agreed to be advanced was insufficient to complete the dam. Plaintiff was not, therefore, entitled to recover as special damages under the evidence sums so expended.

There are many assignments of error. We do not think the occasion demands a separate treatment of each of them. By reference to the opinion herein advanced it will be seen that the trial court in a number of rulings on the evidence and in some special instructions to the jury misconceived in part the measure of recoverable damages, and for those errors the judgment will be reversed, and the cause remanded for another trial. In other respects, the record shows no error.

Reversed and remanded.

Dowdell, C. J., and Simpson and Mayfield, JJ., concur.

When Loss of Profits may be Considered as an Element of Damage is discussed in the note to *Sitton v. McDonald*, 60 Am. Rep. 488; and in the recent cases of *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 137 Am. St. Rep. 1059; *Harper Furniture Co. v. Southern Express Co.*, 148 N. C. 87, 128 Am. St. Rep. 588; *Emerson v. Pacific Coast and Norway Packing Co.*, 96 Minn. 1, 113 Am. St. Rep. 603, and the cases cited in the cross-reference note thereto.

ROQUEMORE & HALL v. MITCHELL BROS.

[167 Ala. 475, 52 South. 423.]

SPECIFIC PERFORMANCE—Contract for Personal Services.

Courts of equity will not undertake to enforce the specific performance of a contract for personal services which are material or mechanical, and not peculiar or individual; but where the contract stipulates for special, unique, or extraordinary services, or where the services to be rendered are purely intellectual and individual in their character, the courts will grant an injunction in aid of specific performance. (p. 53.)

SPECIFIC PERFORMANCE—Contract for Continuous Duties.

A court of equity can decree specific performance only when it can dispose of the matter in controversy by a decree capable of present performance. It cannot decree a party to perform a continuous duty, extending over a series of years, but will leave the aggrieved party to his remedies at law. (pp. 53, 54.)

INJUNCTIONS to Prevent the Breach of Contracts calling for personal services and running through an indefinite period of time are granted by the courts with great caution. (p. 53.)

SPECIFIC PERFORMANCE.—An Injunction is Granted in a suit for specific performance only as auxiliary to the execution of the decree; and where the decree itself cannot be enforced, the court will not attempt to restrain, but will leave the party complaining of the breach to his remedy at law. (p. 54.)

SPECIFIC PERFORMANCE—Pleading—Accuracy Required.—

In bills for specific performance great accuracy of averment is required. Where under the contract certain amounts are required to be paid and security furnished for deferred payments in a certain manner and within a certain time, performance, or an offer to perform, such conditions as provided in the contract must be alleged and cannot rest in inference. (pp. 54, 55.)

SPECIFIC PERFORMANCE—Pleading—Accuracy Required.—

Where the consent of a third party is necessary before a contract becomes binding, or can be performed, a bill for the specific performance thereof must allege such consent. (p. 55.)

C. H. Roquemore and Ray Rushton, for the appellant.

Gunter & Gunter, for the appellee.

⁴⁷⁷ MAYFIELD, J. The bill is one to enforce specific performance of a contract, and to enjoin respondents from interfering with the performance thereof pending the suit. The respondents demurred to and answered the bill, denying its equity, and moved to dissolve the injunction issued upon its filing. On the hearing upon ⁴⁷⁸ these issues the injunction was dissolved and the bill dismissed for want of equity. The chancellor declined to fix bond and reinstate the injunction pending appeal. From this decree complainants appeal.

The contract is one not susceptible of specific performance. It is a contract for personal service or employment, to continue five years, but on condition that, if Montgomery county will consent to a transfer of a certain contract which it had with a part of the respondents to the complainants by

such respondents, then it is to become a contract to transfer and assign such other contract. The condition subsequent is not shown to have happened, nor is the contract sought to be enforced upon this theory, but on the theory that it is one of employment.

The bill alleges that Mitchell Bros. made a contract with the county of Montgomery to load gravel from the pit of the county, and also to sell gravel to others from such pit, and to be paid therefor by the square yard of gravel loaded for the county, and to pay the county so much per square yard for the gravel sold to third parties. The bill then alleges that Mitchell Bros. employed complainants to carry out this contract with the county for the respondents Mitchell Bros., and for the same consideration that the respondents were to receive from the county. The contract then concludes as follows: "It is further mutually agreed that if the board of revenue of Montgomery county, Alabama, will consent for the said Mitchell Bros. to transfer and assign the above-described contract to Roquemore & Hall, then said Mitchell Bros. upon request of them will so transfer and assign said contract to them, but, if the said board of revenue will not agree for an assignment of said contract, then the foregoing provisions and agreement to employ said Roquemore & Hall to load gravel ⁴⁷⁹ in said contract shall be and remain in full force and effect." Such contracts are not susceptible of specific performance.

Courts of equity will not undertake to enforce the specific performance of a contract for personal services which are material or mechanical, and not peculiar or individual; but where the contract stipulates for special, unique or extraordinary services, or where the services to be rendered are purely intellectual and individual in their character, the courts will grant an injunction in aid of specific performance: *William Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 18 Am. St. Rep. 278, 20 Atl. 467, 7 L. R. A. 779. If a contract implies the performance of personal services requiring special skill, judgment and discretion, a court of equity will not undertake its specific performance: *South etc. Alabama R. R. Co. v. Highland Ave. etc. R. R. Co.*, 98 Ala. 400, 39 Am. St. Rep. 74, 13 South. 682. Courts of equity will decline jurisdiction to decree specific performance of contracts for personal services involving the exercise of special skill, judgment and discretion, continuous in their nature, and running through an indefinite period of time; and injunctions to prevent the breach of such contracts are granted with great caution by the courts, although the remedy by damages at law may be inadequate: *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449. A court of equity can decree specific performance only when it

can dispose of the matter in controversy by a decree capable of present performance, but it cannot decree a party to perform a continuous duty, extending over a series of years, but will leave the aggrieved party to his remedies at law: *Electric Lighting Co. v. Mobile etc. Ry. Co.*, 109 Ala. 190, 55 Am. St. Rep. 927, 19 South. 721. A contract for the personal services⁴⁸⁰ of an adult, as a general thing, is a matter for courts of law; and for a violation of it the remedy is in damages, and a specific performance will not be enforced: *Hamblin v. Dinneford*, 2 Edw. Ch. 533; *Haight v. Badgeley*, 15 Barb. 499. See *Kemble v. Kean*, 6 Sim. 333; *In re Clark*, 1 Blackf. 122, 12 Am. Dec. 213; *Smith v. Gould*, 2 Ld. Raym. 1274; *Rutland Marble Co. v. Ripley*, 77 U. S. 339, 19 L. ed. 955; *Cooper v. Pena*, 21 Cal. 403; *Randall v. Latham*, 36 Conn. 48; *Richmond v. Dubuque & S. C. R. Co.*, 33 Iowa, 422; *Ford v. Jermon*, 6 Phila. (Pa.) 6; *Palmer v. Scott*, 1 Russ. & M. 391; *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. 411. Defendant, having contracted to perform at plaintiff's theater at a fixed compensation for a certain time, and not to perform elsewhere during that time, might be restrained by injunction from carrying out an agreement to perform elsewhere, there being no demand in the complaint for a specific performance, and no uncertainty in the contract as to time, place, or substance: *Hayes v. Willio*, 11 Abb. Pr., N. S., 175. See *Montague v. Flocton*, L. R. 16 Eq. 189. Injunction is only granted as auxiliary to the execution of the decree; and where the decree itself cannot be enforced, the court will not attempt to restrain, but will leave the party complaining of the breach to his remedy at law: *Fredricks v. Mayer*, 13 How. Pr. 568, 1 Bosw. 231. See *Morris v. Colman*, 18 Ves. Jr. 437; *Clarke v. Price*, 2 Wils. Ch. 157; *Kemble v. Kean*, 6 Sim. 333; *Baldwin v. Society for Diffusion of Useful Knowledge*, 9 Sim. 393. But see, contra, *Western Union Tel. Co. v. Union Pac. R. Co.*, 3 Fed. 423, 1 McCrary, 558; *Western Union Tel. Co. v. St. Joseph & W. R. Co.*, 3 Fed. 430, 1 McCrary, 565; *Singer S. M. Co. v. Union B. H. & E. Co.*, 1 Holmes, 253, Fed. Cas. No. 12,904.

⁴⁸¹ The bill is also defective, in that it fails to allege that complainants paid the amounts agreed to be paid by them under the contract sought to be enforced, and furnished the security to be furnished for the deferred payment, within the time and in the manner provided in the contract. This necessity, of course, is attempted to be avoided by showing the refusal of the respondents to accept the payment and security. While the bill avers a tender and an offer to perform, it does not aver a tender and offer to perform as provided in the contract. This material fact (if it exists) is not averred, but must rest in inference—which is not sufficient. The answer specifically denies that the tender or offer

to perform was made in accordance with the terms of the contract sought to be enforced. In bills for specific performance great accuracy of averment is required: Daniel v. Collins, 57 Ala. 625; Johnston v. Jones, 85 Ala. 286, 4 South. 748. Equity, in this suit, could not (if it would) compel the county of Montgomery to allow complainants to perform the contract which it made with the respondents. This, so far as the bill shows, would be necessary to a specific performance. Certain it is that it fails to show that the county has consented to the arrangement or contract between the parties to this suit.

The decree is affirmed.

Dowdell, C. J., and Simpson and McClellan, JJ., concur.

SPECIFIC PERFORMANCE OF CONTRACTS CALLING FOR SERVICES OF A PERSONAL NATURE.

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I. Nature and Grounds of Remedy.

a. **In General.**—"The remedy for the specific performance of contracts," says Pomeroy in Pomeroy's Equity Jurisprudence, paragraph 1401, "is purely equitable, given as a substitute for the legal remedy of compensation, whenever the legal remedy is inadequate or impracticable. In the language of Lord Selborne: 'The principle which is material to be considered is, that the court gives specific performance instead of damages only when it can by that means do more perfect and complete justice: *Wilson v. Northampton etc. Ry.*, L. R. 9 Ch. 279, 284.' The jurisdiction depending upon this broad principle is exercised in two classes of cases: 1. Where the subject matter of the contract is of such a special nature, or of such a peculiar value, that the damages, when ascertained according to legal rules, would not be a just and reasonable substitute for or representative of that subject matter in the hands of the party who is entitled to its benefit; or, in other words, where the damages are inadequate; 2. Where, from some special and practical features or incidents of the contract inhering either in its subject matter, in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that no real compensation can be obtained by means of an action at law; or in other words, where damages are impracticable."

And Mr. Freeman, in his note to the case of *Standard Fashion Co. v. Siegel-Cooper Co.*, 68 Am. St. Rep. 749, 753, says: "There are two classes of cases in which, in a suit for specific performance of a contract, equity will refuse to grant a decree, although there is no question as to the validity, certainty, mutuality, or justice of the contract, and although there is no doubt that the defendant is entirely able to, and in all justice should, perform his contract. The first class, of which instances are rare, embraces those cases in which, by reason of the nature of the subject matter of the contract sued upon, the court is unable to properly frame a decree for specific performance, as where the contract was to refrain from divulging the secret of an invention: *Newberry v. James*, 2 Meriv. 446; or of a patent medicine: *Williams v. Williams*, 3 Meriv. 157; or where it is sought to enforce the common covenants of husbandry: *Rayner v. Stone*, 2 Eden, 128; or where the contract is for the sale of a goodwill: *Baxter v. Connolly*, 1 Jac. & W. 576; *Coslake v. Till*, 1 Russ. 376. The second class . . . embraces the numerous cases in which, by reason of the nature of the thing contracted to be done, a decree of specific performance must prove an ineffective or inexpedient remedy. While equity aims to supply a remedy wherever there is a right that cannot be adequately enforced at law, it refuses to be drawn into the absurdity of substituting for an imperfect legal remedy an equitable one less perfect and more cumbersome and inexpedient."

It is essential to the jurisdiction of a court of equity, to enforce the performance of a contract, that certain qualities should be found

inherent in the contract itself. Besides being complete and definite, it must belong to a class capable of being specifically enforced, and be of a nature that the court can decree its complete performance against both parties without adding to its terms. The contract must be fair, just, and equal in its provisions, and the circumstances must be such at the time the court is called upon to act that to enforce it will not operate to the oppression of the person against whom its enforcement is asked. Moreover, it must appear that the plaintiff has no adequate remedy at law, and that to refuse to perform the contract would be a fraud upon him: *Ikerd v. Beavers*, 106 Ind. 483, 7 N. E. 326.

b. Injunction Analogous to Specific Performance.—An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit: *Pomeroy's Equity Jurisprudence*, par. 1341.

In *Shubert v. Woodward*, 167 Fed. 47, the court said: "An injunction against the breach of a contract is a negative decree of specific performance of the agreement, and the general rule is that the power and the duty of a court of equity to grant the former is measured by the same rules, principles, and practice as its power and duty to grant the latter relief: 4 *Pomeroy's Equity Jurisprudence*, 3d ed., par. 1341; *General Electric Co. v. Westinghouse Elec. & Mfg. Co.*, 144 Fed. 458; *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98; *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616. This, like most general rules, is not without its exceptions, under which injunctions may be lawfully issued to restrain the performance of specific acts in violation of agreements whose specific performance the courts would not completely enforce."

If the negative remedy of injunction against a breach of contract will do substantial justice between the parties, for instance by obliging an employee to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it: *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 90 Am. St. Rep. 627, 51 Atl. 973, 58 L. R. A. 227. A note, fully discussing injunctions to restrain breaches of negative covenants in contracts and mandatory injunctions to compel the observance of affirmative covenants, will be found in 90 Am. St. Rep. 634.

c. Discretion of Court.—The granting or denial of equitable relief for the specific performance of a contract rests within the sound discretion of the court, and such discretion is controlled by the established principles of equity applicable to the facts of each case: *Gould v. Womack*, 2 Ala. 83; *Blackwilder v. Loveless*, 21 Ala. 371; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695; *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192, 15 South. 756; *Taylor v. Florida etc. Ry. Co.*, 54 Fla. 635, 127 Am. St. Rep. 155, 45 South. 574,

16 L. R. A., N. S., 307, 14 Ann. Cas. 472; *Maltby v. Thews*, 171 Ill. 264, 49 N. E. 486; *South Chicago City Ry. Co. v. Calumet etc. Ry. Co.*, 171 Ill. 391, 49 N. E. 576; *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255, 70 N. E. 271; *Gossard Co. v. Crosby*, 132 Iowa, 155, 109 N. W. 483, 6 L. R. A., N. S., 1115; *Offutt v. Offutt*, 106 Md. 236, 124 Am. St. Rep. 491, 67 Atl. 138, 13 L. R. A., N. S., 232; *Banaghan v. Malaney*, 200 Mass. 46, 128 Am. St. Rep. 378, 85 N. E. 839, 19 L. R. A., N. S., 871; *Daniel v. Frazer*, 40 Miss. 507; *Mississippi etc. Ry. Co. v. Cromwell*, 91 U. S. 643, 23 L. ed. 367; *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428.

In *Shubert v. Woodward*, 167 Fed. 47, the court said: "The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary, whimsical will, but in its sound judicial discretion informed and directed by the established principles, rules and practice of equity jurisprudence: *Hennessey v. Woolworth*, 128 U. S. 438, 9 Sup. Ct. Rep. 109, 32 L. ed. 500. Nor are these principles and rules and this practice hard, fast, or without exception. They are rather advisory than mandatory, and the application of the rules and of their exceptions to each particular case as it arises is still intrusted to the conscience of the chancellor. Yet these principles and rules and this practice serve to inform the intellect and to enlighten the conscience, and by them the judicial discretion of the court must be guided."

In *Banaghan v. Malaney*, 200 Mass. 46, 128 Am. St. Rep. 378, 85 N. E. 839, 19 L. R. A., N. S., 871, it is held that the right to specific performance is not absolute, but rests in the sound discretion of the court, and may be refused to anyone who has been guilty of any unfair conduct or has taken any inequitable advantage of the other party to the agreement, even though there is no sufficient ground for its rescission.

A note fully discussing the subject of "Discretionary character of the right to obtain specific performance," may be found in 128 Am. St. Rep. 384.

d. Certainty of Contract.—Specific performance will not lie, unless the agreement is certain, fair and just in all its parts; and in such an action any element showing that the contract is unfair, unjust and against good conscience will justify the court in refusing such decree, although the contract, had it been executed, might offer no sufficient ground for cancellation: *Superior Oil and Gas Co. v. Mehlin*, 25 Okl. 809, 138 Am. St. Rep. 942, 108 Pac. 545. Specific performance will not be decreed if to decree it will create inequality resulting from old age, mental weakness, poverty, inexperience, ignorance, sex, etc., or where the terms of the contract are so indefinite or assented to with such lack of caution that the enforcement will produce an inequality not foreseen by the defendant, although the complainant was free from any intention to take an unfair advantage: *Starcher Bros. v. Duty*, 61 W. Va. 373, 123 Am. St. Rep. 990, 56 S. E. 524, 9 L. R. A., N. S., 913.

A court of equity will refuse specific performance on the ground of incompleteness of the terms, or of the uncertainty in the construction, or in the application of the terms of a contract. If the parties have made no certain and definite contract, the court will not make a contract for them: *Gaslight and Coke Co. v. City of New Albany*, 139 Ind. 660, 39 N. E. 462. And the specific perform-

ance of contracts is allowed as a matter of grace and not of right; consequently, a court of equity will never lend its aid to accomplish by indirect means what the law or its clearly defined policy forbids to be done directly: *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695.

In *New Orleans v. Board etc. of Tulane Educational Fund*, 46 La. Ann. 801, 15 South. 161, it is held that the board of administrators of the University of Louisiana, having contracted and agreed with the city of New Orleans for a fair and adequate consideration to educate five boys of indigent parents, to be appointed annually from the public schools of the city of New Orleans, the administrators and their successors and assigns can be kept to their agreement, and held bound to accept and educate the designated number of boys of indigent parents when properly appointed.

a. Mutuality of Contract.—Contracts, in order to be enforced by specific performance, must be mutual in obligation as well as in remedy: *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449; *Tombigbee Valley R. Co. v. Fairford Lumber Co.*, 155 Ala. 575, 47 South. 88; *Joliffe v. Steele*, 9 Cal. App. 212, 98 Pac. 544; *O'Brien v. Perry*, 130 Cal. 526, 62 Pac. 927; *Newman v. French*, 138 Iowa, 482, 128 Am. St. Rep. 212, 116 N. W. 468, 18 L. R. A., N. S., 218; *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514; *Martin v. Platt*, 5 N. Y. St. Rep. 284; *Harlow v. Oregonian Pub. Co.*, 45 Or. 520, 78 Pac. 737; *Deitz v. Stevenson*, 51 Or. 596, 95 Pac. 803; *General Elec. Co. v. Westinghouse etc. Co.*, 144 Fed. 458.

"Specific performance," said Justice Sanborn, in *Shubert v. Woodward*, 167 Fed. 47, "will not ordinarily be decreed in favor of a party to a contract against whom the court cannot efficiently compel its performance. The obligation and the remedy under the contract must be mutual: 2 Beach on Contracts, 885, and note 1; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955; *Fry on Specific Performance of Contracts*, 3d ed., pars. 440, 441; *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98; *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27; *Chicago Municipal Gas Light and Fuel Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616; *Ogden v. Fossick*, 32 L. J. Eq., N. S., 73; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84; *Richmond v. Dubuque & S. C. R. Co.*, 33 Iowa, 422. There are exceptions to this rule, as where the specific performance of the complainant's covenants which are not susceptible to enforcement by the court has been completed before he institutes his suit: *Burnell v. Bradbury*, 67 Kan. 762, 74 Pac. 279; *Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255; *Green v. Richards*, 23 N. J. Eq. 32; *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907. . . . There are authorities in which courts have sought and found some reason or excuse in the particular facts of cases to take them out of the rule, as in *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, and *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. Rep. 243, 34 L. ed. 843. But it is both unreasonable and unjust for a court of equity to constrain one party to an agreement to specifically perform it, when it is without power to compel the other party to do so, and he may escape its performance at will, and the general practice, as well as the weight of authority, sustains the rule."

An interesting case is that of *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 40 S. W. 353, 37 L. R. A. 682, to which Justice Sanborn refers. It is held in this case that where a contract is

made between a newspaper corporation and an editor, by which he purchases a portion of its capital stock, and is employed for a number of years, and is given sole control of the paper, and it is agreed that if the profits of the paper shall not be, during that period, a sum specified, or if he shall accept any public or political office, or undertake any other business, or should die, resign or become unable to perform the duties of editor and manager, his salary shall cease, and that he will sell his stock at a valuation to be fixed by arbitration, such contract is not so deficient in mutuality as to deprive a court of equity of jurisdiction to compel its specific performance at his instance.

In *Turley v. Thomas*, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568, it is held that the doctrine that there must be mutuality in a contract of which specific performance is demanded, and that it must be susceptible of enforcement at the suit of either party at the time it was entered into, is subject to so many exceptions and such important qualifications, that it is doubtful whether a court would ever be warranted in declaring the law so broadly.

"The remedy of specific performance," to quote from *Pacific E. Ry. Co. v. Campbell-Johnston*, 153 Cal. 106, 94 Pac. 623, "must be mutual, and the test of mutuality of remedy is applied by considering whether the agreement under which the remedy is asserted is of such a character that, at the suit of either, a court of equity would decree specific performance against the other. In applying this test, if it appears that the right to this remedy is not reciprocal, it is not available to either party to the contract. When there is no such mutuality of remedy, equity refuses to interfere, and leaves the parties to assert their rights under the contract in a court of law. . . . Having in mind this doctrine that there must exist a mutuality of remedy in order to warrant specific enforcement of their contract by either party against the other, it is quite clear that no such mutuality exists under the contract upon which this action is based. When we examine that contract, it appears therefrom that the agreement on the part of plaintiff is to 'build and operate' a railroad, and as appears from the complaint, in advance of construction of any part of its railroad over the lands of the defendants, it is seeking to compel them to convey a right of way to plaintiff over such lands, and a further conveyance of what is apparently a bonus of forty acres of land. Now, if a court of equity at the suit of the defendants could not decree specific performance against plaintiff of the agreement on its part to construct and operate the railroad, then plaintiff cannot enforce specific performance against defendants to convey the right of way and the forty-acre bonus because there is a lack of mutuality of remedy."

f. Intervening Rights of Third Persons.—Specific performance will be denied when rights of innocent third parties have intervened so that the enforcement of the contract would be harsh, oppressive or unjust to them: *Bernard v. Benson*, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439. In *Stanton v. Singleton*, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334, it is held that an unperformed contract on the part of the plaintiff, the specific performance of which requires that he be let into possession, under the contract, for the purpose of performing labor provided for therein, will not be decreed,

where the contract named a cotenant of the defendants as a party of the first part, and was unexecuted by him or on his behalf.

g. Contracts Between an Individual and a State.—In *Re Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216, it is held that where a contract is between an individual and a state, no action will lie against the state, and any action founded upon it against the parties to the contract who are officers of the state, the object of which is to enforce its specific performance by compelling those things to be done which, when done, would constitute a performance by the state, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the state, is in substance a suit against the state itself, and within the prohibition of the constitution which secures to the state immunity from suit by individual citizens of other states or aliens. This immunity includes not only direct actions for damages for the breach of a contract brought against a state, but all other actions and suits against it, whether at law or in equity.

In *Adams v. Murphy*, 165 Fed. 304, it appeared that the National Council of the Creek Nation passed an act authorizing its principal chief to "contract with, retain and employ an attorney at law, or firm of attorneys at law," to represent the nation and members before various departments in Washington, and in any litigation growing out of such questions as the right of membership in the tribe, and the right to tribal lands. The contract entered into between the plaintiff and the principal chief stipulated for remuneration, etc., and also that it should be "subject to cancellation by either party thereto upon thirty days' notice, for good cause shown." The subjects in controversy which subsequently arose between the parties to the contract were referred to a master in chancery, whose report recommended that a decree be entered adjudging that the complainant was entitled to certain moneys for salaries, etc., which report was confirmed and a final decree was entered.

It was held (1) that the act of the National Council of the Creek Nation did not make the attorney with whom its principal chief entered into a contract an officer of the nation, but an employee for the purpose of rendering professional services, and such professional employees' rights were derived from the contract and not from the National Council's act; (2) that a suit in equity for the specific performance of a contract for personal services will not lie; (3) that the Creek Nation of Indians is exempt from civil suit to compel its performance of a contract, or to recover damages for its violation.

In reversing the decree Judge Armidon said: "The complainant throughout this litigation has conceded the exemption of the Creek Nation from civil suit. That fact is put forward in the bill as the very ground for invoking equitable relief. It is there averred 'that this plaintiff has no remedy at law by which he could sue the Creek Nation and recover from said Creek Nation the amount of unpaid salary due him, . . . or for damages for the breach of said contract,' and hence it is charged that he has no plain, speedy, or adequate remedy at law for his injuries, and therefore is entitled, on a familiar principle, to relief in equity. But the equitable doctrine invoked has no application to the facts of the present case. When the law, out of considerations of public policy, denies a remedy, equity cannot grant one. The defect of remedy which will support

a resort to equity must lie in the legal remedy and not in the legal policy. An action for damages would afford a complete redress of complainant's grievance; but the courts are forbidden to grant the remedy because of the disastrous consequences that would result if the tribe were exposed to civil suit. It is the right and not the remedy that is deficient. To say that, when the law denies its remedies out of considerations of sound public policy, a party may have his claim enforced in equity, would be a scandal to our jurisprudence, and render equity less just than the law."

h. Administering Complete Relief After Jurisdiction Acquired.—

Where a court of equity properly acquires jurisdiction of a cause to enforce specific performance of a contract, the court will proceed to administer complete justice by adjudicating all matters properly presented and involved in the case. Injunctions, both mandatory and restraining, may be granted and damages may be awarded upon proper allegations and proofs when necessary to do complete justice: *Taylor v. Florida etc. Ry. Co.*, 54 Fla. 635, 127 Am. St. Rep. 155, 45 South. 574, 16 L. R. A., N. S., 307, 14 Ann. Cas. 472. To the same effect are *Dickinson v. Arkansas City Imp. Co.*, 77 Ark. 570, 113 Am. St. Rep. 170, 92 S. W. 21; *Bessemer Irr. Ditch Co. v. Woolley*, 32 Colo. 437, 105 Am. St. Rep. 91, 76 Pac. 1053; *Everett v. Tabor*, 127 Ga. 103, 119 Am. St. Rep. 324, 56 S. E. 123.

II. Contracts Calling for Peculiar Services.

a. Contracts Requiring Material or Mechanical Services.—Courts of equity will not undertake to enforce the specific performance of a contract for personal services which are material or mechanical, and not peculiar or individual: *Roquemore & Hall v. Mitchell Bros.*, 167 Ala. 475, ante, p. 52, 52 South. 423; *Wm. Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 18 Am. St. Rep. 278, 20 Atl. 467, 7 L. R. A. 779; *Gossard Co. v. Crosby*, 132 Iowa, 155, 109 N. W. 483, 6 L. R. A., N. S., 1115; *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 190 Am. St. Rep. 627, 51 Atl. 973, 58 L. R. A. 227. In *Wm. Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 18 Am. St. Rep. 278, 20 Atl. 467, 7 L. R. A. 779, Chief Justice Andrews says: "It is now held that where a contract stipulates for special, unique, or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of a specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages. The reason seems to be that services of the former class are of such a nature as to prevent the possibility of giving the injured party adequate compensation in damages, while the loss of services of the latter class can be adequately compensated by an action for damages."

b. Contracts Requiring Unique or Extrordinary Services.—Courts of equity will, therefore, not undertake to enforce the specific performance of a contract for personal services which are material or mechanical, and not peculiar or individual, but where the contract stipulates for special, unique, or extraordinary personal services, or where the services to be rendered are purely intellectual and individual in their character, the courts will grant an injunction in aid of a specific performance: *Roquemore & Hall v. Mitchell Bros.*, 167 Ala. 475, ante, p. 52, 52 South. 423; *Leonard v. Board of Directors*, 79

Ark. 42, 94 S. W. 922, 9 Ann. Cas. 159; Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 18 Am. St. Rep. 278, 20 Atl. 467, 7 L. B. A. 779; Gossard Co. v. Crosby, 132 Iowa, 155, 109 N. W. 483, 6 L. B. A., N. S., 1115; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 90 Am. St. Rep. 627, 51 Atl. 973, 58 L. B. A. 227. But inability on the part of the plaintiff to perform his part of an agreement is a good reason for refusing to enforce the agreement against the defendant by a bill in equity for specific performance by injunction: Rice v. D'Arville, 162 Mass. 559, 39 N. E. 180.

c. **Contracts Requiring Skill, Judgment or Discretion.**—Courts of equity will decline jurisdiction to decree specific performance of a contract for personal services involving the exercise of skill, judgment and discretion, continuous in their nature, and running through an indefinite period of time; and injunctions to prevent the breach of such contracts are granted with great caution, although the remedy by damages at law may be inadequate: Iron Age Publishing Co. v. Western Union Tel. Co., 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449; Tombigbee V. Ry. Co. v. Fairford L. Co., 155 Ala. 575, 47 South. 88; Roquemore & Hall v. Mitchell Bros., 167 Ala. 475, ante, p. 52, 52 South. 423; Joliffe v. Steele, 9 Cal. App. 212, 98 Pac. 544; Wakeham v. Baker, 82 Cal. 46, 22 Pac. 1131; O'Brien v. Perry, 130 Cal. 526, 62 Pac. 927; Clark v. Truitt, 183 Ill. 239, 55 N. E. 683; Dukes v. Bash, 29 Ind. App. 103, 64 N. E. 47; Wood & Duvall v. Iowa B. & L. Assn., 126 Iowa, 464, 102 N. W. 410; Bomer v. Canady, 79 Miss. 222, 39 Am. St. Rep. 593, 30 South. 638, 55 L. B. A. 328; Beach v. Bryan (Mo. App.), 133 S. W. 635; Martin v. Platt, 5 N. Y. St. Rep. 284; Port Clinton B. Co. v. Cleveland etc. Co., 13 Ohio St. 544; Deitz v. Stephenson, 51 Or. 596, 95 Pac. 803; Carrico v. Stevenson (Tex. Civ. App.), 135 S. W. 260; Campbell v. Rust, 85 Va. 653, 8 S. E. 664; Gruble v. Starkey, 90 Va. 831, 20 S. E. 784; Adams v. Murphy, 165 Fed. 304; Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. ed. 955; and monographic notes in 68 Am. St. Rep. 753, and 90 Am. St. Rep. 634.

But if one person agrees to render personal services to another which require and presuppose a special knowledge, skill and ability in an employee, so that in case of a default the same service could not easily be obtained from others, although the affirmative, specific performance of the contract is beyond the power of a court of equity, its performance will be negatively enforced by enjoining its breach. The damages for the breach of such contract cannot be estimated with any certainty, and the employer cannot, by means of any damages, purchase the same services in the labor market, and proof of impossibility of obtaining equivalent service is not a prerequisite to relief. This rule has been applied to a contract for services by a baseball player: Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 90 Am. St. Rep. 627, 51 Atl. 973, 58 L. B. A. 227; by a prima donna: Lumley v. Wagner, 1 De Gex, M. & G. 604, 42 Eng. Rep. 687. And in Turley v. Thomas, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568, it is held that a contract by the defendant to transfer a specified number of shares of stock to the plaintiffs on their promise that they "will, to the best of their ability, use their best energies toward the securing of the sale of treasury stock in such company, and do all in their power to assist in advancing the interests of such company," may be specifically enforced after performance on their part by securing subscribers for the shares as contemplated.

And while equity will not ordinarily decree the specific performance of contracts requiring continuous acts involving skill, judgment, discretion and technical knowledge, contracts relating to the operation of railroads may be specifically enforced: *Taylor v. Florida etc. Ry. Co.*, 54 Fla. 635, 127 Am. St. Rep. 155, 45 South. 574, 16 L. R. A., N. S., 307, 14 Ann. Cas. 472. So, also, if under a contract for personal services, the services have been fully performed, or there has been substantial performance of the services by the person agreeing to render them, the contract may be specifically enforced: *Teske v. Dittberner*, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57.

d. Contracts Requiring Continuous Acts.—A court of equity can decree specific performance only when it can dispose of the matter in controversy by a decree capable of present performance; it usually cannot decree a party to perform a continuous duty, extending over a series of years, and will leave the aggrieved party to his remedies at law: *Electric etc. Co. v. Mobile etc. Ry. Co.*, 109 Ala. 190, 55 Am. St. Rep. 927, 19 South. 721; *Elliott v. Elliott*, 3 Alaska, 352; *Grape Creek Co. v. Spellman*, 39 Ill. App. 630; *Pacific E. R. Co. v. Campbell-Johnston*, 153 Cal. 106, 94 Pac. 623; *Brown & Sons v. Boston etc. R.*, 106 Ma. 248, 76 Atl. 692; *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Harlow v. Oregonian P. Co.*, 45 Or. 520, 78 Pac. 737; *Lone Star S. Co. v. Texas etc. Ry. Co.*, 99 Tex. 434, 90 S. W. 863, 3 L. R. A., N. S., 828; *Carrico v. Stevenson* (Tex. Civ. App.), 135 S. W. 260; *General Elec. Co. v. Westinghouse etc. Co.*, 144 Fed. 458; *Shubert v. Woodward*, 167 Fed. 47; *Sewerage etc. Board of New Orleans v. Howard*, 175 Fed. 555, 99 C. C. A. 177; *La Hogue D. Dist. v. Watts*, 179 Fed. 690, 103 C. C. A. 236.

But while equity will not ordinarily decree the specific performance of contracts requiring continuous acts, contracts relating to the operation of railroads may be specifically enforced: *Taylor v. Florida etc. Ry. Co.*, 54 Fla. 635, 127 Am. St. Rep. 155, 45 South. 574, 16 L. R. A., N. S., 307, 14 Ann. Cas. 472.

III. Contracts Involving Subject Matter of Various Kinds.

a. Contract to Construct or Repair Railroad.—A court of equity, as a rule, will not enforce the performance of a contract to construct or repair a railroad: *Pacific Electric Ry. Co. v. Campbell-Johnston*, 153 Cal. 106, 94 Pac. 623; *Crane v. Chicago & N. W. Ry. Co.*, 20 Fed. 402; *Oregonian Ry. Co. v. Oregon Ry. & N. Co.*, 37 Fed. 733; *Strang v. Richmond P. & C. R. Co.*, 101 Fed. 511, 41 C. C. A. 574. In the last case, the court said: "The bill prays, among other things, that the railroad company be required to fulfill its contract. Now, the contract on the part of the plaintiff was to construct, furnish, and build a complete roadbed. That on the part of the defendant was to pay for such completed roadbed in bonds, or cash, the proceeds of bonds. The plaintiff was not entitled to anything unless the roadbed was completed. He charges that he could not perform his contract unless the defendant fulfilled its contract in affording him the facility of doing so. The bill in purpose and substance is for the specific performance of a contract to build the road. If the court could undertake to order the defendant on its part to fulfill all the parts of its contract, it must order the plaintiff on his part

to fulfill his contract; that is, to build the road. . . . This the court cannot do."

In a proper case a court of equity delights specifically to enforce contracts where the parties have no other remedy, or the remedy afforded elsewhere is less complete or satisfactory; but where the undertaking of a party is to build a railroad, or to procure others to build it, a court of equity will not enforce a contract for that purpose: *Ewing v. Litchfield*, 91 Va. 575, 22 S. E. 362.

b. Contract to Furnish Freight for Specially Constructed Railroad. In *Lone Star Salt Co. v. Texas S. L. Ry. Co.*, 99 Tex. 434, 90 S. W. 863, 3 L. E. A., N. S., 828, the railroad company agreed to construct a road to the place where the defendant's salt works were located, and the latter agreed to furnish the former for transportation "for the full term of twenty years, sixty-six per cent of all the tonnage moved by rail incident to the operation of its said works." The agreement, however, failed to provide at what times and in what quantities the tonnage was to be delivered for transportation, but provided for liquidated damages for each year in which the defendant should fail to tender to the plaintiff sixty-six per cent of its tonnage. The road was in due course constructed by the plaintiff to give the defendant the benefit of competition in rates.

The evidence showed that the road was nine miles in length, running through an unsettled territory in which the traffic originating, besides that derived from the defendant's business, was not sufficient to justify the building of the road, and that without the defendant's business it would be operated at a loss. It was held that the agreement did not obligate the defendant to deliver to the plaintiff for transportation sixty-six per cent of its tonnage as it accrued, and since all data needed for the measuring of damages resulting from the contract were easily accessible, the plaintiff was not entitled to a decree for specific performance.

"It is not our purpose," said the court, "to go further in the construction of the agreement than is necessary to the disposition of the present controversy. The question whether or not the defendant might, by conduct such as is supposed, commit a substantial breach of its obligation entitling plaintiff to damages, may arise in other actions, and it should not be prejudged. If it be conceded that such might be the case, no support is found in that proposition for a decree for the specific performance of such an agreement as we find this to be; for it follows from what we have said that defendant is at liberty to manage its business as its exigencies may require, restricted only by its obligation to the plaintiff, which is to furnish the stipulated percentage of its tonnage, but not at any stipulated time, nor in any stipulated quantities.

"It is impossible for a court of equity, by any decree it might render in advance, to define the exact things the defendant under any given circumstances must do in order substantially to fulfill such an obligation. Any attempt to enforce specific performance of it would require nothing less than a constant supervision by the court of the defendant's management of the transportation of its commodities, under the constantly changing circumstances and conditions from time to time affecting it; and this, too, in a case in which adequate compensation in damages may be made. The recovery of compensation might, to be sure, require a number of suits, but the

vexation resulting from their number would probably be small compared to that which would likely attend proceedings attempting to enforce specific performance of a contract which does not itself furnish a definite basis therefor."

c. **Contract to Build and Maintain Depot.**—Where the owner of a hotel conveys land to a railroad company upon which to construct its right of way for the main line, a spur track and depot, and the deed of conveyance contains an agreement upon the part of the railroad company to maintain the spur track and depot to a point near the grantor's hotel and to operate all its regular passenger trains upon the spur track to the depot during a certain season of the year, and it appears that a controlling consideration for the conveyance was the maintenance of the spur track and depot thereon, and the operation of passenger trains over the spurs to the depot, which would be peculiarly beneficial to the grantor's hotel property and business, and extensive improvements of the hotel property are made upon the fact of the agreement to maintain the spur and depot, and to operate the passenger trains as stated, such agreement may be specifically enforced in equity unless enforcement will directly, materially and injuriously affect the rights of the general public: *Taylor v. Florida E. C. Ry. Co.*, 54 Fla. 635, 127 Am. St. Rep. 155, 45 South. 574, 16 L. R. A., N. S., 307, 14 Ann. Cas. 472.

And where an agreement to establish and maintain a depot for freight and passengers was a part of the consideration in a deed to a railroad company, and the depot was to be erected on the land thereby conveyed to the company of which it was put in possession, a court of equity will decree specific performance thereof: *Murray v. Northwestern R. Co.*, 64 S. C. 520, 42 S. E. 617.

In *Lawrence v. Saratoga Lake Ry. Co.*, 3 N. Y. St. Rep. 743, 36 Hun, 467, it was held that where a railroad enters upon land, and constructed tracks and structures, so that it could not be restored to its original condition, the railroad company's contract to build a bridge at the east line, and a "neat and good overhead bridge near my west line," and "erect a neat and tasteful station for the accommodation of passengers," was sufficiently definite and certain to enable a court of equity to decree specific performance thereof. In this case the court said: "Certainly, there is seldom a case which calls more strongly for the active aid of the court than the present. A corporation gets possession of the plaintiff's land by his consent, and on terms to which they agree; it pays nothing for the land, and is spared the trouble and expense of proceedings to condemn; and then, when in possession, it refuses to perform the things it agreed to do. And it makes no excuse whatever. It seems to hope by delays and technicalities to weary out the perseverance of the present plaintiffs, as it has succeeded in making this action outlive the original plaintiff. The case is another instance showing that the managers of corporations will unblushingly do what, in an individual, they would at once condemn as rank dishonesty."

d. **Contract to Operate Railroad.**—While equity will not ordinarily decree the specific performance of contracts requiring continuous acts involving skill, judgment and technical knowledge, contracts relating to the operation of railroads have been specifically enforced. For example, where a railroad company, in consideration of the conveyance to it of land, makes a reasonable agreement to perform in

return for such conveyance certain service that is fairly within its corporate powers and purposes, and that is not essentially inconsistent with the company's duty to the general public, such agreement, if not otherwise illegal or unenforceable, will be specifically enforced in equity upon proper allegations and proof: *Taylor v. Florida E. C. Ry. Co.*, 54 Fla. 635, 127 Am. St. Rep. 155, 45 South. 574, 16 L. R. A., N. S., 307, 14 Ann. Cas. 472.

In *Schmidt v. Louisville & N. R. Co.*, 101 Ky. 441, 41 S. W. 1015, 38 L. R. A. 809, it was decided that a court of equity will decree specific performance of a contract to operate a railroad for a period of thirty years for the benefit of mortgage bondholders, although the contract calls for continuous service, involving skill, judgment and technical knowledge, and will require constant supervision by the court. "It seems to us," says the court, "that the weight of modern authorities sustains the contention of appellant, and a court of equity can enforce specific performance of the contract under consideration. It is pretty well known history of the country that many railroads, and for long terms, have been operated under the direct supervision and control of courts of equity. It does not seem to us that it would be difficult to enforce specific execution of the contract under consideration. The court might enforce its orders by attachment or rule according to equity practice, or, if deemed best, it might place the road in the hands of a receiver, to be operated at the cost and expense of the appellee the Louisville and Nashville Railroad Company."

a. Contract to Lay Tracks.—In *Windham Cotton Mfg. Co. v. Hartford, P. & F. R. R. Co.*, 23 Conn. 373, it appeared that two railroad corporations whose roads were constructed parallel and near to each other on the northerly side of the plaintiff's warehouse, agreed to make and maintain a turnout or sidetrack, for the accommodation of the plaintiffs, from either or both of the railroad companies' main tracks to the warehouse. The plaintiffs claimed that the turnout from the track farthest from the warehouse should cross the track of the other road, and a single sidetrack should be laid from thence to their warehouse; while the defendant claimed that the turnout should be made on the outer side of such roads respectively.

The committee to whom the cause was referred by a court of chancery found that a single track, laid as the plaintiffs required, would, unless managed and used with proper care and prudence, expose the public travel along the railroad to serious danger from collisions and other causes, but if the same were under the supervision of the railroad companies, and a reasonable degree of prudence and care was exercised in its management and use, the danger therefrom would be very slight and scarcely appreciable, but the committee did not find that it was indispensable or necessary that such turnout should be constructed in such mode, nor that some other mode would not answer equally well.

It was held that if the contract required the turnouts to be made as required by the plaintiffs, the court would not specifically enforce it, but would leave the plaintiffs to their remedy at law. "The contract, or obligation," says the court, "in one sense, is indefinite and ambiguous. The respondents are to make and maintain a turnout or sidetrack for the accommodation of the plaintiffs, from either or

both of said companies' main tracks, at any time within five years, etc.' The exact mode is not pointed out."

In *Patton Township v. Monongahela St. Ry. Co.*, 226 Pa. 372, 75 Atl. 589, it was held that the plaintiff was entitled to, and a court of equity had jurisdiction to grant, a decree against a street railroad company for the specific performance of a contract providing for laying additional tracks on a street and for repairing the pavement along the tracks in a particular manner, in consideration of the grant by the plaintiff to the defendant of permission to lay the track on the street.

f. Contract Between Railroad and Express Company for Transportation.—In *Southern Express Co. v. Western N. C. R. R. Co.*, 99 U. S. 191, 25 L. ed. 319, it was held that a receiver of a railroad cannot be compelled to perform a contract for the transportation of persons and property over the road made by the railroad company. "The enforcement of contracts," said Justice Swayne, "not relating to realty by a decree for specific performance is not an unusual exercise of equity jurisdiction. Such cases are numerous in both English and American jurisprudence. They proceed upon the ground that under the circumstances a judgment at law would not meet the demands of justice, that it would be less beneficial than relief in equity, that the damages would not be an accurate satisfaction, that their extent could not be exactly shown, or that the pursuit of the legal remedy would be attended otherwise with doubt and difficulty. . . . There is another objection to the appellant's case which is no less conclusive. The road is in the hands of the receiver appointed in a suit brought by the bondholders to foreclose their mortgage. The appellant has no lien. The contract neither expressly nor by implication touches that subject. It is not a license as insisted by counsel. It is simply a contract for the transportation of persons and property over the road. A specific performance by the receiver would be a form of satisfaction or payment which he cannot be required to make. As well might he be decreed to satisfy the appellant's demand by money as by the service sought to be enforced. Both belong to the lienholders, and neither can be thus diverted."

And in *Fargo v. New York & N. E. R. Co.*, 3 Misc. Rep. 205, 23 N. Y. Supp. 360, it is held that a contract between a railroad company and an express company, which grants to the latter company, for the term of five years, the exclusive right and privilege to control, direct and transport all the express matter on the railroad company's passenger trains, the railroad company at all times to furnish a "sufficient space" in the baggage or other cars hauled by the passenger trains, for the purpose of affording the express company requisite and reasonable facilities, conveniences, and also the assistance of the railroad company's employees when necessary, cannot be specifically enforced.

"The impossibility of executing such a contract," the court says, "once for all, by a single decree, is quite apparent. . . . It is apparent that the due execution of such a contract must involve the ascertainment of what it is right and proper that the parties should do from day to day with regard to ever-varying circumstances. A decree for the specific performance, couched in the precise terms of the contract itself, would be but the beginning of the judicial work. If, for instance, the court should adjudge that the railroad company

at all times furnish a sufficient space in its cars, and afford the express company, from time to time, requisite and reasonable facilities, conveniences, and rooms, and the assistance of employees, when necessary, etc., is it not entirely clear that the question of compliance would involve supplemental judgments, from time to time, upon subsequent and successive issues of fact? And would not the enforcement of the judgment upon these supplemental inquiries call for successive proceedings to punish for contempt? The answer must plainly be in the affirmative. I feel constrained to say that this contract is not only within the rule, and the reason of the rule, but that it is an extreme illustration of the difficulty which would attend an attempt to enforce continuous and successive acts by a judicial decree."

g. Contract Between Railroad and Telegraph Company.—In Appeal of Pittsburg & C. R. Co., 99 Pa. 177, it appeared that A agreed with the railroad company to construct and equip at his own expense a line of telegraph along the road of the company. The consideration for this work on the part of A was "the maintenance and working of the wire by the railroad company when constructed," and the payment by the latter to the former one-half of all the earnings. A constructed the telegraph, and the railroad company operated it, paying for several years one-half of the earnings to A, and then the company ceased to use the telegraph for commercial purposes. It was held that A's remedy for the breach of the contract was by a suit at law, and not by a bill in equity for specific performance.

"We find," says the court, "that the injury complained of is the nonpayment of moneys which would be due to the plaintiffs if the defendant continued to maintain and work the line. For the time that it was worked according to the agreement, the moneys actually received were in good faith divided. The plaintiffs have no ownership in the telegraph line. They have no right to participate in working it. The defendant has the exclusive right to take the earnings, and when they are received they are the sole property of the defendant. After their receipt arises the obligation to pay to the plaintiffs a sum equal to one-half of the amount received. Surely, this is but a bare pecuniary obligation, the breach of which is fully and adequately compensated by a recovery in damages of the amount which ought to be paid."

In *Western Union Tel. Co. v. Pennsylvania*, 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968, the contract between the railroad company and the telegraph company provided for the construction, maintenance and operation of a telegraph line along the road of the railroad company. The railroad company agreed to put up the telegraph poles and cross-arms for two or more wires, while the telegraph company agreed to furnish wires, insulators, instruments and patents, and to operate the line, sending messages relating to the railroad company's business free of charge. The line was built and operated under the contract for nearly fifty years, during which period the line became an important part of the telegraph company's system.

It was held that a court of equity was not precluded from decreeing the specific performance of the contract because it was continuous in its operation, in view of the fact that the principal if not the only relief required was to preserve the statu quo between the parties,

and to prevent the threatened termination of the contract by the railroad company.

The court said: "The specific performance which is sought here is that the defendant should observe the contract under which both parties have lived for nearly half a century, by not interfering with complainant's rights under said contract, and by not compelling complainant to remove its wires and dismantle its offices along the line of defendant's road. It thus appears that specific performance, in the proper sense of those terms is not the main relief sought by the bill. The prayer which, if granted, will be operative and efficient to give to complainant the remedy it demands and requires in this case, is the injunctive process of the court. It asks that the defendant company may be enjoined from interfering with the location, construction, maintenance and operation of complainant's said lines of telegraph, under and in accordance with the provisions of said contract, upon the roadway or the right of way of the said defendant. So that, when the court has determined that the contractual relations which have existed so long between the parties are not determinable merely at the will of the defendant, it means nothing more than that those relations shall continue as they have heretofore existed. Such a determination does not involve any change in the present situation. Nothing is required to be done by either complainant or defendant, other than they have been doing for nearly half a century, and are still continuing to do. . . . All that is required is that the statu quo should be preserved and the complainant not interfered with. Injunctive relief is the principal, if not the only, relief required. If, however, after a decree giving such relief, difficulties should develop in the relations heretofore existing under the contract, such difficulties may be dealt with as they arise. We are not to assume that the mandate of the court will not be respected and obeyed, or that there will be any real difficulty in simply maintaining the old time and existing relations between complainant and defendant."

h. Contract Between Railroad and Sleeping-car Company.—In *Pullman's Palace Car Co. v. Texas & P. R. Co.*, 4 Woods, 317, 11 Fed. 625, the agreement between the Pullman company and the railroad company provided, among other things, that the former should furnish sleeping-cars to be used by the latter, "sufficient to meet the demands of travel" on its line of road, with the necessary attendants therefor, and also to keep the cars in good order and repair. The railroad company agreed to pay the Pullman company for the use of its cars four cents per car per mile for each mile run, and "that it will not contract with any other parties to run said class of cars over said line of road for fifteen years." The Pullman company operated its sleeping-cars for many years upon the lines of the railroad company by virtue of this contract, but before the expiration of the period during which the contract was to continue in force, the railroad company notified the former that its cars would not be handled any longer.

In refusing an injunction pendente lite, the court said: "Any injunction issued in this case and granting relief to the complainant, whether mandatory to compel the performance or prohibitory to restrain the violation of the contract on the part of the defendant, substantially amounts to a decree or order for the specific perform-

ance of the terms of the contract. No such decree or order should be rendered when there is not a mutuality of remedy between the parties, obtainable from the court. If the position of the parties were reversed, it does not seem that there could be any order for the Pullman company to comply with, because the court could not compel that company to build cars or purchase cars, or furnish cars 'sufficient to meet the requirements of travel' over the extensive lines of the railway company. Nor, in such a case, could any order be issued restraining the Pullman company from furnishing cars to other railway companies until the contract should be complied with, for the contract has no such scope. . . .

"A decree restraining the defendant from violating the contract, amounting, as it would, to a mandate to comply with the contract, compels the court to supervise and control the performance of continuous covenants, with intricate details, running through a period of nine years, over a vast system of railways, involving large discretion, and the employment of an army of expert agents and business men, 'unreasonably taxing the time, attention and resources of the court and its officers, and interfering in the general administration of justice': See *Pomeroy on Specific Performance of Contracts*, par. 307 et seq.; also *Marble Co. v. Ripley*, 10 Wall. 358, 13 Ohio St. 344. . . . The contract is silent as to the number of cars to be furnished by the complainant and hauled by the defendant. It is also silent as to what passenger trains the cars furnished shall be hauled on or attached to, on day trains, night trains, or excursion trains. . . . The right, then, to determine what cars and what trains are 'sufficient to meet the requirements of travel,' is vested by the contract and by the nature of things in the defendant company.

"An injunction to the defendant restraining the hauling of any other cars than those furnished by the complainant takes away the power of the defendant to determine what cars are 'sufficient to meet the requirements of travel,' and vests it permanently in the complainant (for the defendant can have no other cars than the complainant sees fit to or can furnish), and, finally, after necessary delay, and possibly after the occasion has passed or the need lapsed, in the court. It is true that the complainant's failure to perform the stipulations imposed upon him by the contract would at *once* cause a dissolution of the injunction; but the dissolution of the injunction can only be ordered by the court, and the court can only dissolve after notice, a hearing and a finding, and the *at once* becomes an indefinite time, controlled by the mutations and delays of a litigation, and that through more than one court."

1. **Contract to Construct Track Crossings.**—Where land for a right of way is conveyed to a railroad company under an agreement that one or more under-track crossings of certain specified dimensions are to be built and maintained for the convenience of the grantee in working the land across which the road is constructed, a court of equity will decree specific performance of the contract, and not leave the grantee to his action for damages, when specific performance will alone answer the purpose of justice: *Gloe v. Chicago R. I. & P. Ry. Co.*, 65 Neb. 680, 91 N. W. 547. And specific performance of covenants, on the part of a railroad company, to build, provide and maintain road crossings, cattle-guards and other structures on its right of way through a farm, entered into as and for part of the considera-

tion for the right of way, may be enforced in equity by mandatory injunction: *Johnson v. Ohio River R. Co.*, 61 W. Va. 141, 56 S. E. 200. "To deny specific performance, therefore," says the court, "is to deny to the covenantee any remedy by which he may obtain that to which he is entitled. The covenantor may prefer to pay damages repeatedly and not put in the crossings at all. Besides, he has it in his power to delay the work indefinitely and thereby place a burdensome and unjust restraint upon the covenantee in respect to the use of property."

In *Owens v. Carthage W. Ry. Co.*, 110 Mo. App. 320, 85 S. W. 987, the plaintiff conveyed a right of way to the defendant railroad for the sum of four hundred dollars in money and the following clause: "Said Carthage and Western Railway Company hereby agrees to construct cattle and wagon pass at place designated by the chief engineer on said premises." It was held that the performance of a contract whereby a railroad company agreed to construct an undergrade farm crossing may be decreed by a court of equity. But in *Clarke v. Rochester L. & N. F. R. Co.*, 18 Barb. 350, it was held that where the plaintiff conveyed to the defendants a strip of land six rods wide, running through his village lot, for the track of their railroad, without reserving the right of crossing the same, and the railroad company constructed an embankment on the strip of land, fifteen feet high, which rendered access to a portion of the lot, and the passage from one parcel to the other, difficult and inconvenient, and the unsold portion of the lot was of small value, whereas the expense of making a crossing would much exceed the value thereof, and there were no special circumstances shown in regard to the manner of using the land rendering a crossing necessary, a court of equity ought not to adjudge specific performance.

In *Blair v. St. Louis, K. & N. Ry. Co.*, 92 Mo. App. 538, the plaintiff asked for specific performance of an agreement to construct and maintain a passway for cattle under the defendant's railroad tracks and a water gate and a cul-de-sac from the right of way to low-water mark on the bank of the Mississippi river. Specific performance of the agreement would require supervision by the court so long as the right of way over the plaintiff's land should be used for railroad purposes, for the covenant was perpetual and was to plaintiff, his heirs and assigns. It is held there is nothing difficult of performance to carry out the agreement, and should supervision by the court become necessary, there is nothing in the way to prevent the court from making further orders in the exercise of its equitable jurisdiction or to exercise its equitable powers, if it should become necessary to enforce its decree.

J. Contract to Drain Land, Construct Ditches or Build Levees.—Specific performance of a contract for the construction of "dredge ditches" will not be decreed at the instance of a contractor, if the work requires special skill, and the authorities of a drainage district have supervision: *La Hogue Drainage Dist. v. Watts*, 179 Fed. 690, 103 C. C. A. 236. And a court of equity is without jurisdiction to require the specific performance of a contract to build a levee, since it does not involve personal services of a special, unique, or extraordinary nature: *Leonard v. Board of Directors*, 79 Ark. 42, 94 S. W. 922, 9 Ann. Cas. 159. A court of equity will not decree specific performance of a contract, by means of an injunction, to open a channel for

the purpose of diverting a portion of the water from one lake to another: *Harley v. Sanitary Dist. of Chicago*, 54 Ill. App. 337.

Where swamp and overflowed lands, granted by the general government to the state, and by the state to the several counties, are conveyed by a county to an incorporated company, on condition that the grantees shall drain the lands, the latter take the lands burdened with the trust arising under such condition, and a court of equity may enforce its execution. But such jurisdiction will not be exercised in all cases; it is only when the trust can be executed by the employment of the ordinary agencies to which the court can readily and practically resort: *Henry County v. Winnebago Drain Co.*, 52 Ill. 454.

In this case the court says: "The court is urged to adopt and execute a plan *cy pres*. And to do so, it is obvious that the court, from the very nature of the trust, would be compelled to employ a corps of engineers, to survey and report plans, specifications and estimates of costs of construction. It would then have to choose a plan, employ agents and laborers, or let the contract, by biddings, to contractors for the performance of the work; then employ agents, engineers and superintendents to carry out the plan. In other words, the court would have to organize all the necessary means for an extensive internal improvement. Such would not be adapted to the organization of a court of chancery, and could never be practically carried into effect. To do so with any reasonable hope of success, the court would have to remain in daily session during the progress of the work, for the purpose of making orders and the change of plans and other necessary directions in the prosecution of the work. . . . We are aware of no precedent for such a course in this class of cases, and could one be referred to, we would hesitate to follow it on account of the complications and impracticable character of such a course."

k. Contract to Install and Maintain Waterworks.—In *Sewerage etc. of New Orleans v. Howard*, 175 Fed. 555, 99 C. C. A. 177, it is held that a court of equity will not decree specific performance, nor grant an injunction to restrain a violation, of a contract "to pump water into the mains and pipes as long as a single customer remains connected with the system" of one of the parties to the contract, for specific performance of such contract would make it necessary to retain the bill and supervise the contract indefinitely.

But in *Hubbard City v. Bounds* (Tex. Civ. App.), 95 S. W. 69, it is held that an agreement for the installment and maintenance for many years of a waterworks system, with fire hydrants for fire protection, may be specifically enforced by a court of equity. "Aside from the long period of time," says the court, "that the contract has run, it is believed that, in the specific performance of that provision of it sought to be enforced in this suit, none of those difficulties or objections which have been recognized in adjudicated cases as furnishing sufficient reason for denying the remedy will be encountered. Nor do we think it can reasonably be contended that a suit at law would afford redress for the alleged threatened injury in this case. It is well settled that, if the remedy in such an action be not adequate, full and complete, equity will interpose, and compel the specific performance of the contract. It is obvious that appellant's main purpose in entering into the contract in question, and granting to appellees

the valuable franchise incident thereto, was to secure, for the protection of its citizens against the destruction and loss of their property by fire, the best water supply and water pressure for fighting fire attainable. Fire protection was the paramount consideration in view, and a decree for specific performance of that provision of the contract providing the method and means of securing it would involve, it occurs to us, neither the exercise of skill and judgment, nor such service or supervision on the part of the court as would require a denial of the relief. It seems clear that any such damages as might be recovered for a breach of the contract in a suit at law would not afford an adequate remedy, and that the contract is a proper one for specific performance."

In *Grubb v. Sharkey*, 90 Va. 831, 20 S. E. 784, it appeared that a tract of land was purchased by the defendants for the purpose of erecting and operating thereon an ore washer. They covenanted in the deed of conveyance that if a stream which flowed through their land into the land of the vendors should be made continuously muddy by the ore washing so as to render the water unfit for cattle to drink, they would lay a pipe from another stream above, so as to conduct a supply of clear water over their land to a designated point of the vendor's land, and there erect a trough for the use of stock. It was held that a court of equity had jurisdiction to compel the defendants to specifically perform the terms of the agreement.

1. **Contract to Build a Bridge.**—In *Texas & St. L. Ry. Co. v. Rust*, 5 McCrary, 348; 17 Fed. 275, the railway company entered into a contract with the defendants for the construction by the latter of a bridge across the Arkansas river. A misunderstanding between the parties arose before the bridge was completed, and the railway company filed a bill asking the court to take possession of the defendant's plant and complete the bridge "in accordance with the specifications." In ordering the dissolution of a preliminary injunction, Justice Caldwell said: "It is not necessary to determine whether a court of chancery will, in any state of case, undertake to enforce specific performance of a contract to build a railroad bridge. . . . Courts are poorly adapted to the business of building railroad bridges. If not properly constructed, the most serious consequences to life and property are likely to result. Their proper construction requires a high degree of engineering skill, which this court does not possess. Any court which engages in the business is liable to commit grave mistakes, and inflict great wrong and hardship, for which the injured parties will have no redress; for the errors and mistakes of the court, though they may ruin a citizen, are placed in the category of injuries produced by the law, and for which the law furnishes no redress. Certainly, no court ought to engage in the business, when it would have to resort, in the beginning, to the exercise of such questionable powers to get the tools to carry on the work.

"It is obvious that the sole object of the bill in this case is to obtain, through the agency of the court, the use of the defendants' plant until the bridge can be finished. If the court should continue the forced loan of the defendants' tools and complete the bridge, it would have to settle with the plaintiff for the money received, and there this case would end, leaving every question in dispute between the parties where it stood when this case was begun. This would be proceeding by inversion. The method has too much the air of

that proceeding by which a man is first hung and tried afterward to find favor in a court of equity."

And in *Brown & Sons v. Boston & M. R. R.*, 106 Me. 248, 76 Atl. 692, it was held that specific performance will not be decreed to enforce a reservation in a conveyance to a railroad company whereby it bound itself to construct and always maintain an overhead street crossing or bridge for foot-passengers and teams in consideration for a right of way, where its construction would not benefit the grantor and would impose an unnecessary expense and burden upon the grantee, and no decree could be made which would be capable of performance at once, but must be for the performance by the railroad company of the perpetual duty of maintaining the bridge, which would necessarily involve the frequent interposition of the court to consider new conditions that might arise during the progress of time.

m. Contract to Clear Land, Load Gravel, or Furnish Peculiar Stone.—A contract to clear a large tract of land, containing many complicated provisions regarding the details of the work, involving personal services and extending over a long period of time, cannot be specifically enforced, since it would require of the court such supervision of the work as it could not properly undertake: *Carrieco v. Stevenson* (Tex. Civ. App.), 135 S. W. 260. And a court of equity will not grant specific performance of a contract for the operation of a tramroad for the purpose of carrying logs and lumber from certain designated points to the main line of a railroad, where it involves personal services and would require the constant superintendence of the court from day to day for an indefinite time, in order to enforce the decree: *Sims v. Vanmeter L. Co.*, 96 Miss. 449, 51 South. 459.

In *Roquemore & Hall v. Mitchell Bros.*, 167 Ala. 475, ante, p. 52, 52 South. 423, the defendants employed the plaintiffs to carry out a contract made by the former with a county to load gravel from the pit of the county, and also to sell gravel to others from such pit, and to be paid therefor by the square yard of gravel loaded for the county, and to pay the county a certain sum per square yard for the gravel sold to third parties. The contract between the plaintiffs and defendants also contained a provision that if the board of revenue of the county "will consent for the said Mitchell Bros. to transfer and assign the above-described contract to Roquemore & Hall, then said Mitchell Bros., upon request of them, will so transfer and assign said contract to them, but, if said board of revenue will not agree for an assignment of said contract, then the foregoing provisions and agreement to employ said Roquemore & Hall to load gravel in said contract shall be and remain in full force and effect."

It is held that the contract is not one susceptible of specific performance, for the reason that it involves personal services requiring skill, judgment and discretion, extending over a series of years; also, that a court of equity cannot compel the county to allow the complainants to perform the contract which they made with the defendants, as the bill failed to show that the county consented to the arrangement between the parties to the suit.

In *Rector St. David's v. Wood*, 24 Or. 396, 41 Am. St. Rep. 860, 34 Pac. 18, the defendant agreed to furnish the necessary stone from his quarry, to dress, transport, cut and lay the same in the walls of

a church building to be erected by the plaintiff, but after doing two-thirds of the work, the former became insolvent. The stone which the defendant agreed to furnish was of a peculiar kind, color, quantity and texture, and no other stone of like character could be procured except from the defendant's quarry, and to use other stone would destroy the beauty and harmony of the building, or the walls would have to be taken down and rebuilt with other stone. It was held that since the defendant could not be compelled to do that which his pecuniary condition forbid, he could be negatively required to specifically perform the contract by compelling him to allow the plaintiff to take the necessary stone to complete the building, and to permit the plaintiff to use the derricks at the quarry and at the church building in quarrying, transporting and raising the stone.

n. Contract to Build City Hall on Certain Land.—A court of equity will not undertake to control the judgment of the common council of a municipal corporation, and compel them to build a public hall upon a lot which they do not think is suitable or convenient for that purpose, though the municipality had previously accepted the conveyance of such lot upon the condition that such hall should be built thereon: *Kendall v. Frey*, 74 Wis. 26, 17 Am. St. Rep. 118, 42 N. W. 466.

o. Contract Pertaining to the Construction of Building.—Specific performance of a contract to erect a building will not be awarded by a court of equity: *Braithwaite v. Henneberry*, 124 Ill. App. 407. In *Bromberg v. Eugenotto Const. Co.*, 158 Ala. 323, 48 South. 60, 19 L. R. A., N. S., 1175, it is held that a contract for the lease of a store-room of a certain amount of floor space in a building in process of construction cannot be specifically enforced. "It seems," says the court, "both on reason and authority, that where the erection of the building requires the exercise of skill, judgment and discretion, a court of equity will not assume jurisdiction for the enforcement of specific performance of a contract in such a case. There can be no doubt that the erection of the building, such as is referred to in the contract in this case, would require the exercise of 'special skill, judgment and discretion,' and would extend over a considerable period of time.

"The erection of such a building would require the services of the architect, the skilled mechanic, and various workmen and superintendents. Necessarily, the distribution and placing of the beams, vents and air-shafts, component parts of such a building, and the very things of which the bill complains as diminishing the 'floor space' contracted for in the lease, are involved in the exercise of the required special skill, judgment, and discretion in the construction of the building."

An agreement to take down or remove a building will not be specifically enforced, because of the court's inability to see that the work is carried out, and damages at law are generally an adequate remedy: *Armour v. Connolly* (N. J. Eq.), 49 Atl. 1117. "There is an additional obstacle to specific performance in the case," says the court, "arising from the fact that the contract to be performed is in the alternative—to take down or remove the building. A decree for specific performance must be certain, and usually follows the very terms of the contract; and although specific performance may be decreed of one of the alternative terms of a contract, where the performance of the other alternative has become impossible, and the

contract is therefore rendered certain (Pomeroy on Specific Performance of Contracts, para. 298-302), I have not been referred to or found any case where the decree itself commanded the defendant to exercise an option, and proceed to do one of the two alternatives mentioned in the contract."

And an action will not lie for the specific performance of a contract to convey land, where the consideration named is that the purchaser shall erect thereon "a certain building" without any further description. Such contract lacks the essential prerequisite on which to found the action: *Mastin v. Halley*, 61 Mo. 196.

In *Gregory v. Ingwersein*, 32 N. J. Eq. 199, the facts showed that in consideration of the conveyance of a strip of land lying between the buildings of the complainant and the defendant the latter agreed to construct, on such strip, a stairway of certain dimensions for the perpetual joint use of both buildings, and the platforms so built as to enter the several stories of the complainant's building on a level with the floors. It was held that equity would enforce specific performance of a contract to construct a building in a certain manner. "Though the defendant may, and probably will," says the court, "be put to considerable expense in altering the stairways so as to make them conform to the requirements of the contract, that consideration will not avail to prevent the court from compelling a performance of the contract. The complainant has no adequate remedy at law."

In *Ames v. Witbeck*, 179 Ill. 458, 53 N. E. 969, one of the directors of an apartment-house company entered into a contract with the company whereby he agreed to complete an apartment-house at his own expense, free from all liens and demands, in consideration of a certain amount of bonds secured by the premises, to be issued by the company, and other valuable consideration. It was held that a trustee for the benefit of creditors was entitled to a decree for specific performance of the contract.

In *Jones v. Parker*, 163 Mass. 564, 47 Am. St. Rep. 485, 40 N. E. 1014, it is held that specific performance of a covenant in a lease that during the term the lessor will reasonably light and heat the demised premises will be enforced. The fact that the court may be called upon to form a scheme for heating and lighting, and to provide the proper apparatus does not justify it in declining jurisdiction.

p. Contract Pertaining to Electrical Devices.—In *General Elec. Co. v. Westinghouse Elec. and Mfg. Co.*, 144 Fed. 458, the contract between the complainants and defendants provided, among other things, that the defendant would not manufacture certain electric controllers for use in the United States; that the complainant would sell and deliver such controllers to the defendant with reasonable promptness at a stated reduction in price; that the defendant would sell such controllers to the exclusion of all others of the same kind; that the complainant would sell overhead trolleys made by the defendant to the exclusion of all other overhead trolleys; that if complainant should fail to supply controllers pursuant to the contract defendant might manufacture them; the contract was to run for fifteen years, and provided for liquidated damages for a violation thereof by either party. It was held not to be a contract of which a court of equity would decree specific performance.

"It is clear," says the court, "that equity cannot compel the General Electric Company to manufacture and sell to the Westinghouse

Company controllers such as are described in the complaint. It is a continuing contract, running for fifteen years, and the courts will not undertake to supervise and compel performance of such a contract. . . . But it is urged . . . that there is no adequate remedy at law, and therefore equity should interfere. There are two answers to this contention: First. The parties themselves, foreseeing that there might be a refusal to perform, have fixed the damages and a mode or basis for ascertaining or measuring them. Performance in all events was not contemplated. They have expressly provided a substitute for nonperformance. . . . Second. The damages agreed upon to be paid in case of nonperformance are easily ascertained, and this may be done as readily at law as in equity."

q. **Contract for One-half Interest in Invention.**—In *McRea v. Smart*, 120 Tenn. 413, 114 S. W. 729, the defendant agreed to give the plaintiff a one-half interest in a patent covering an invention which was described as "a device to dispense with the link motion on any reversible engine by the adoption of a reverse lever to take the place of apparatus controlling said link motion on any reversible engine," in consideration for which the plaintiff agreed to supply the defendant with the necessary tools to model the invention and to furnish all necessary money to obtain a patent. It was held that the device was described with sufficient certainty and the agreement was mutual, entitling the complainant to a decree of specific performance.

r. **Contract Pertaining to Mines.**—In *Grape Creek Coal Co. v. Spellman*, 39 Ill. App. 630, the plaintiff and defendant entered into an agreement whereby the latter agreed to sell and the former agreed to buy the output of a coal mine, the minimum to be not less than two thousand tons of lump coal per month at an agreed price. Specific performance by means of an injunction restraining the defendant from selling his output to anyone except the complainant was refused, the court saying: "In the very nature of things, relief in respect to matters of that sort would be out of the question because not practicable. Here the court cannot compel the defendant to employ men to work his mine, operate his machinery, furnish necessary supplies, produce the coal, and deliver it to the complainant. A succession of continuous acts calling for his personal services and for the exercise of his judgment, experience and tact in reference to a complicated business, cannot be specifically compelled as would be necessary in this instance. Indeed, the complainant seeks to avoid this difficulty by praying for an injunction to restrain the selling of the coal to others; but this would not give him the coal, nor does it accord with his theory of relief that he needs this particular variety of coal to supply his trade. A court of equity will not assume what it cannot practically accomplish."

In *Elliott v. Elliott*, 3 Alaska, 352, the plaintiff prayed specific performance of an oral and written contract with the defendant that the former should have an undivided one-half interest in all mines located by the latter in Alaska. The written contract was in the nature of a last will and testament which, among other provisions, contained the following: "Also that in case I return from Alaska whatever riches I possess she shall have 50 per cent. of same to do with in her own right as she may see fit in consideration of (\$400) four hundred dollars given me in cash to make trip to Alaska." The defendant

admitted the making of the alleged contract-will, but denied the oral contract which plaintiff alleged to be similar in terms with the one in writing. When the alleged contracts were entered into between the plaintiff and defendant they were husband and wife, but subsequently the wife secured a divorce.

Specific performance was refused, the court saying: "It is my judgment that there is a failure to establish the oral contract. The oral negotiations were merely preliminary to the written will contract of January 31, 1898, in which they merged. It being conceded that locator Elliott wrote, signed and delivered to the plaintiff the writing of January 31, 1898, its effect in this suit must be determined. It was intended, first, as the last will and testament of the husband; . . . second, he promised to divide his riches with his wife upon his return. In so far as it is the will of the maker, it need not be further considered, for nothing is claimed by the plaintiff under that part of the writing. The maker is yet alive, and may revoke it before he dies. The contract clause alone is of importance. . . .

"That writing did not constitute a mining or other partnership agreement. There was no provision for future advances, or for the division of profits or losses. Nor did it constitute a grubstake contract for the joint location of mines in Alaska or elsewhere. A grubstake contract is an agreement between two or more persons to locate mines upon the public domain by their joint aid, effort, labor or expense, whereby each is to acquire, by virtue of the act of location, such an interest in the mine as is agreed on in the contract. . . . In the writing signed by locator Elliott no mention is made of any joint interest in mines or mining claims, or of locating mines upon the public domain in Alaska, or at all. No promise is made to plaintiff in that writing that she shall have an interest as locator in any such mines, nor is the consideration of four hundred dollars acknowledged upon any such basis. The contract did not bind Elliott to locate mines. He made no promise to locate, purchase, or acquire mines, and no single element of a grubstake mining contract can be found in the writing. . . . Elliott was not made the agent for plaintiff by the writing of January 31, 1898, to locate mines for her in Alaska. He made no location of mines in her name, or in his own name as her agent, under that writing. She did not become an original locator, nor acquire any title as tenant in common with her husband in the mines so located by him in Alaska, and in controversy, under that writing.

"The contract portion of the writing of January 31, 1898, if it can be given any force at all, was a postnuptial agreement, in consideration of four hundred dollars, that in case he returned 'from Alaska whatever riches I possess she shall have 50 per cent of same to do with in her own right as she may see fit.' It was a promise to make her a settlement of one-half his riches at that time. It was an agreement to divide their community riches and to settle upon her her own share as her individual estate. . . . The general rule seems to be that after a divorce from the bonds of matrimony all nonvested rights dependent upon the marriage relation are terminated and cut off. . . .

"Since this court must find as a fact established by the evidence herein that the plaintiff had knowledge of the facts upon which she now bases her right in the property sued for, at the time when the

decree of divorce was entered, it follows from these authorities that the wife cannot, in this suit, have any decree based upon her rights as a wife."

s. Contract in Consideration of Marriage.—Where a man, in proposing marriage, writes to the woman: "That I have tolde you and rote to you you are first with me above all other you are one that my honner before God that I have plege myself to take care of and support as long as you live"; and she marries him in consideration of this assurance, the letter is evidence sufficiently definite to entitle her to a specific performance against his heirs by a decree in equity providing means for her support out of his estate: *Offutt v. Offutt*, 106 Md. 236, 124 Am. St. Rep. 491, 67 Atl. 138, 12 L. R. A., N. S., 232. And where a man enters into an antenuptial agreement with a woman who had been his housekeeper for many years, that for the reason of a marriage to be consummated between them he agrees and promises that she shall be supported from his estate during her natural life, by providing a home and such an amount monthly, or quarterly, or yearly as may be necessary to enable her to live in comfort, and equal to such as she has heretofore enjoyed, and, in case of sickness, such added amount as may be necessary for care, medical attendance and other necessary expenditures, and at her death funeral expenses and rights of burial, and the marriage is consummated, such an agreement is specific enough to be enforced: *Thompson v. Tucker-Osborn*, 111 Mich. 470, 69 N. W. 730.

In *Collins v. Collins*, 72 Iowa, 104, 33 N. W. 442, the antenuptial contract provided that "E. A. Collins does by these presents agree to, and does hereby, settle upon Maria, out of his estate, a sufficient amount to keep and maintain her during her life, or as long as she remains his widow; that such amount so to be furnished shall be sufficient to maintain Maria in such manner as the estate of said Collins, Sr., will justify, and as will be reasonable to be furnished by a party or an estate in like financial circumstances." The court decreed specific performance, and fixed the amount that would be reasonable under all the circumstances.

Hull v. Hull, 117 Iowa, 63, 90 N. W. 496, is an unusual case. John F. Hull contracted a matrimonial alliance with the plaintiff, and in refusing a decree of specific performance of an antenuptial contract, Justice Waterman says: "Both plaintiff and Hull had previous matrimonial experience, and were so far advanced in years as that they had adult children. Perhaps it was age that caused them to overlook the true basis of marriage in contracting this second union. As plaintiff states her case, she married for money. She says Hull represented himself as wealthy, and agreed if she would marry him, to convey to her 'all the property that he had or would inherit'; and that she relied on this promise, or rather upon the following contract, in which such promise was crystallized into a supposedly enforceable form. . . .

"That for and in consideration of the party of the second part marrying the party of the first part, the said party of the first part gives to the party of the second part all money and property of every kind and description that he now has, or he may acquire in the future, and all property and money of every kind and description now owned by said party of the first part is this day assigned by the party of the first part to the party of the second part. The party of the

second part agrees to take care of the party of the first part as long as he may live, and provide him with a home. John F. Hull. Mrs. S. C. Garner.' (Duly acknowledged.) The present action is, as we have said, founded upon this contract, and seeks to divest Hull of his whole estate, which, according to plaintiff's allegation, amounts to several thousand dollars. The case as presented is somewhat singular.

"The original petition sought specific performance of a contract to pay money, for no real estate or special property of any kind is involved. Such an action will not lie, for there is an adequate remedy at law: *Richmond v. Dubuque S. C. R. R. Co.*, 33 Iowa, 422; *First Nat. Bank v. Day*, 52 Iowa, 680, 3 N. W. 728. The amendment charged that the defendants other than plaintiff's husband were indebted to her, and asked 'judgment as prayed in her original petition.' The action, therefore, still remained one for specific performance, and the grounds were as untenable as in the first instance."

Another interesting case is *Brewer v. Cary*, 148 Mo. App. 193, 127 S. W. 685. The antenuptial agreement in this case is as follows: "I the undersigned, Wade Cary, not a member of the Roman Catholic Church, wishing to contract marriage with Miss Gertrude A. Brewer, a member of the Roman Catholic Church, propose to do so with the understanding that the marriage bond thus contracted is indissoluble except by death; and I promise that she shall be permitted the free exercise of religion according to the Roman Catholic Faith, and that all children of either sex, born of this marriage, shall be baptized and educated in the faith and according to the teaching of the Roman Catholic Church, even if she should happen to be taken away by death." The marriage rite was subsequently performed, and after the birth of children the mother died.

"Referring," the court says, "to that feature of the case which is so earnestly pressed upon us by plaintiff and his counsel, namely, that we are to and can consider the welfare of these children when closely connected with what is their religious training, we cannot do better than quote Judge Bakewell, in the *Doyle* case (16 Mo. App. 159), in which case that learned judge has said: 'A great deal has been said in the argument as to the religious question. In determining what will be best for the child, we cannot, under the system of law which we are appointed to administer, look at that. The state of which we are citizens and officers does not regard herself as having any competency in spiritual matters. She looks with equal eye upon all forms of a so-called "Christianity," and subjects no one to any disability for rejecting Christianity in any form, nor for rejecting the generally accepted doctrines of natural religion. A father in Missouri forfeits no rights to the custody and control of his child by being, or becoming, an atheist; nor are his rights in this respect increased before the law by his believing rightly. The law does not profess to know what is a right belief.' . . . In a proceeding in equity, as this case at bar is, a court of equity cannot decree specific performance of a moral duty, cannot enforce a duty that is one of conscience. Nor can we, in determining what is for the welfare of the infant, determine that on consideration of religion. That would involve our determination between religions—and that we are not permitted to do."

In *McCartney v. Titsworth*, 126 N. Y. Supp. 905, it is held that an oral antenuptial agreement, made by the husband in consideration of marriage, to convey property to his wife, which agreement is within the statute of frauds, cannot be specifically enforced by the wife after marriage on the ground that she has performed her part of the agreement. In *Hunt v. Hunt*, 171 N. Y. 396, 64 N. E. 159, 59 L. R. A. 306, it is held that marriage alone is not such a part performance of an oral antenuptial contract, the only consideration of which is marriage, as to take it out of the operation of the statute of frauds, and the contract cannot be specifically enforced in equity.

In *Moore v. Allen*, 26 Colo. 197, 77 Am. St. Rep. 255, 57 Pac. 698, it is held that antenuptial agreements to convey land are included in those which, by the statute of frauds, must be in writing; but where a woman has been induced to enter into a contract of marriage by an oral promise on the part of the man to convey lands to her, which promise he fails to perform, the result is such a fraud upon her as will take the promise out of the statute of frauds, and, as between them, equity will enforce the contract.

t. *Contract of Separation Between Husband and Wife.*—In *Greenleaf v. Blakeman*, 40 App. Div. 371, 58 N. Y. Supp. 76, an action to specifically enforce an agreement between a husband and wife, executed after they had separated and were living apart, the agreement provided, among other things, that the husband should pay to the wife, through a trustee, a certain sum annually until her death or remarriage, "which sum or sums are and shall be for the use, maintenance and support of the party of the second part" (the wife and two children); that the payment of such sum shall be in full satisfaction for her support and maintenance, "and she shall, and hereby does, release all her claims, present and future . . . for maintenance and support, and all her dower and right of dower in the real estate . . . of which he is now seised, or which he may hereafter acquire, and any and all rights, present and future, which he now has, or may hereafter acquire of, in, or to the estate, real and personal." It was held that there was ample consideration for the agreement, and it would be specifically enforced. "There is nothing to show," says the court, "that the amount agreed upon was in any way excessive, or that the agreement itself was not a perfectly fair one. . . . That this agreement on the part of the wife to relinquish her dower interest in the husband's estate was binding upon the parties was recognized by both, the husband demanding a compliance with the covenant on the part of the wife, and in that the wife acquiescing."

In *Bailey v. Dillon*, 186 Mass. 244, 71 N. E. 538, 66 L. R. A. 427, it was held that a fair and voluntary contract of separation between a trustee in behalf of the husband and the latter's wife, under which the husband placed in the hands of the trustee a fund for the support and maintenance of the wife, in consideration of which the wife agreed not to make any further claim against her husband for support and maintenance, was not void as against public policy and would be specifically enforced. "The defendant," said the court, "was not obliged to enter into the agreement. If the facts warranted her in so doing, she could have filed a libel for divorce or brought a petition for separate support, as she has now done, but she did not do either. Instead she entered into the agreement in question. She did this freely and voluntarily, for aught that appears, and we see no reason

why, as a matter of public policy, she should not be bound by it, if otherwise valid, so long at least as the separation continues."

The validity of separation agreements between husband and wife are discussed in the notes in 83 Am. St. Rep. 859, 90 Am. Dec. 367.

II. Contract to Support.

1. *Between Parents and Children.*—In *Grimmer v. Carleton*, 93 Cal. 189, 27 Am. St. Rep. 171, 28 Pac. 1043, it is held that a deed made in consideration that the grantor, an aged woman, in feeble health, should be supported and maintained for the rest of her natural life by her daughter, the grantee, is upon a consideration not enforceable, and therefore insufficient in law, and the deed will be canceled by a court of equity at the instance of the grantor.

In *Gardner v. Knight*, 124 Ala. 273, 27 South. 298, it is held that an obligation to support the grantor in consideration for a conveyance of land, is not of a nature which a chancery court will specifically enforce, being only for undefined personal acts of the obligator. And in *Chadwick v. Chadwick*, 121 Ala. 580, 25 South. 631, it is held that a court of equity will not decree specific performance of an agreement to convey land, where the consideration is an undertaking of the complainant to allow the defendant to reside with him and to support her for life. "It is an undertaking," says the court, "which implies the legal duty on his part not only to furnish necessities for defendant's support, but to treat her with due consideration, so that her existence as a member of his household might be at least tolerable. The court of equity will not undertake to regulate or control the performance of such continuous duties, and it would be powerless to do so by any of its processes."

In *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514, the defendant entered into an agreement with a married daughter, complainant's wife, whereby the daughter undertook to support and maintain her father during his life, in consideration for which the latter agreed to allow the former and her family to possess and reside upon certain property, and that it should be hers absolutely at his death. Subsequently the daughter died, and her father, the defendant, repudiated the agreement. The court refused to decree specific performance, and said: "We can see no foundation for jurisdiction in this case. If Josephine Bourget were living, and had filed this bill herself, a decree of specific performance would, if made, involve continuous duties on her part, including all those household cares and attentions essential to the decent care of parents by their children, which could not be constantly regulated by any process within the power of a court of equity, and which, if enforced unwillingly, would be destitute of the affection and confidence which are the chief value of such relations. The duties on defendant's part would also be continuous, and dependent on good treatment, and the conveyance must either be made by will, which no court can compel a man to make, or by deed from his heirs. In other words, the performance could not be enforced mutually, or at all, and is impracticable within any rule of equity. . . . It was never contemplated that the parent should have to look to anyone but his daughter for the care which he needed. Her death made the performance impossible. Beyond this it cannot be claimed that any duty devolved upon her infant children or on complainant which could be enforced by legal proceedings."

In *O'Brien v. Perry*, 130 Cal. 526, 62 Pac. 927, it is held that an oral agreement between a father and daughter that he will give her and her family the rent of his home free for life, and leave her by will the residue of his estate, subject to certain bequests, in consideration of her promise to provide him a home therein and supply his personal wants for life, is a contract on her part to render personal services during the life of her father, and cannot be specifically enforced by either party; and that for any breach of the contract while unperformed on her part, the parties must be left to their remedies at law.

But in *Teske v. Dittberner*, 65 Neb. 167, 101 Am. St. Rep. 614, 91 N. W. 181, it is held that while an oral agreement between a son and his parents that he shall, in consideration of carrying on their business and providing for their support, become vested upon their death, with the title to the family homestead, contravenes the statute of frauds and the statute of wills, yet if fairly made and substantially performed by the son, equity may grant him relief in case the parents repudiate the agreement.

2. *Between Relatives or Strangers:*—In *Watson v. Watson*, 20 Ind. 223, it appeared that A., an aged bachelor in feeble health promised B., a physician, and M., his wife, that if they would occupy a certain house, then owned by him, and permit him and his nurse to live in it with them, board the two, and attend upon and take care of him as long as he lived, he would convey the house to M. B. and his wife. M. accepted the offer, took possession of the house, made some improvements, received A. and his nurse into the house, boarded the two, gave medical and other proper attention and care to A. until he died, some nine months after the occupancy of the house began. In a suit against the heirs for title to the property, it was held that the contract was a proper one for specific performance. "There is no pretense in the case," the court said, "of any fraud or undue influence in the execution of the contract, nor but that Watson was compos mentis; and it cannot be denied that labor and service constitute a valuable consideration upon which performance of a contract may be compelled."

In *Hackett v. Hackett*, 67 N. H. 424, 40 Atl. 434, it appeared that under a will devising land in trust to be used by the trustees as they deemed to be for the best interests of the cestui que trust, with authority to sell it, or convey it to him in fee, the trustees entered into a written agreement with complainant to convey the land to her in consideration of the undertaking on her part to furnish the cestui que trust a comfortable home during his life, to which agreement the cestui que trust also consented. The court decreed specific performance, and said: "The claim of want of mutuality in the remedy is not well taken. No reason occurs to us why the defendants could not maintain a bill to compel the plaintiff to accept a deed and perform the contract. The contract is not open to the objection that it is an engagement which a court of equity will not enforce because it is 'continuous, involving skill, personal labor, and cultivated judgment.' The trustees are not charged by the will with the duty of providing for the support or comfort of the cestui que trust."

In *Mowers v. Fogg*, 45 N. J. Eq. 120, 17 Atl. 296, it was said: "So far as the bill seeks to enforce the contract to take care of the complainant in case of 'general debility or sickness,' I can find neither

principle nor precedent upon which to base a decree in favor of the complainant. The authorities all seem to be against the court undertaking to enforce any such contract. How can the court, from time to time determine what is meant by 'general debility or sickness'? If it be possible, within any equitable rule, to settle it, in one instance, how can the court determine how long such 'debility or sickness' may continue? Or how can the court determine when she is properly taken care of, or how long such care should continue, supposing it were possible for the court to establish a standard? I can see no way by which this court can aid the complainant."

v. Contract Between Employer and Employee.—A creditor may attach the amount due his debtor for labor already performed by him, and he may also attach whatever is to become due upon an existing contract for his future labor; but the debtor cannot be compelled to work out his part of such contract so as to earn the promised reward for the exclusive use of the creditor: *Teeter v. Williams*, 3 B. Mon. 562, 39 Am. Dec. 485. In *Harlow v. Oregonian P. Co.*, 45 Or. 520, 78 Pac. 737, the plaintiff purchased an interest in a newspaper carrier route contract providing that the carrier should carry and deliver the paper to all paying subscribers within a designated territory, to endeavor to increase its circulation, to collect subscriptions therefor, and to pay weekly for all papers he took from the office, receiving as compensation for "his labor" a certain proportion of the subscription price of the paper; that the relationship should continue until one party or the other considered a "separation necessary," in which event, if the parties should be unable to agree upon "a proper method of doing so," each should appoint one arbitrator, who, if they could not agree, should choose another, whose decision should be final. It was held that a court of equity could not decree specific performance of such a contract.

A contract by the owner of land granting an option to purchase or sell at prices specified, in consideration of the promise of the grantee to do all in his power to dispose thereof according to its terms, whatever validity it may have as a basis for a claim of damages for its breach, is incapable of specific performance, as involving a contract for personal services of an indefinite and uncertain character, and cannot constitute a valid claim to an interest in the land: *Jolliffe v. Steele*, 9 Cal. App. 212, 98 Pac. 544. And a contract to cut trees from land and convert them into lumber, indefinite and uncertain as to the trees to be cut, cannot be specifically enforced: *Bomer v. Canaday*, 79 Miss. 222, 89 Am. St. Rep. 593, 30 South. 638.

w. Contract Between Attorney and Client.—Agreements between attorney and client were at one time disfavored by the courts. Now, however, if they are understandingly and fairly made, they will be upheld. But they never will be decreed to be specifically enforced, if the attorney has failed to discharge the obligations which he has assumed: *Martin v. Platt*, 5 N. Y. St. Rep. 284. After a contract by an attorney to render services in litigating the title to land, in consideration of a conveyance of a part thereof as compensation for his services, has been fully performed by the attorney, the contract may be specifically enforced against the client and his vendees with notice, whether the client had title or not. But if the attorney has not fully or substantially performed the contract, and performance

has not been waived, the contract cannot be specifically enforced: *King v. Gildersleeve*, 79 Cal. 504, 21 Pac. 961.

For a full discussion of contracts between attorneys and clients, see the note to *Shirk v. Neible*, 83 Am. St. Rep. 159.

x. Contract to Sell Specific Articles.—In *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 68 Am. St. Rep. 749, 51 N. E. 408, 43 L. R. A. 854, it is held that though a contract is of such a character that the difficulty of supervising its performance may induce the court not to undertake to compel a specific performance, yet the court may interpose by injunction to restrain one of the parties to the contract from violating the negative and several covenants thereof. In this case, one of the parties to the contract agreed that he would not sell nor allow others to sell on his premises any but a specific make of pattern during the continuance of the contract.

In *Gossard Co. v. Crosby*, 132 Iowa, 155, 109 N. W. 483, 6 L. R. A., N. S., 1115, the defendant agreed to work for the plaintiff for a period of three years as corset saleswoman and demonstrator at a stated weekly salary and expenses incurred in the service. The court refused to grant the prayer of plaintiff for equitable relief, and said: "By what standard of law or of taste or pure or applied science is the court or the master to determine whether the defendant is a person of such 'high mental culture and refinement, strong and pleasing individuality, good address, prepossessing appearance, knowledge of physical culture, ability as a lecturer and high-class salesmanship,' as to render her services to the plaintiff so unique and exceptional that her place cannot be filled by any of the hundreds of other women of whom their friends may speak in equally glowing terms of commendation? . . . Mr. Freeman, in his note to the *Lajoie* case, 90 Am. St. Rep. 648, expresses strong doubt of the soundness of the rule which permits an injunction in any case to enforce either a positive or negative covenant for personal service. He says the rule is impracticable because it fixes no standard by which to determine whether the services contracted for are unique and extraordinary, or material, mechanical, and ordinary. The solution of this question is left wholly to the discretion of the court trying the case. Under exactly similar facts one court may consider the services contracted for as extraordinary while another court of equal standing may consider them merely ordinary. . . . Indeed, if we omit the merely complimentary and appreciative description of the appellee set forth in the petition (and which she could not be expected to deny), the allegation, when reduced to brief terms, is simply that appellee was an experienced and competent saleswoman, who was capable of rendering to appellant valuable service, and she has violated her agreement so to do. Experience, competency, and high degree of efficiency in exploiting and selling any brand of goods are qualifications which can hardly be so rare as to require the aid of equity to prevent irreparable loss by an employer who finds himself compelled to substitute one saleswoman for another."

A contract between a manufacturer and seller of patterns for all kinds of garments worn by women and children, and the owner of the largest dry-goods store in a city, that the latter will purchase such patterns and keep them on hand for sale, and will not sell, or permit to be sold, during the term of the contract, any other patterns, will

be enforced by enjoining its violation: *Butterick P. Co. v. Fisher*, 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189.

y. Contract to Advertise Specific Articles.—In *Goddard v. The American Queen*, 44 App. Div. 454, 61 N. Y. Supp. 133, the contract between the parties contemplated two things: First, the insertion of an advertisement in the defendant's magazine of the plaintiffs' wares for a period of eighteen months; second, that the defendant should refrain from publishing any advertisement for others than the plaintiffs of skirt protectors or of skirt bindings with an edge similar to or resembling the edge of "the Feder Brush Skirt protector." The court said: "The conclusion of law found by the learned judge contains the adjudication that the plaintiffs have suffered injury which probably cannot be compensated in money damages—a conclusion which is obviously right. Unless it be directed by a court of equity that the contract must be specifically performed, the plaintiffs are remediless. While the right to specific performance by a decree of a court of equity rests in judicial discretion, and be granted or withheld upon a consideration of all the circumstances of a particular case (*McCabe v. Matthews*, 155 U. S. 550, 15 Sup. Ct. Rep. 190, 39 L. ed. 253; *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527, and cases cited), it is the duty of the court to grant equitable relief where a remedy does not exist at law, where great injury will result to an innocent party unless a court of equity interferes, where the rights of a plaintiff are thoroughly established, and where, as in this case, a sufficient excuse for nonperformance has not been proven. Under such circumstances, judicial discretion to grant relief becomes judicial duty to grant it."

z. Contract to Enter into Partnership.—"As a rule," says Justice McAdam, in *Goldberg v. Kirschstein*, 36 Misc. Rep. 249, 73 N. Y. Supp. 358, "the court will not enforce specific performance of a contract to form and carry on a partnership. To this rule there is the exception that, if the contract defines the terms of the partnership, and there has been part performance of the contract, the court may specifically execute it by decreeing the parties to execute a proper deed, and, if necessary, by restraining any partner from carrying on business under the partnership style with other persons."

And in *Cross v. Hopkins*, 6 W. Va. 323, the court says: "Whether the court will undertake to coerce parties actually to commence or continue a partnership business for a series of years, is a question very difficult of solution. Generally, a partnership undertaking demands the will and care, as well as the agreement and co-operation of the parties. Dissension, enmity and dissatisfaction promise little success to a partnership enterprise. An enforced inauguration of a partnership would be as futile as unpropitious. The reluctant partner may not only withhold his countenance and industry from the furtherance of the object contemplated, but may, at his pleasure, sell his interest in the concern, and thus terminate the partnership."

In *Clark v. Truitt*, 183 Ill. 239, 55 N. E. 683, the court refused specific performance of a contract to sell a one-half interest in a newspaper plant, whereby the complainant would be a partner in the management of the plant, and in conducting its business, including the selection of articles and preparing editorials for the columns of the paper. "Should a court of equity decree the specific performance of a contract providing for a partnership where personal skill,

attention, and services are required, as would be the case here, the enforcement of a decree in such a case upon an unwilling party would of necessity require the court to manage the partnership, which of itself is regarded a sufficient reason for a refusal to grant the relief. Moreover, where a partnership agreed upon is not for a definite time, but is merely at will, specific performance will be refused for the reason that the partnership could be immediately dissolved, and a court is never required to do a void or useless thing."

But in *Whitworth v. Harris*, 40 Miss. 483, it is held that specific performance of partnership articles, though the partnership may be of indefinite duration, will be decreed when it is necessary to invest one of the partners with the legal rights for which he entered into partnership.

In *Roberts v. Kelsey*, 38 Mich. 602, it was held that a logging contract of partnership between A. on the one side and A. and B. on the other, could not be specifically enforced after the death of A., in behalf of his personal representative, because a court of equity had no means of seeing to its execution, or of supplying the judgment and business faculty of the deceased partner. Said the court: "A contract depending so largely on personal confidence would become grossly unjust when that confidence became impossible."

In an action by a partnership for the specific performance of a covenant to renew a five-year lease, it is immaterial that at certain times during the first term of such lease other persons held an interest in the partnership, where the persons who constituted the partnership at the time of demanding such renewal are the same persons who were members of the firm at the time of the execution of the lease; also, where one of the partners sells his interest in the firm with the consent of the other members, and a purchaser is taken in and recognized as a partner and the business continued, this does not work a dissolution of the firm: *Gorder v. Pankonin*, 83 Neb. 204, 131 Am. St. Rep. 629, 119 N. W. 449.

In *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459, it appeared that plaintiff and defendant entered into an oral agreement whereby a certain invention of defendant's and all letters patent granted therefor should be their joint property. The plaintiff was to contribute the money to procure letters patent, and both were to use their best efforts to make the invention remunerative. In a suit for specific performance, it was held, (1) that the agreement was one of partnership, and not invalid under the statute of frauds, relating to the sale of goods, etc.; (2) that it was not invalid as an agreement not to be performed within one year; (3) that a court of equity had jurisdiction to enforce the contract, although oral, it not being within the statute of frauds and no adequate remedy being attainable in an action at law; (4) that such an agreement, though made before the issue of a patent, was valid and enforceable in equity by compelling an assignment, an accounting and such other relief as the circumstances of the case might require.

In *Deitz v. Stephenson*, 51 Or. 596, 95 Pac. 803, the facts showed that the plaintiff and defendant entered into a contract whereby the former agreed to purchase from the latter a fourth interest in hotel property for a certain sum, and the latter agreed to procure for the former and his wife the position of managers of the hotel at an agreed compensation. The contract also provided that "if an adjustment or

settlement is made between the stockholders of the Scott Hotel Company so that the first party gets control of all the stock of said corporation, then the second party is to have one-fourth of the stock of said corporation . . . but should the stockholders of said Scott Hotel Company be unable to adjust their matters, a new corporation is to be organized for \$16,000.00, and the second party is to have one-fourth of the stock and the first party herein is to have three-fourths." In a suit for specific performance of the contract to restore the plaintiff to the position of manager from which he was removed, it was held that the contract did not create a partnership in the business, but only a personal obligation on the part of the defendant to sell a fourth interest therein; and since he occupied the position of an employee of the corporation, and was subject to its discretion and control, and liable to be discharged by it at its pleasure, the court could not compel specific performance because of the impracticability of enforcing the decree.

GILBERT v. PINKSTON.

[167 Ala. 490, 52 South. 442.]

QUIETING TITLE—Removal of Cloud—Burden of Proof.—In an action to quiet title and remove a cloud therefrom, where the defendant relies upon a conveyance from the complainant to his grantor, the burden of proving such conveyance is on him. (p. 90.)

HOMESTEAD—Deed—Defective Acknowledgment by Wife.—A deed of the homestead, to which the separate acknowledgment of the wife does not comply with the requirements of the statute, is void, and cannot be made effective by any subsequent act short of an actual conveyance. (p. 90.)

HOMESTEAD — Deed — Defective Acknowledgment — Reacknowledgment.—Where a conveyance of a homestead is void because of a defective acknowledgment by the wife, the land vests in the heirs of the husband on his death, and the reacknowledgment of the conveyance by the wife after her husband's death cannot give life to the conveyance. (p. 91.)

HOMESTEAD — Interest of Surviving Wife.—Under section 2543 of the Alabama Code of 1886, the widow's right was only to occupy the homestead during her life, and it did not vest in her absolutely, unless the estate of her deceased husband was duly declared insolvent; and if she abandoned the homestead or attempted to convey it away, her rights ceased. (p. 91.)

HOMESTEAD — Succession — Who are "Heirs."—According to section 1915 of the Alabama Code of 1886, the homestead of one who dies leaving a wife and brothers and sisters descends to the brothers and sisters, who are the decedent's heirs, and not to his wife. (p. 91.)

ADVERSE POSSESSION—Recording Claim.—One who claims and holds land under a deed from the administrator of a former owner, or as heir at law of her brother, is not required to record a claim of adverse possession. (p. 91.)

E. J. Garrison and D. H. Riddle, for the appellant.

Whatley & Cornelius, for the appellee.

⁴⁹¹ SIMPSON, J. The original bill in this case was filed by the appellee against the appellant to remove a cloud from her title. The respondent, by answer and cross-bill, set up the claim that the complainant had conveyed the lands in question to her brother, William Pinkston, during his life, and that said William Pinkston and his wife, Lutitia Pinkston, had conveyed the land to ⁴⁹² the respondent. The point being made that the land in question was occupied by William Pinkston at the time of the execution of said deed (May 4, 1885), and that the separate acknowledgment by the wife did not comply with the requirements of the statute, the respondent amended his answer and cross-bill by showing that since the commencement of this suit the widow of said William Pinkston had made a proper acknowledgment. It appears from the evidence that William Pinkston died in 1887 or 1888; that at the time of his death, and for several years anterior thereto, he was living on the land in question as his homestead. There was no proof of his ownership of the lands except the testimony of several witnesses tending to show that in 1885 the complainant had executed a deed conveying said land to him, which deed was never recorded and has been lost; while the complainant produced in evidence a deed from the administrator of their father's estate of January 8, 1879, purporting to be in accordance with an order of the probate court and sale thereunder duly advertised conveying the land to her. She testified that the paper which was spoken of as a deed from her to William Pinkston was not a deed at all, but a paper agreeing that he might occupy the land during his life, and that she refused to sign it, and she was corroborated by other witnesses. She also testified that William Pinkston merely entered upon the land by her permission, and she had agreed to let him occupy it during his life. Her own testimony and that of others also tended to show that she has been in adverse possession of the land since shortly after William Pinkston's death. The burden being upon the respondent to show what right, title, or claim he has to the property, the testimony is not at all conclusive to the point that William Pinkston ever owned the land. In the next place, if he ⁴⁹³ did own it, he was certainly occupying it as a homestead at the time the deed was attempted to be made to the respondent, and, the separate acknowledgment being defective, the deed was absolutely void: *Cox v Holcomb*, 87 Ala. 589, 13 Am. St. Rep. 79, 6 South. 309; *Slappy v. Hanners*, 137 Ala. 199, 33 South. 900, and cases cited.

The deed being absolutely void, it is difficult to see how any subsequent act, short of an actual conveyance, could galvanize the original deed into life. Accordingly, our court has held distinctly that, when a man dies, after the execution

of such a deed, the land descends to his heirs, and no subsequent acknowledgment by the widow can make the deed effective: *Richardson v. Woodstock Iron Co.*, 90 Ala. 266, 8 South. 7, 9 L. R. A. 348; *Parks v. Barnett*, 104 Ala. 438, 16 South. 136. The appellant insists that these decisions have no bearing on this case, because the widow of William Pinkston was his only heir, that the estate vested absolutely in her, and she had a right to convey it. Even if that were a correct statement of the situation, a mere acknowledgment of a deed could not be construed into a conveyance of the property. Her rights, however, were governed by the statutes found in the Code of 1886. Under section 2543 of that code, the widow's right was only to occupy the homestead during her life, and it did not vest in her absolutely, unless the estate of her deceased husband was duly declared insolvent; and if she abandoned the homestead or attempted to convey it away, her rights ceased: *Munchus v. Harris*, 69 Ala. 506; *Baker v. Keith*, 72 Ala. 121; *Barber v. Williams*, 74 Ala. 331. The evidence in this case shows that within a year or two after her husband's death said widow abandoned the homestead, and is now living in the poorhouse. She testifies ⁴⁰⁴ herself that shortly after her husband's death she gave the land up to complainant, who has been in possession of it ever since, and that she has not claimed any interest in the lands since her husband's death. According to section 1915 of the Code of 1886, the brothers and sisters of William Pinkston were his heirs, and not his widow. Whether the complainant held the land under the deed from the administrator which was at least "color of title," or as the heir of her brother, it was not necessary for her to record her claim of adverse possession under the act of 1893, afterward embodied in section 1541 of the Code of 1896.

Under all the evidence, the court below properly held that the complainant was entitled to the relief prayed, and that the cross-complainant was not entitled to relief.

The decree of the court is affirmed.

Dowdell, C. J., and McClellan and Mayfield, JJ., concur.

The Conveyance of Homesteads is the subject of a note to *Poole v. Gerrard*, 65 Am. Dec. 482. As to whether a conveyance or mortgage of a homestead, with or without covenants for title, executed by only one of the spouses, may become operative on subsequent abandonment, or on the property becoming vested solely in the spouse who made the conveyance, see the note to *Alt v. Bauholzer*, 12 Am. St. Rep. 683. The effect of a conveyance of the homestead by one only of the spouses is the subject of a note to *Jerde v. Furbush*, 95 Am. St. Rep. 909. A lease of the homestead signed by the husband alone is void: *Town of Jasper v. Martin*, 161 Mich. 336, 137 Am. St. Rep. 508; *Mailhot v. Turner*, 157 Mich. 167, 133 Am. St. Rep. 333, and see the note thereto. A deed of a homestead by a householder to his or her wife or husband, not subscribed and acknowl-

edged as prescribed by the statute by the wife or husband, where possession is not abandoned or given pursuant to the conveyance, does not operate to convey the estate of homestead: *Gillam v. Wright*, 246 Ill. 398, 138 Am. St. Rep. 243. A conveyance made by a husband alone of land held by him and his wife as joint tenants, but which has been dedicated by her as a homestead, is void: *Swan v. Walden*, 156 Cal. 195, 134 Am. St. Rep. 118. In Alabama the only mode of dealing with the homestead is by the voluntary assent and signature of the wife, with the one exception in favor of laborers' and mechanics' liens: *Clark v. Bird*, 158 Ala. 278, 132 Am. St. Rep. 25. But a husband making a deed of the homestead without the signature of his wife, may be estopped from asserting its invalidity: *Lucy v. Lucy*, 107 Minn. 432, 131 Am. St. Rep. 502. The requirements of the statute for the conveyance of a homestead must be strictly adhered to, and it has been said that neither husband nor wife can be estopped from asserting the homestead right as against a grant or mortgage not executed in the mode prescribed by law: *Weatherington v. Smith*, 77 Neb. 363, 124 Am. St. Rep. 855.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

THOMAS-HUYCKE-MARTIN COMPANY v. GRAY.

[94 Ark. 9, 125 S. W. 659.]

CONTRACT to Buy Output of Mill—Mutuality.—A contract by which one party agrees to buy the lumber produced by a certain saw-mill at a certain fixed price is not void for want of mutuality, since a corresponding obligation on the part of the other party to sell and deliver the lumber is implied. (p. 95.)

SALE—Waiver of Seller's Breach of Contract.—Under a contract for the purchase of lumber in different lots, the purchaser, after accepting and paying for one lot, cannot urge objections to the manner of the performance of that part of the contract by the seller as ground for refusal to perform the remainder of the contract. (pp. 96, 97.)

H. N. Smith and T. F. & R. D. Garver, for the appellant.

J. H. Carmichael and A. G. Leming, for the appellees.

¹⁰ **McCULLOCH, C. J.** Plaintiffs, Gray & Sons, were owners of a portable sawmill, and were engaged in manufacturing and selling lumber. The Thomas-Huycke-Martin Company was dealing in lumber, and those parties, plaintiffs and defendant, entered into a written contract for the sale of the output of the mill, the contract (omitting caption) being as follows:

"The Thomas-Huycke-Martin Company, parties of the first part, agree to take from Gray & Sons the mill cut from the mill belonging to the parties of the second part located on Jones's Creek, Scott County, Arkansas. The Thomas-Huycke-Martin Company, parties of the first part, agree to pay the parties of the second part eight dollars and twenty-five cents (\$8.25) per thousand feet mill run for all merchantable lumber to run No. 2 and better, with the usual rule of measuring 2 inches only to be counted with one-eighth off and to cut lumber from 10 to 20 feet and to cut

one and two inch, and are to cut as requested by the parties of the first part. It is further agreed and understood by both parties that the price of \$8.25 is the price for lumber at the mill yard for all merchantable lumber cut and stacked properly, and are to stack each length and width separate, and to stack the lumber 200 feet away from the mill, so the parties of the first part can obtain insurance. The Thomas-Huycke-Martin Company will check the lumber once each month and pay for it ¹¹ on the yard; all lumber that will not grade No. 2 to be charged back to the parties of the second part. It is further agreed and understood that all the lumber now on the yard is to come in under the contract of November 5, 1906, and as soon as the amount is hauled in then the new contract takes effect.

"Present set to be 100 feet from mill and next set 200 feet from mill.

"GRAY & SONS.

"THOMAS-HUYCKE-MARTIN CO."

The word "set" as used in the latter part of the contract meant, according to the evidence, the location of the mill or place where it was being operated. When the contract was entered into, plaintiffs were engaged in sawing lumber at a certain location, and this is what was meant by the words "present set"; and the next location referred to is what was meant by the words "next set." Defendant accepted and paid for all the lumber sawed at the first or present location, referred to in the contract, though complaint was made of the manner in which the lumber was stacked, and plaintiffs allowed a small discount for culls which were in the stacks. Defendant refused to accept any more lumber from plaintiffs, and they instituted this action to recover damages alleged to have been sustained by reason of defendant's refusal to accept the lumber sawed at the second location referred to in the contract. It is alleged in the complaint that plaintiffs sawed four hundred thousand feet of lumber, and that the damages caused by defendant's refusal to accept it amounted to three dollars and fifty cents per thousand.

Defendant in the answer admitted the execution of the contract, but denied that it had violated the terms thereof, and alleged that plaintiffs broke the contract by failing to saw and stack the lumber in accordance with the specifications of the contract. The trial before a jury resulted in a verdict in plaintiffs' favor for the sum of five hundred and eighty-five dollars and eleven cents, and defendant appealed.

Some of the defendant's exceptions were not preserved in the motion for new trial, and some that were so preserved are not insisted on here. We will consider only those insisted on here which were properly preserved in the motion for new trial.

It is first insisted that the complaint does not state facts sufficient to constitute a cause of action, for the reason that the ¹² contract set forth therein lacked mutuality and was not binding. It is said that the contract attempted to bind the defendant to purchase the lumber, but did not bind plaintiffs to sell and deliver it. The written contract is ambiguous as to the subject matter upon which it is intended to operate, but we think that the addition of the words "present set to be 100 feet from the mill, and next set 200 feet from the mill," together with the attending explanatory facts and circumstances, makes it plain that the contract referred to the lumber sawed at the (then) present location and the next location of the mill. The obligation of the defendant, expressed in the contract, to purchase the lumber implied a corresponding obligation on the part of the plaintiff to sell and deliver it at the prices named and on the stipulated terms, and the language of the contract shows an agreement on their part to sell and deliver the lumber to defendant: *Minneapolis Mill Co. v. Goodnow*, 40 Minn. 497, 42 N. W. 356, 4 L. R. A. 202; *Lewis v. Atlas Mut. Life Ins. Co.*, 61 Mo. 534; *Jones v. Binford*, 74 Me. 439; *Miller v. Board Com. Weld. Co.*, 17 Colo. App. 120, 67 Pac. 347; *Bangor Furnace Co. v. Magill*, 108 Ill. 656.

The contract does not present a case where the obligations are all on one side and none on the other side. Such a case is that of *St. Louis etc. Ry. Co. v. Matthews*, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467, and *Davie v. Lumberman's Min. Co.*, 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357, and others which might be cited. The case of *Minneapolis Mill Co. v. Goodnow*, 40 Minn. 497, 42 N. W. 356, 4 L. R. A. 202, is very much in point. There the agreement provided that "the Minneapolis Mill Company agrees to saw for said John Goodnow, in its Jones Mill, so called, during the summer of 1887, six million feet or more of pine logs; said sawing to be done in good and workmanlike manner, and as shall be directed from time to time by said John Goodnow or his agent. Said John Goodnow agrees to pay said Minneapolis Mill Company for sawing, scaling, loading and delivering at his piling place," etc. The court, in construing this provision, said: "There is in this agreement no express promise on the part of Goodnow to furnish for plaintiff to saw the six million feet of logs which the plaintiff is to saw for him and as he shall direct. But that is necessarily implied. How could it saw the logs as he should direct unless he should furnish them? There can be little doubt that, as the parties understood this agreement when they ¹³ executed it, Goodnow was thereby engaged to furnish the six million feet of logs for plaintiff to saw, and plain-

tiff was engaging to saw them in the manner and at the prices specified. A third party would so understand it."

The Maine case cited above is also clearly in point. There, a number of farmers, including defendant, signed an agreement to plant sweet corn suitable for packing, and to deliver the product to plaintiff, and plaintiff agreed to pay certain stipulated prices for all corn which it received. It was argued that there was no mutuality, because the plaintiff had not agreed to receive this corn, but only to pay certain prices for that which it did receive. The court, in construing the contract, said: "The only fair construction which can be given to this contract, and the one which expresses the meaning of the parties better than any other, is that the defendant undertakes to plant and cultivate a specified quantity of the land to sweet corn and deliver what is so raised at the plaintiff's factory when fit for packing, when notified if reasonable notice is given, or, if no reasonable notice is given, he may still deliver it during the time specified, and for all the corn so raised and delivered the plaintiffs must pay the stipulated price. Thus it is a simple contract for the production, sale and purchase of personal property. This construction relieves it from objection on the ground of any alleged illegality, as well as from want of consideration."

In *Lewis v. Atlas Mut. Life Ins. Co.*, 61 Mo. 534, it is said: "It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. As, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract will necessarily be implied."

The next assignment is that the court erred in refusing to allow the defendant to show that the lumber sawed at the first location ¹⁴ of the mill and accepted and paid for by defendant was not sawed and stacked in accordance with the specifications of the contract. It was not erroneous to exclude that testimony. It is undisputed that, notwithstanding defendant's objection to the manner in which the first lot of lumber was sawed or stacked, it waived those objections and accepted the lumber and paid for it. That part of the contract was therefore fully performed, and defendant's objections to the manner in which it was performed

by plaintiff, after such objections were waived by acceptance of the lumber, could not be made grounds for refusal to perform the remainder of the contract. There was no proof offered that defendant, in accepting the lumber, stipulated that the balance of the contract would be abrogated, nor that the lumber sawed at the next location of the mill failed to come up to the requirements of the contract. If the first installment of lumber was not up to contract, defendant had a right either to reject it and treat the contract as broken, or to accept the lumber and treat the contract as being still in force. He could not, with full knowledge of the facts, do both: 3 Page on Contracts, sec. 1494.

The court gave the following instruction over defendant's objection: "If defendant has failed to show a verbal contract made subsequent to the written contract, then your verdict should be for plaintiffs." This was an indirect way of stating the issue in the case, but, as the defense from liability under the contract rested primarily on proof that there was a subsequent verbal contract, the instruction reached to the issue in the case. Defendant contended that the words, "present set to be 100 feet from the mill, next set to be 200 feet from the mill," were not incorporated in the contract, but that, subsequent to the time it was entered into, the parties thereto verbally agreed that, if the lumber sawed at the first location was satisfactory to defendant, defendant would take the lumber to be sawed at the next location, and that the words referred to above were noted on the contract merely as a memorandum, and not as a part of the contract. Plaintiffs contended that the words were added to the contract as a part thereof, before it was signed, and that there was no verbal agreement between the parties subsequent to the execution of the contract. That was the principal issue ¹⁵ of fact in the case; and if the jury found that there was no subsequent verbal contract, then the written contract prevailed, and, according to the undisputed testimony on the other issues, the plaintiffs were entitled to recover.

Excessiveness of the verdict is not set up as grounds for new trial, but it is contended that the evidence as to the market value of the lumber is not sufficient to sustain the verdict. While the evidence on this point is not entirely satisfactory, we think there is enough to sustain the verdict.

Judgment affirmed.

A Contract to Purchase All the Cross-ties of a given kind made by a manufacturer of lumber, at a given price, until the purchaser orders the manufacturer to make no more, is valid. It binds the manufacturer, probably not to make any ties, but if he does make any, to sell them to the purchaser at the agreed price; and it binds the pur-

chaser to take any ties already made at any time he chooses to terminate the agreement: McIntyre Lumber etc. Co. v. Jackson Lumber Co., 165 Ala. 268, 138 Am. St. Rep. 66, and see cases cited in the cross-reference note thereto.

A Contract for "Necessary Ballast" for a traction company's tracks in a county is not void for want of mutuality of obligation, if the necessary amount can be determined from the testimony of experts. The expression "necessary ballast" means the ballast reasonably necessary to complete the road for the purposes for which it was built: Blue Grass Traction Co. v. Hedges, 139 Ky. 358, 104 S. W. 370.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. SHAW.

[94 Ark. 15, 125 S. W. 654.]

CARRIER—Concurring Negligence at Depot.—A carrier may be liable for the concurring negligence of its servants in running a train by a depot without giving signals, and that of the servants of an express company in operating a hand truck at the depot, whereby a person steps toward the track and is struck by the train. (p. 100.)

CARRIERS—Concurring Negligence—Liability.—If the negligence of trainmen concurs as a proximate cause of an injury to a person at a depot, it matters not, so far as the carrier's liability is concerned, what other agency is the other concurring cause. (p. 101.)

CARRIERS—Duty to Protect Persons on Premises.—A carrier owes to passengers and others using by lawful right its premises the duty of protection from dangerous habits of others using the premises by its permission. (p. 101.)

CARRIERS—Waiting for Train—Contributory Negligence.—Where an infant while awaiting a train at a railroad station, in attempting to avoid a hand truck, stepped in front of a moving train, an instruction that if he could have avoided the truck by stepping in a direction away from the train he should have done so, and that his failure to do so constituted negligence, is erroneous in leaving out of account his ignorance of the approach of the train, its failure to give signals, and the fact of infancy. (pp. 101, 102.)

Kinsworthy & Rhoton and James H. Stevenson, for the appellant.

McRae & Tompkins and D. L. McRae, for the appellee.

¹⁶ McCULLOCH, C. J. This is an action instituted by the administrator of the estate of Joe Shaw, deceased, to recover damages resulting from an injury of said decedent by one of appellant's passenger trains at Hope, Arkansas. Deceased was a boy seventeen years of age, and was on his way from Emmett, a station on appellant's road, to Washington, Arkansas, which is on the line of the Arkansas and Louisiana Railway Company. He came from Emmett to Hope over appellant's line, and at the time he was run over

by the train he was waiting for his train to start on the Arkansas and Louisiana Railroad. The two roads jointly used the ¹⁷ same station and platform at Hope. Deceased was accompanied by his brother, who was his elder by only two years. While waiting for the train, he, with other passengers, was on the platform. While he was standing on the platform a few feet from the railroad track and looking up the track, he either was struck from behind by a moving baggage or express hand truck, and knocked or jostled toward the track, or stepped toward the track to get out of the way of the truck. This occurred just as a passenger train from the south passed along at a high rate of speed, and he was caught by the pilot beam of the engine, knocked under the train and mortally injured. Some of the witnesses say that he was struck from behind by the truck and knocked or jostled toward the track. Another witness says that he was struck by the truck, which "kind o' staggered him, and he just made one step before the train hit him." Others say he stepped over toward the track to get out of the way of the truck and lost his balance, and another witness says that deceased was never in the way of the truck, but took a position on the platform close enough to the track for the pilot beam of the engine to strike him. It appeared that he was unconscious of the approach of the truck on the platform or of the train, and was looking in the other direction. Another train was switching in the yard near by, and there was enough noise and confusion to drown the noise of an approaching train. The testimony warranted a finding that no signals, by bell or whistle, were sounded by the approaching engine.

The court, over appellant's objections, submitted the case to the jury on the following instructions requested by appellee:

"2. You are further told that where a railroad company is running its trains through populous communities, towns and cities, where the presence of persons upon the track is to be expected, it is its duty to give notice in some way, either by sounding the whistle, ringing the bell, or in some other way, of the approach of the train, and, if necessary, to reduce the speed of the train. So in this case, if you believe from the evidence that the deceased was without fault, and that he was killed by reason of the failure of the defendant to discharge its duty in this regard, your verdict should be for the plaintiff.

"3. If you believe from the evidence that the death of the deceased was caused by the negligence of the defendant company, ¹⁸ a recovery will not be defeated on the ground of contributory negligence, unless it appears from the evidence that the deceased himself failed in the exercise of ordinary

prudence, and that such failure so contributed to the injury that it would not have occurred if he had been without fault."

The court also gave four other instructions at appellant's request as to the duty of deceased under the circumstances; and also gave the following at appellant's request: "The jury are instructed that the defendant had the right to run its train through the town of Hope without stopping, and that the employees of defendant in charge of said train had a right to presume that passengers and parties on the platform would keep out of the way of moving trains, and the jury are instructed that the defendant is not liable for running its trains through the said town of Hope at the speed shown by the evidence."

It is contended that if the evidence shows that deceased was struck by a hand truck, operated by a servant of the express company, the alleged negligence of the trainmen in failing to give signals was not the proximate cause of the injury, and that instruction No. 2 was erroneous in submitting the case to the jury on that charge of negligence. The evidence warranted the finding of a state of facts constituting concurring negligence on the part of the trainmen in failing to give signals, which rendered appellant liable for damages. When the truck came along and struck deceased, or caused him to step aside, he was standing very near the track looking in the opposite direction, and apparently unconscious of his danger. He was not injured by being struck by the truck; but his proximity to the railroad track caused him, when struck by the truck, or when he stepped out of the way of the truck, to get near enough to the track for the passing train to catch him. His position in close proximity to the track was an incident to the injury, and this was caused by the negligence of the trainmen in failing to give signals of the approach of the train, as the jury might have found that he would not have been in that position if he had received proper notice of the approach of the train.

There were two street crossings near by, and the statutes require that signals be given under such circumstances. If a warning had been given, deceased would not have been close ¹⁹ enough to the track to be struck by the train or to be knocked or jostled over near the track as the train passed along. Thus the negligence of the trainmen concurred with the negligence of the truckman in producing the injury. In other words, the negligence of the trainmen caused deceased to be in a position where he was injured, and where he would not have been but for the act of negligence, which thus became one of the efficient causes of the injury: *City Elec. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 33

S. W. 426, 31 L. R. A. 570; Chicago M. & L. Co. v. Cooper, 90 Ark. 326, 119 N. W. 672; St. Louis etc. Ry. Co. v. Corman, 92 Ark. 102, 122 S. W. 116.

The court refused to give the following instructions requested by appellant:

"8. If the jury believe from the evidence that the truck in question belonged to the Pacific Express Company, and was handled by employees of that company, then the defendant railway company is not liable, and you will so find."

"12. If the jury believe from the evidence that deceased was pushed or knocked on to or near the railroad track and in front of a moving train by a truck owned and operated at the time by the Pacific Express Company, and on account of such push or knock was run over and killed by the train, you will find for defendant."

These instructions were asked on the theory that the act of the agent of the express company in running the truck against deceased was that of an independent agency, for which appellant was not responsible. The instructions were, however, erroneous, even if it be conceded that appellant was in no wise responsible for the alleged negligent act of the truckman, for they place the responsibility for the injury entirely upon the act of the truckman; and, as the jury had a right to conclude that the negligence of the trainmen was a concurring cause of the injury, it was incorrect to say that the verdict should be for appellant if it was found that the truckman who ran the truck against deceased was a servant of the express company. If the negligence of the trainmen concurred as a proximate cause of the injury, it matters not what other agency was the other concurring cause.

But the instructions were incorrect in other respects. Even if it be conceded that the railway company was not primarily responsible for the servants of the express company, still it owed passengers and others using by lawful right its premises the duty of protection from dangerous habits of such servants in negligently moving trucks about the platform without warning to anyone: *Huddleston v. St. Louis etc. Ry. Co.*, 90 Ark. 378, 119 S. W. 280. There was evidence to the effect that the truckman of the express company was permitted to pursue a course of conduct in operating trucks about the platform which was dangerous to those on the platform, and it would have been erroneous, in any view of the case, to tell the jury broadly, as is done in these instructions, that the railway company was not responsible for the negligent act of the truckman.

Error is assigned in the refusal of the court to give the following instruction:

"9. If the jury believe from the evidence that at or just before the time deceased, Joe Shaw, was struck by defendant's

engine, he could have gone around or stepped out of the way of the truck in question by moving toward the depot instead of moving toward the railroad track, then it was his duty to have done so—moved toward the depot—and his failure to do so and moving toward the railroad track and in front of the approaching train was negligence on his part, and you will find for the defendant.”

This instruction was clearly erroneous, even if it was correct in other respects, in leaving out of account the fact that deceased did not know of the approach of the train, and that no warning of its approach had been given. It also leaves out of account the age of deceased, and holds him to the highest degree of discretion and judgment under trying circumstances. The instruction was properly refused.

There are other assignments of error which we do not deem of sufficient importance to discuss. The judgment is affirmed.

Battle, J., not participating.

ON REHEARING.

MCCULLOCH, C. J. We find on re-examination of the evidence in the record that we were not justified in saying that ²¹ “there was evidence to the effect that the truckman of the express company was permitted to pursue a course of conduct in operating the trucks about the platform which was dangerous to those on the platform.” This does not, however, change the result, for the requested instruction was properly refused for other reasons stated in the opinion. We do not wish to be understood as holding that the railroad company is not responsible for the negligent act of the servant of the express company. It is unnecessary to pass on that question. We held in *Huddleston v. St. Louis etc. Ry. Co.*, 90 Ark. 378, 119 S. W. 280, that a railway company is not primarily liable for the negligence of a mail agent; but whether or not the same rule should be applied as to liability for negligence of a servant of the express company using the premises of the railroad company under contract and by permission, we do not undertake to decide in this case.

Rehearing denied.

It is the Duty of a Carrier of Passengers to keep its station platforms in a reasonably safe condition: *Pennsylvania Co. v. Marion*, 123 Ind. 415, 18 Am. St. Rep. 330; *Fullerton v. Fordyce*, 121 Mo. 1, 42 Am. St. Rep. 516. It should prevent a mail agent from throwing a loaded mail bag from a train, which is a dangerous practice, and liable to cause injury to passengers and others lawfully on the carrier's premises. When injury does result from it, the carrier may be charged with negligence: *Galloway v. Chicago etc. Ry. Co.*, 56 Minn. 346, 45 Am. St. Rep. 468.

Where the Concurrent Negligence of Two or More persons results in the injury of a third person, each is answerable therefor: *City Electric St. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262; *Village*

of Carterville v. Cook, 129 Ill. 152, 16 Am. St. Rep. 248, and note thereto. That the negligence of a third party concurred with that of the defendant in producing the injury is no defense: Consolidated Ice-Machine Co. v. Keifer, 134 Ill. 481, 23 Am. St. Rep. 688. A carrier is liable for an injury to a passenger which results from the concurring negligence of a stranger and its own: Irwin v. Louisville etc. R. R. Co., 161 Ala. 489, 135 Am. St. Rep. 153.

'ARKANSAS STAVE COMPANY v. STATE.

[94 Ark. 27, 125 S. W. 1001.]

CONSTITUTIONAL LAW—Obligation of Contracts.—The Charter of a corporation constitutes a contract between it and the state granting it, and, like all other contracts, it is protected by the federal constitution from legislation of the state impairing its obligation. (p. 105.)

CONSTITUTIONAL LAW.—A Corporation is a Person within the meaning of the due process and equal protection clauses of the fourteenth amendment of the federal constitution. (p. 105.)

CONSTITUTIONAL LAW—Amendment of Corporate Charter. The right to amend the charter of a corporation, and thus to limit or regulate its power to contract, is within the constitutional power of the legislature under the power reserved by sections 2 and 6 of article 12 of the constitution of Arkansas. (p. 106.)

CONSTITUTIONAL LAW—Amendment of Corporate Charter. The power of the legislature to amend and alter the charter of a corporation is not unlimited. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. (pp. 108, 109.)

CONSTITUTIONAL LAW—Semi-monthly Payment of Wages. The act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state is not an unreasonable exercise of the legislative power over, and control of, corporations. (p. 109.)

CONSTITUTIONAL LAW—Semi-monthly Payment of Wages. The act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state, does not deny to them the equal protection of the law. (p. 109.)

CONSTITUTIONAL LAW—Semi-monthly Payment of Wages. The act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state is not void as restricting the right of contract between corporations and their employees. (p. 110.)

MASTER AND SERVANT—Act Regulating Payment of Wages. The act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state, is for the public good, and any contract made in violation of its terms is void as against public policy. (p. 110.)

MASTER AND SERVANT—Act Regulating Payment of Wages—Penal Statute.—The act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state is a penal statute and must be strictly construed. (p. 110.)

MASTER AND SERVANT—Act Regulating Payment of Wages. The act of February 1, 1909, requiring the semi-monthly payment of

wages by all corporations doing business in the state, being a penal statute, can be violated only by a corporation failing or refusing to pay the wages of employees that may have been earned semi-monthly; and it cannot thus fail or refuse unless a request or demand has been made for the payment of such wages, or unless by its acts and conduct it shows that it will so fail or refuse if such request or demand should be made. (p. 111.)

MASTER AND SERVANT—Act Regulating Payment of Wages.

Any contract made between a corporation and its employee in violation of the act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state, is void, but the mere making of the contract does not subject the corporation to a fine under the act. (p. 111.)

MASTER AND SERVANT—Act Regulating Payment of Wages.

A reasonable construction of the act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state, requires that the corporation have the opportunity to make such payment. If the employee does not desire and refuses to accept the payment, there is no violation of the act, the evident intention of the legislature being to benefit those who need and desire payments to be made semi-monthly. (p. 111.)

Hawthorne & Hawthorne, for the appellant.

Hal L. Norwood, attorney general, and Wm. H. Rector, assistant, for the appellee.

²⁹ **FRAUENTHAL, J.** The appellant, the Arkansas Stave Company, is a corporation organized under the laws of the state of Arkansas, and is doing business in Craighead county.

The grand jury of that county returned three indictments against appellant, charging it with violating the provisions of the act of the General Assembly of the state of Arkansas entitled, "An act requiring corporations doing business in Arkansas to have two regular pay days each month," which was approved February 1, 1909 (Acts 1909, p. 21). The act is as follows:

³⁰ "Sec. 1. All corporations doing business in this state who shall employ any salesmen, mechanics, laborers or other servants for the transaction of their business shall pay the wages of such employees semi-monthly.

"Sec. 2. Any corporation that shall through its president, or otherwise, violate section one of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than fifty dollars nor more than five hundred dollars for each offense.

"Sec. 3. All laws and parts of laws in conflict herewith are hereby repealed, and this act shall take effect and be in force from and after July 1, 1909."

The first indictment charged that the defendant is a domestic corporation, doing business in Craighead county, Arkansas, and that it entered into a contract with William Nichols, one of its employees and laborers, that it would not pay him his wages semi-monthly, but would pay him monthly.

The evidence on the trial of the second indictment proved that the defendant refused and failed to pay its said employee and laborer, who was working for it, semi-monthly as required by the statute, although requested so to do.

The evidence on the trial of the third indictment showed that said employee and laborer requested said defendant not to pay him semi-monthly, and thereupon defendant did not pay him semi-monthly, but paid him monthly as requested by the employee to do.

The cases were tried separately on each indictment; and there was a conviction in each case, from which an appeal has been taken to this court; and on the docket of this court these cases are numbered respectively 1434, 1435 and 1436.

The defendant contends that the above act of the General Assembly is unconstitutional and void, because it contravenes section 1 of the fourteenth amendment of the constitution of the United States, in that it deprives the defendant of liberty and property without due process of law, and denies to it the equal protection of the law. Under the decisions of the federal supreme court, the articles of incorporation or charter of the defendant is a contract between the state and the defendant, and like all other contracts it is protected by the federal constitution ³¹ from legislation of the state impairing its obligation; and the defendant is a person within the meaning of the due process and equal protection clause of the fourteenth amendment, which is as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The right freely to acquire property and the liberty to make contracts in respect thereto and in regard to one's business is fundamental, and it has been often held that this right and liberty is under the protecting power of this clause of the fourteenth amendment. But, even in the case of individuals, it has been also held that the right to make contracts is not absolute, and that it is subject to certain limitations which the state may impose. As is said by Mr. Justice Brewer in the case of *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. Rep. 324, 52 L. ed. 551, 13 Ann. Cas. 957: "It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is a part of the liberty of the individual, protected by the fourteenth amendment to the federal constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the fourteenth amendment, restrict in many respects the individual's power to contract."

In a state of organized society every member surrenders something of his absolute and natural rights. "Every man,"

says Blackstone, "when he enters into society gives up a part of his natural liberty." It has been said that the right of property is even higher than any constitutional sanction: and while this expression represents the sacredness of property and the rights to acquire and deal with it, still it is not entirely beyond the control of the state—of its legislature and laws, whose protection its possessor and owner seeks for its safety and preservation. But in this case the defendant is not a natural person but a corporation. It is but the creature of the legislature. It "possesses only those rights, powers or property which the charter of its creation confers upon it, either expressly or as incidental to its existence." The source from which it has secured its right to enter into contracts is the legislature, and ³² this right may be altered or amended by the power that granted it. The defendant was created under and by virtue of the general incorporation laws of the state, and these laws were enacted in pursuance of the provisions of the constitution of the state. Those laws and the constitutional provisions became a part of the charter under which defendant was organized. Section 2 of article 12 of the constitution provides: "The General Assembly shall pass no special act conferring corporate powers except for charitable, educational, penal or reformatory purposes, where the corporations created are to be and remain under the patronage and control of the state." And section 6 of article 12 of the constitution provides: "Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this state, in such manner, however, that no injustice shall be done to the corporators."

It will thus be seen that the General Assembly reserved the power to alter the privileges which it granted to the appellant when it issued its charter to it; and it could modify or amend them, or even extinguish them by revoking the charter. It therefore had the right to regulate the power of the appellant to enter into contracts when that regulation would not be subversive of any vested rights or the object of the charter, but which would be, in the judgment of the legislative body, for the advancement of a sound public policy. That this right to amend the charter of a corporation, and thus to limit or regulate its power to contract, is within the constitutional authority of the legislature, under the reserved power to amend, has been decided by this court in the case of *Leep v. St. Louis etc. Ry. Co.*, 58 Ark. 407, 41 Am. St. Rep. 109, 25 S. W. 75, 23 L. R. A. 264. In that case an able and exhaustive

opinion was rendered by Mr. Justice Battle. In that case there was involved the constitutionality of the act of the legislature requiring railroad companies or corporations to pay promptly on their discharge with or without cause their employees the unpaid wages of such employees without abatement or deduction, under a penalty for such nonpayment. It was contended that this act was in conflict with the ²³ above provisions of the fourteenth amendment of the federal constitution. In speaking of the power of the legislature to amend and in effect to regulate the right of corporations to contract, Mr. Justice Battle says: "Being created by statute, the legislature may so change them by amendment as to make them subserve the purposes for which they were created. If the legislature, in its wisdom, seeing that their employees are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employees when the same is fully performed at the end of their employment. If it be true that in doing so it would interfere with contracts which are purely and exclusively private, and thereby limit their right to contract with individuals, it would nevertheless, under such circumstances, have the right to do so under the reserved power to amend." This act requiring railroad corporations to pay their employees on the day of their discharge and imposing a penalty for failure to do so was again upheld by this court as a valid and constitutional exercise by the state of the power reserved by the constitution to alter and amend any charter of incorporation, in the case of *St. Louis etc. Ry. Co. v. Paul*, 64 Ark. 83, 62 Am. St. Rep. 154, 40 S. W. 705, 37 L. R. A. 504. This case was taken upon writ of error to the supreme court of the United States and by that court affirmed: *St. Louis etc. Ry. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. Rep. 419, 43 L. ed. 746.

In that case Mr. Chief Justice Fuller says: "Corporations are the creations of the state, endowed with such faculties as the state bestows and subject to such conditions as the state imposes, and if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation; and as this amendment rested on reasons deduced from the peculiar character of the business of the corporations and the public nature of their functions, and applied to all alike, the equal protection of the law was not denied."

In the case of *Woodson v. State*, 69 Ark. 521, 65 S. W. 465, this court held ³⁴ that the act of April 10, 1899, which required every corporation engaged in the business of mining and selling coal by weight to procure scales and to pay the miners according to the weight of the coal ascertained before the same was screened, was a valid exercise of legislative power, in so far as it relates to domestic corporations.

In the case of *Ozan Lumber Co. v. Biddie*, 87 Ark. 587, 113 S. W. 796, this court held that the act of March 8, 1907, making railroad and mining companies and all other corporations liable for injuries to a servant by the negligence of a fellow-servant, was a reasonable and constitutional exercise of the right reserved by the constitution to alter corporate charters.

In the case of *State v. Brown & Sharpe Mfg. Co.*, 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856, it was held that an act of the legislature of Rhode Island which required every corporation to pay weekly the employees engaged in its business was not obnoxious to constitutional objections. And in that case the court said: "The reservation to the legislature of power to amend or repeal a charter contained in the charter itself, upon common-law principles, is not repugnant to the grant, but is a constitutional limitation of the powers granted, and the reservation is equally valid and effectual if it exists in the constitution of the state or in a prior general law."

In the case of *Skinner v. Garnett Gold Min. Co.*, 96 Fed. 735, it was held that an act of the legislature of the state of California, requiring all corporations to pay their employees at least once a month the wages earned during the preceding month did not deprive the corporations of their property without due process of law by interfering with their freedom to make contracts, nor did such provision deny to them the equal protection of the law within the prohibition of the fourteenth amendment of the federal constitution.

In the case of *Lawrence v. Rutland R. Co.*, 80 Vt. 370, 67 Atl. 1091, 15 L. R. A., N. S., 350, 13 Ann. Cas. 475, it was held that an act of the legislature of Vermont requiring corporations to pay each week in lawful money to each employee engaged in their business the wages earned by such employee was valid; that the reserved power to amend the charter of the corporation included the right to require it to pay its employees weekly in lawful money; and that the constitutional right of the corporation to contract was not impaired by requiring it to pay ³⁵ its employees weekly in lawful money; and that the constitutional right of the corporation to contract was not impaired by requiring it to pay its employees weekly.

But the power of the legislature to alter and amend the charter of a corporation is not without its limitation. As is

said by Mr. Justice Swayne in *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357: "The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation." The plain purpose of this act now in question was to secure a frequent payment of wages earned by the employees. These corporations represent aggregations of capital, and the employees are the laborers who are dependent on their wages for their livelihood. The inconvenience to the corporation to pay the wages semi-monthly could not be as great as it would be to those whose actual necessities require the frequent payments not to receive such payments. The corporation has already received the full value for which it is required to pay; and this requirement to pay semi-monthly the wages of its employees already earned could not substantially impair or destroy the object or purpose of its incorporation. If the legislature in its wisdom thought that by the more frequent payment of the wages to the laborer better service would be secured for the corporation and the objects of its creation thus advanced, it would be reasonable and just to require such frequent payments. This would not be considered oppressive or wrong. We cannot say that this act is an unreasonable exercise of the power of the legislature. We only pass upon the power of the legislative body of the government to act; of the wisdom, propriety and policy of such act, under our system of government, the legislature must solely judge: *Cooley on Constitutional Limitations*, 6th ed., 479.

Nor does this act deny to the defendant the equal protection of the law. It applies to all corporations. Within the sphere of its operation all artificial persons are treated alike under like circumstances and conditions. Because the act only applies to corporations and not to natural persons, it does not contravene the equal protection clause of the federal constitution. Nearly all legislation is special, either in the objects sought to be attained or in its application to classes. And the general rule is that legislation does not infringe the constitutional right ³⁰ of equal protection where all persons, whether natural or artificial, of such class are treated alike under like circumstances and conditions. In the case of *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, 32 L. ed. 107, Mr. Justice Field, speaking of this provision of the federal constitution, says: "Such legislation does not infringe upon the clause of the fourteenth amendment requiring equal protection of the laws because it is special in its character. . . . And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same condi-

tions": *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. Rep. 281, 43 L. ed. 552; *St. Louis etc. R. Co. v. Matthews*, 165 U. S. 1, 17 Sup. Ct. Rep. 243, 41 L. ed. 611; *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. Rep. 206, 53 L. ed. 315.

It is also urged that the act is invalid because it restricts the rights of the defendant's employees to contract with it. But it is the established doctrine of the law that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to promote the safety, health and welfare of the people. The right to contract is often limited by the law, and certain contracts are prohibited by statute. It is fundamental that the legislature may declare what persons are competent to enter into a contract. Thus persons under disability cannot enter into a binding contract. Contracts cannot be made in restraint of trade, and contracts against public policy are void. The statute of frauds enables contracting parties to avoid contracts not in writing; a party will not be allowed to contract to waive the benefit of homestead or exemptions; and a married man cannot convey his homestead without his wife joining in the execution of the conveyance. These instances and many others that might be mentioned show that the law-making power of the state may restrict the right to contract. But under this act the restriction of the employee's right to contract is not direct; that restriction only applies to the corporations; and those dealing with them cannot complain of the incompetency of the corporations to make contracts which are inhibited by the law, any more than they could in making contracts with persons laboring under legal disabilities, or in contracting relative to subject ³⁷ matters prohibited by law: *Lawrence v. Rutland R. Co.*, 80 Vt. 370, 67 Atl. 1091, 15 L. R. A., N. S., 350, 13 Ann. Cas. 475; *State v. Brown & Sharp Mfg. Co.*, 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789.

A contract made in violation of this act is a contract against public policy. The legislature has declared by the enactment of this law that it is for the public good. When the legislature speaks in the exercise of its power to legislate, it thereby declares what is the public policy; and any contract made which is opposed to public policy is void.

The law under consideration, we think, is not contrary to any provision of the federal or state constitution; and it was within the valid exercise of legislative power for the General Assembly to enact it.

But, the statute being penal in its nature, it must be construed strictly; and no act that does not clearly violate its provisions can be declared an offense. The act provides that all corporations doing business in the state shall pay their

employees their wages semi-monthly, and it declares a violation of that provision an offense. The corporation can only violate this provision by failing or refusing to pay the wages of such employees that have been earned, semi-monthly. But it cannot fail or refuse to do this unless a request or demand has been made for the payment of such wages, or unless by its acts and conduct it shows that it will fail or refuse to pay the wages, even if a request or demand for same should be made. If, upon request for payment, it should fail to pay, or if by acts of intimidation or coercion or oppression it should prevent the employee from making such request or demand for payment; or if it evinces, from the circumstances of the case, an intention not to pay although a request or demand for the payment of the wages should be made; then it would be guilty of a violation of this act. Any contract that might be voluntarily entered into between the corporation and its employee for the payment of the wages at a longer period than semi-monthly would be void, and could not deprive the employee of his right to request or demand the payment of his wages semi-monthly. But the mere agreement entered into not to pay the wages semi-monthly would not subject the corporation to a fine under this act. And if the laborer or servant willingly and without coercion or act of threatened oppression ³⁸ by the corporation did not desire or request that his wages be paid semi-monthly, then there would be no refusal or failure to pay the wages semi-monthly within the prohibition of this act. The act provides that the corporation should pay its employees semi-monthly their wages, and a reasonable construction of such provision would require that the corporation should have the opportunity to make such payment. If the employee did not desire and did refuse to accept the payment, then it would be requiring an unreasonable thing to be done to make the corporation pay in such event; and so, too, if it should be required to pay in every event. The evident intention of the legislature was to make more frequent the payment of the wages earned, in order to meet the necessities of those who were dependent upon their wages for a livelihood, and thus to benefit those who would need and desire the payments to be made semi-monthly.

In the first indictment (case No. 1434) it is charged that defendant entered into an agreement with its employee that his wages should be paid monthly and not semi-monthly. It is true that such a contract would be void because it contravenes the provisions of this act, should the employee afterward request the semi-monthly payment of his wages; but the act does not declare it to be an offense to enter into such agreement. The demurrer to this indictment should therefore have been sustained.

In the trial under the third indictment (case No. 1436) the undisputed evidence showed that the employee requested the defendant not to pay him semi-monthly, and that the defendant did not refuse to pay the wages, but, on the contrary, may have been willing to do so. The failure of the employee to accept or his desire not to receive the payment of the wages semi-monthly would not be sufficient evidence upon which to convict the defendant of a violation of this act, although it did not as a matter of fact pay the employee semi-monthly, when this resulted by reason of the request and desire of the employee. There was not sufficient evidence, therefore, to sustain the verdict in the trial upon the third indictment.

The evidence is sufficient to sustain the verdict of conviction in the trial of the case on the second indictment (case No. 1435). In that case it was proved that the defendant failed and ²⁹refused to pay its employees semi-monthly, as required by this act, although requested so to do.

It follows from this that the judgment in the trial on the first indictment (No. 1434) will be reversed and the cause remanded, with directions to sustain the demurrer to the indictment.

The judgment in the trial of the third indictment (No. 1436) is reversed and the cause remanded for a new trial.

The judgment in the trial on the second indictment (No. 1435) is affirmed.

The Constitutionality of Statutes Regulating the Payment of Wages is discussed in the notes to *New York etc. Ry. Co. v. Williams*, 139 Am. St. Rep. 863; *Shortall v. Manson*, 122 Am. St. Rep. 903.

BELMONT v. JONES HOUSE FURNISHING COMPANY.

[94 Ark. 96, 125 S. W. 651.]

SALE — Goods for Bawdy-house — Immoral Consideration.—A sale of furnishings, on credit, to the keeper of a bawdy-house, the seller knowing the character of the house and that the furnishings were to be used therein, but having no interest in the house or the business there conducted, is not void, and recovery may be had for the purchase price. (pp. 114, 115.)

C. V. Teague, for the appellant.

Jones & Hamiter, for the appellee.

²⁷ WOOD, J. This action was instituted in the Garland chancery court by appellee against appellant on a contract between the parties, dated September 1, 1905, and two

promissory notes for four hundred and seventeen dollars each, dated November 21, 1907, and due on November 21, 1908, and November 21, 1909, respectively, and upon a mortgage given on November 21, 1907, to secure the payment of said notes.

The appellee set up the contract, which it made an exhibit. This contract shows that for the sum of nine hundred and ninety-three dollars and ninety-five cents appellee sold to appellant certain household furnishings, and the appellee reserved the title and the right to take possession if the installments of the purchase money were not paid at the time specified. Appellee also set up the notes and mortgage given to secure them, and alleged that the appellant had not paid the purchase money, as evidenced by the contract, notes and mortgage, and prayed for judgment for the balance alleged to be due, and that the property included in the contract of sale and the lot embraced in the mortgage all be sold to satisfy the judgment.

The defense of appellant was as follows: "At the time she purchased the goods from plaintiff she was engaged in running a house of prostitution in the city of Hot Springs, which fact was well known to the plaintiff; that the consideration for the contract and for the notes and mortgage sued on was for furniture supplied by plaintiff to defendant for furnishing a house of prostitution, and was to be paid for, as plaintiff well knew, out of the profits rising from the business of keeping said house of prostitution, and that said contracts, notes and mortgage were founded upon an illegal consideration, contrary to public policy, good morals, and are therefore void, and that there was no other consideration for said contract, notes or mortgage except the illegal consideration aforesaid. That said contract contains the following: And it is expressly understood and agreed by and between the payee and the makers hereof that the title to the above-described property shall be and remain in the said Jones House Furnishing Company until all of said installments of purchase money are fully paid; and that, in default of payment of any one of said installments when due, the whole of this note and all of said installments shall become ⁹⁸ and be considered immediately due and payable, and the payee shall have the right to enter and retake possession of said property, or any part thereof, without process of law, and any payments theretofore made on this note shall then go and be considered as rent on all of said property to said payee during the time it may have been in the possession of the makers hereof."

The appellant does not question the purchase of the goods nor the amount of appellee's claim. Her only defense is that the consideration for the contract was illegal; that the

furniture was for a bawdy-house, which fact appellee knew at the time it sold her the goods, and that appellee sold her the furniture knowing that it was to be paid for out of the profits of the bawdy-house business, and that therefore the contract was void.

The testimony on behalf of appellant tended to show that it was understood between her and Jones, the manager of appellee, that the money to pay for the furniture in suit was to be made out of the bawdy-house business, that the contract was made with that understanding. The testimony of appellant tended also to show that the notes and mortgage were given with the understanding that the money to pay them was to be made out of the bawdy-house business.

Appellant testified in part: "That Mr. Jones and she talked it over, and it was their idea that if she bought these attractive goods it would make business better and she would be able to pay for them; that plaintiff depended on her making the money in that way; that there was no other consideration for the mortgage"; that appellee "put the furniture down in her house." Appellant testified on cross-examination that she never made any agreement with appellee to give it any interest in her business.

On behalf of appellee the evidence tended to show that appellee never had anything to do with, or any interest in, the bawdy-house business, that it merely sold appellant the goods, knowing at the time of the sale, and at the time the notes and mortgage were executed, that the goods were bought by appellee to be used, and that same were used, by her in the house which she occupied and used for a bawdy-house.

⁹⁹ While appellee at the time it sold the furniture to appellant knew that she was keeping a bawdy-house, and knew that she bought the furniture to use in the bawdy-house, yet, according to the testimony of appellee, such use of it was not a part of the contract of sale and purchase. Appellee had no interest in the business, but merely sold appellant the goods, so its manager testified, and the chancellor accepted his testimony as the truth. It cannot be said that the use of the goods by appellant was inseparable from the business in which she was then engaged. Appellant might have changed her business from bawdy-house to boarding-house, and the furnishings could have been used in the latter as well as the former. The furnishings were not such as could be used only in the bawdy-house business, and therefore they were not "inseparable" from the bawdy-house business. Nor can it be said by the terms of the contract, as appellee states it, that appellee was knowingly to derive some benefit from the use of the furnishings in the bawdy-house.

Jones, the manager of appellee, says it had no interest in her business, and appellant in her cross-examination corroborated Jones by saying that she "never made any particular agreement with him to give him any interest in the business."

The findings of the chancellor are not clearly against the ¹⁰⁰ preponderance of the evidence. We are unable to distinguish the case in principle from Hollenberg Music Co. v. Berry, 85 Ark. 9, 122 Am. St. Rep. 17, 106 S. W. 1172, where the law of such cases is stated. See authorities there cited.

The judgment is affirmed.

The Mere Fact That the Seller of a piano knew that it was to be used in connection with the unlawful keeping of a bawdy-house does not avoid the contract of sale, nor prevent the seller from recovering the property on the failure of the purchaser to comply with the terms of the sale, where it was not inseparable from the business, and the seller was not to derive any benefit from the use of the piano in the house: Hollenberg Music Co. v. Berry, 85 Ark. 9, 122 Am. St. Rep. 17, and see cases cited in cross-reference note thereto.

SOUTHWESTERN TELEGRAPH AND TELEPHONE COMPANY v. ABELES.

[94 Ark. 254, 126 S. W. 724.]

TELEPHONE COMPANIES—Duty to Provide Safeguards.—It is the duty of a telephone company upon installing its telephones to equip them with known devices for the prevention of the wires conducting lightning and excessive currents of electricity into the building where its telephone is installed. It must exercise the care of a prudent man under like circumstances, and its failure to do so is negligence rendering it liable to one injured thereby. (p. 118.)

TELEPHONE COMPANIES—Personal Injuries to Patron.—A telephone company is liable for personal injuries to one using its instrument in the ordinary manner during an ordinary electrical disturbance, such injuries being caused by the failure of the company to properly install safety devices for protection against lightning. (p. 119.)

TELEPHONE COMPANIES—Negligence—Question of Fact.—The question whether a telephone company has furnished proper safety devices, and properly connected the same, upon installing its instruments, is one of fact for the jury. (p. 119.)

INSTRUCTIONS.—A Specific Objection must be made to the form of an instruction in the trial court or it will not be considered on appeal. (p. 119.)

TELEPHONE COMPANIES—Negligent Equipment—Evidence. In an action for damages for injuries alleged to have been caused by

failure of a telephone company to equip an instrument with a ground wire, printed specifications or rules with reference to ground wires issued by the defendant are admissible in evidence as tending to show that the absence of such wires was dangerous and that the defendant knew it to be so. (p. 121.)

DAMAGES—Measure of for Loss of Hearing.—A verdict of six thousand nine hundred dollars, in an action for personal injuries sustained by a young man from a severe electrical shock, is not excessive, the evidence showing that he suffered greatly for several weeks; that the hearing in one ear was destroyed and in the other impaired. (p. 121.)

Walter J. Terry, for the appellant.

John W. Blackwood and Morris M. Cohn, for the appellee.

255 **HART, J.** Theodore D. Abeles instituted this action against the Southwestern Telegraph and Telephone Company to recover damages for physical injuries received by him on account of the alleged negligence of said company. From a verdict and judgment in his favor for six thousand nine hundred dollars an appeal has been duly prosecuted to this court. The appellant owned and operated a system of telephone lines in the city of Little Rock, Arkansas, and one of its telephones had been installed in the office in the lumber-yard of Charles T. Abeles & Company in said city. Appellee was an employee of Charles T. Abeles & Company, and a part of his duties was to answer telephone calls. On the fourth day of April, 1907, appellee was called to the telephone, and, while answering the call, he was severely injured. Appellee had put the receiver to his ear, and was using the telephone in the usual way at the time he received the injury. The physicians and the ear specialist who treated appellee testified that his hearing in the left ear was completely destroyed, and his hearing in the right ear somewhat impaired, although not seriously so. There had been April showers throughout the day on which appellee was injured. The testimony on the part of appellee tended to show that the storm was not an extraordinary one, but was of the ordinary kind incident to the season of the year, and was accompanied with the usual flashes of lightning; that at the time appellee received the injury the storm in the vicinity of the office where he was using the telephone had ceased.

Clem J. Drees, for appellee, testified that he graduated in electrical engineering from the State University in 1895, and had practiced his profession ever since. He said that he was **256** familiar with the installation of electrical appliances for the prevention or transmission of lightning and electricity. Here follows a question propounded to him and his answer:

"Q. I will ask you what was the proper way of installing a telephone in 1907 in regard to the safety from lightning or the transmission of lightning? A. The wires, on entering the building, should immediately be connected to a protective device which would protect the phone from lightning and also from abnormal currents and against what they call 'sneak' or small currents. There are three things to be guarded against in the phone: to be protected against crosses from outside wires and putting large currents into it, to protect it from lightning, and to protect it from small currents, called 'sneak currents.' These protective devices should be installed right at the point, or as close as possible to the point, where the wires enter the building where the phone is to be installed.

"Q. Explain to the jury what that protective device is. Give as plain a description of it as you can. A. These three protective devices against lightning, against abnormal currents, and against small currents, are sometimes separated, but they can be combined into one instrument. Frequently they are combined into one instrument. The protection against lightning is based on the theory that lightning generally follows the shortest path to the ground; it prefers the easiest path to the ground, rather than going through a long route or long circuit, so that lightning is shunted to the ground, or what we call 'short circuited' to the ground, by giving it a chance to go through a short circuit to the ground."

Continuing, he explained in detail the action of lightning on these protective devices. He further stated that a protective device or lightning arrester, in the absence of a ground wire from the telephone, would be almost no protection against lightning. That the object of the ground wire is to convey the lightning from the lightning arrester to the ground. That the ground wire should be placed either on the outside or inside of the room, but generally it is placed on the outside.

The evidence shows that there was no ground wire in connection with the protective device or lightning arrester to the telephone in question.

The witnesses on the part of appellant, some of them being electrical engineers, testified that it was not the practice of telephone ²⁵⁷ companies to use ground wires in connection with lightning arresters for each telephone, but that ground wires were placed at stated intervals along the poles carrying the telephone wires. They testified that they were familiar with the construction of the telephone systems in the various towns and cities of this state, and that in none of these exchanges were any telephones equipped with lightning arresters or protectors, with ground wire attached to them at

the telephone. That they considered the protective apparatus used by appellant much better than one to which is attached a ground wire. That appellant only uses lightning arresters or protective devices with ground wire attached on parts of its line where the telephone wires are laid underground.

Additional facts will be referred to in the opinion. We will not set out the instructions given or refused by the court. To do so would be to needlessly lengthen the opinion. Sufficient reference to them will be made in the opinion.

²⁵⁸ 1. It is earnestly insisted by counsel for appellant that the evidence does not support the verdict. In other words, it is contended that the evidence, when considered in the light most favorable to appellee, did not warrant the jury in returning a verdict in his favor. In determining this question, it becomes necessary to ascertain ²⁵⁹ what is the duty of telephone companies in putting in and maintaining telephones.

In the case of *Southern Tel. etc. Co. v. Evans* (Tex. Civ. App.), 116 S. W. 418, the court said: "The duty resting upon telephone companies to adopt precautions for preventing charges of atmospheric electricity from entering buildings over their telephone wires is thus stated by the supreme court of Vermont: 'Having undertaken to place and maintain the instrument in the house and connect it with its telephone line for the use of the deceased, in so doing it was under the duty to exercise the care of a prudent man under like circumstances. If, while in the exercise of such care, it had reasonable grounds to apprehend that lightning would be conducted over its wires to and into the house, and there do injury to persons or property, and there were known devices for arresting or dividing such lightning, so as to prevent injury therefrom to the house or persons therein, then it was the defendant's duty to exercise due care in selecting, placing and maintaining, in connection with its wires, such known and approved appliances as were reasonably necessary to guard against accidents that might fairly be expected when conducted to and into a house over its telephone wires.'" The following authorities are cited to the same effect: *Griffith v. New England Tel. etc. Co.*, 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919; *Southern Bell Tel. etc. Co. v. McTyler*, 137 Ala. 601, 97 Am. St. Rep. 62, 34 South. 1020; 1 *Joyce on Electric Law*, sec. 445f. See, also, *Rural Home Telephone Co. v. Arnold* (Ky.), 119 S. W. 811; *Southwestern Tel. etc. Co. v. Bruce*, 89 Ark. 581, 117 S. W. 564.

Appellee, when injured, was in the discharge of his duty to his employers, and was using the telephone in the ordinary way. The evidence adduced in his behalf shows that he

was not attempting to use it during a severe electrical storm. His own testimony tends to show that there was no storm in progress in the vicinity of the office when he went to use the telephone. The expert evidence adduced in his behalf tends to show that a protective device or lightning arrester without a ground wire attachment would be of almost no protection against lightning. His expert witness on that point went into details, and gave his reasons for his opinion. His testimony is flatly contradicted by the experts on the part of appellant; but that only ²⁶⁰ presents a conflict of evidence, upon which we are not called upon to pass. Counsel for appellant urges upon us that its telephones were constructed with the kind of lightning protectors generally in use in this state, and that protectors with ground wire attachments were nowhere in use in the state; but this testimony only tended to show that appellant had discharged its duty by using lightning arresters of the most practical kind and in general use; and it was still a question of fact for the jury to say if this was true. We have a statute requiring railroad companies to construct suitable and safe cattle-guards in certain cases. In discussing the question of whether the evidence showed the company had discharged its duty, in the case of Choctaw etc. R. R. Co. v. Goset, 70 Ark. 427, 68 S. W. 879, the court said: "But the question is usually one of fact for the jury, and it would not be proper for the court to instruct them that the company has discharged its duty if the guard is similar to those used by other first class railroads."

We are of the opinion that the facts and circumstances adduced in evidence, when considered in the light most favorable to appellee, warranted the jury in finding that the injury was received during an ordinary electrical disturbance, while appellee was using the telephone in the ordinary way, and that the failure on the part of appellant to attach a ground wire to its lightning arrester to the telephone in question was negligence, and that it was the proximate cause of the injury.

2. Counsel for appellant contends that the first instruction given by the court at the request of appellee assumes that the wires or instruments caused or contributed to the presence of the lightning. The objection is not tenable. The instruction merely defined the duty of appellant in installing its telephone to equip it with such appliances as were reasonably necessary to guard against injuries from lightning. Besides, the objection now urged, being to the form of the instruction, should have been met in the trial court by specific objection, which was not done. This rule has become too firmly established in this state to need a citation of authority to support it.

3. Counsel for appellant also insists that the court erred in refusing his fourth instruction, by which he sought to have the court tell the jury that, if they found the appellee had been ²⁶¹ injured by an extraordinary stroke of lightning, appellant would not be liable.

This was not error because the appellee did not claim any right of recovery unless the jury found that he was injured in an ordinary electrical disturbance; and the instructions given by the court at the request of both appellant and appellee were predicated on the jury so finding.

4. Appellant's fifth instruction was completely covered by the eighth instruction given at the request of its counsel, and there was no error in refusing the fifth.

5. The eleventh instruction asked by counsel for appellant for the most part was covered by instructions given. A part of it was to the effect that appellant was under no legal duty to provide its wires entering into said building with insulating covering. No proof was offered to sustain this alleged ground of negligence, and appellee abandoned his right to recover under it. Hence the court did not err in refusing the instruction.

Other objections are made to some of the instructions, but we will not discuss them in detail. It is sufficient to say that the only ground of negligence relied upon by appellee for a recovery was the failure of appellant to equip its lightning arresters with a ground wire attachment, and this question, together with the other facts necessary to make appellant liable, was fully and fairly submitted to the jury by the instructions given by the court.

6. Again, counsel for appellant insists that the court erred in not excluding certain portions of Dr. Green's testimony, and in certain remarks made by the court when appellant's counsel made objections to the testimony. It is sufficient answer to this to say that no exceptions were saved either to the ruling of the court on the evidence or to the remarks made in doing so. Under the well-established rules of this court, if any errors were committed, they have been waived.

7. Counsel for appellant next objects that the court permitted Drees to testify with reference to the general rules in vogue in the general business world, as to the installation of electric wiring in the city of Little Rock, with reference to lightning arresters or protective devices. An examination of the transcript shows that the witness did not answer the question ²⁶² to which objection was made. He was instructed by the court to make his answer without reference to the code of rules, and he did so.

8. Counsel for appellant next insists that the court erred in admitting certain portions of the testimony of P. C. Ewing,

but, inasmuch as he saved no exceptions to the ruling of the court, the objection must be considered as abandoned.

9. Counsel for appellant earnestly insists that the court erred in permitting appellee to read in evidence a part of appellant's printed specifications or rules with reference to ground wires. The objection to the introduction of the rule was that it was designed for protection against fire.

Appellant's foreman had testified for it that appellant had two methods of installing telephones: The new method by which the lightning arresters were provided with a ground wire attachment, and the old method in which the ground wire was not used. We think the evidence was admissible, and the jury could consider it for what it was worth as tending to show that the installation of a telephone without a ground wire attached to its lightning arrester was dangerous, and that appellant recognized it to be so.

10. Counsel for appellant urgently presses upon us that the damages awarded by the jury are excessive. The testimony of eminent specialists shows that appellee was severely shocked, and that he suffered greatly for several weeks after the injury was received. The hearing in his right ear is impaired, and the hearing in his left ear is wholly destroyed. Appellee is a young man. This affliction and handicap he must bear throughout life, and we cannot say that under such circumstances the verdict is excessive.

We find no error in the record, and the judgment will be affirmed.

It is the Duty of an Electric Company, if there are reasonable grounds to apprehend that lightning may be conducted over telephone wires to and into a house in which the company has placed its instruments, and there do injury, and there are known and approved devices for preventing such consequences, to make use of such devices and thereby guard against accidents from lightning: Note to Hebert v. Lake Charles Ice etc. Co., 100 Am. St. Rep. 522.

A Telephone Company Owes to Patrons a Duty to exercise at all times the highest degree of care and vigilance to protect them from a dangerous electric current over its wires from any source: Delahunt v. United Tel. & Tel. Co., 215 Pa. 241, 114 Am. St. Rep. 958.

EMERSON v. HOPPER.

[94 Ark. 384, 127 S. W. 467.]

CRIMINAL LAW—Felony.—Bond for Costs is not required to be given by one who institutes a prosecution for a felony. Such a bond is void, and a judgment based thereon is coram non iudice, and void. (p. 122.)

EXECUTION—Void Judgment—Justification of Officer.—An execution issued upon a void judgment is also void, but, if regular on its face, it justifies an officer in obeying its mandate. (p. 122.)

REPLEVIN—Property Seized Under Void Execution.—Under the statute of Arkansas requiring, prior to an order of delivery in replevin, an affidavit showing that the property has not been seized under an execution, replevin will not lie against an officer for property seized under a void execution regular on its face. Such property should be considered in custodia legis. (p. 123.)

VOID EXECUTION—Remedy of Owner.—Where property is seized under process apparently good but void in fact, the remedy of the owner is to attack the process and the proceeding under which it issued. If the property has been sold under the void proceeding, he can then successfully maintain replevin for it. (p. 123.)

A. Y. Barr and Wm. T. Miles, for the appellant.

³⁸⁴ WOOD, J. The appellee, as constable, levied upon a horse under an execution regular upon its face, issued on a judgment rendered against appellant by a justice of the peace, on a cost bond given by appellant to pay all costs that should accrue in a criminal prosecution instituted by the affidavit of appellant charging one James Picklesimer of the crime of slander. The appellant, as the owner, sought to replevy the horse. The circuit court held that replevin would not lie, and rendered judgment for appellee.

³⁸⁵ The law does not require a bond to be given by one who institutes a prosecution for a felony. Slander is a felony: Kirby's Digest, sec. 1861.

The bond was void, and the judgment based thereon was coram non iudice and void: 5 Cyc. 746; Williams v. Skipwith, 34 Ark. 529; Walker v. Fetzner, 62 Ark. 135, 34 S. W. 536.

The judgment being void, the execution was also void. But the execution was regular on its face, and justified the officer in obeying its mandate: Bogert v. Phelps, 14 Wis. 88. See Townsly-Myrick Dry Goods Co. v. Fuller, 58 Ark. 181, 41 Am. St. Rep. 97, 24 S. W. 108. Before an order of delivery can issue, the plaintiff in replevin must file an affidavit showing: "That it has not been taken for a tax or fine against the plaintiff, or under any order or judgment of a court against him, or seized under an execution, etc., against his property"; Kirby's Digest, sec. 6854, subd. 5. In Crowell v. Barham, 57 Ark. 195, 21 S. W. 33, the plaintiff sought to replevy property from a purchaser thereof at a tax sale. The plaintiff claimed that the sale for taxes was void, because the officer making the sale (a deputy sheriff) was without authority to distrain and sell for taxes. The court upheld that contention. While the same question is not presented as in the case at bar, the court did construe the section (subdivision fifth) of the statute, supra, as it pertained to a warrant authorizing the taking of property for taxes, and concerning this said: "When the collector of the revenue or his authorized deputy distrains personal property for payment of taxes, under an apparently valid warrant, the person chargeable with the payment of the

taxes cannot sue out an order in replevin against him for the possession of the property. . . . That is the policy of our statute, ³³⁶ which demands, as a prerequisite of an order of delivery, an affidavit that the property 'has not been taken for a tax or fine against the plaintiff.' " Precisely the same policy actuated the lawmakers in embracing in the same statute the requirement that the affidavit should also state that the property had not been seized under an execution. This construction was not necessary to the decision in *Crowell v. Barham*, 57 Ark. 195, 21 S. W. 33, but we are of the opinion that it was the correct construction. However, we are aware that many authorities hold that process valid upon its face, but void in fact, is only protection to the officer who has acted thereunder when he is proceeded against as a tort-feasor, and that it is no defense to him, as in an action of replevin, where the only object sought is the recovery of the property and the proceedings are in rem: *Beach v. Botsford*, 1 Doug. 199, 40 Am. Dec. 45. See, also, note to *Savacool v. Boughton*, 21 Am. Dec. 207, where the cases are exhaustively reviewed. But under our statute the proceedings in replevin are not in rem: *Kirby's Digest*, sec. 6868. Property taken by an officer under process regular upon its face should, as between the officer and the owner from whom it is so taken, be considered as in custodia legis. The remedy of the owner in such case, where the process is apparently good but void in fact, is not to sue the officer for the property or for damages, but he may proceed, as was said in *Crowell v. Barham*, 57 Ark. 195, 21 S. W. 33, to attack the process and the proceeding under which it issued "in any form of action the law affords at any time." If the property has been sold under the void proceeding, he can then successfully maintain replevin for it. He is not remediless, even though he may not maintain replevin against the officer under the statute.

The court followed the construction of the statute as announced in *Crowell v. Barham*, 57 Ark. 195, 21 S. W. 33. The judgment is correct.

Affirm.

The Justification of Officers by Their Process is the subject of a note to *Savacool v. Boughton*, 21 Am. Dec. 190. A ministerial officer, acting under process fair upon its face, and issuing from a tribunal or person having judicial powers, with apparent jurisdiction to issue such process, is justified in obeying it: *State v. Devitt*, 107 Mo. 573, 28 Am. St. Rep. 440; *Townslly-Myrick Dry Goods Co. v. Fuller*, 58 Ark. 181, 41 Am. St. Rep. 97; *St. Louis etc. Ry. Co. v. Lowder*, 138 Mo. 533, 60 Am. St. Rep. 565; note to *Worden v. Witt*, 95 Am. St. Rep. 96. But if he has knowledge of the want of jurisdiction in the tribunal or person issuing it, he is liable for executing it: Note to *Townslly-Myrick Dry Goods Co. v. Fuller*, 41 Am. St. Rep. 104; *Tellefsen v. Fee*, 168 Mass. 188, 60 Am. St. Rep. 379; note to *Worden v. Witt*, 95 Am. St. Rep. 96.

CASEY v. DORR.

[94 Ark. 433, 127 S. W. 708.]

MALICIOUS PROSECUTION—Probable Cause.—A Judgment of Conviction by a court of competent jurisdiction is conclusive evidence of the existence of probable cause, even though the judgment is subsequently reversed and set aside, unless it is shown that the judgment was procured by fraud or undue means. (p. 125.)

MALICIOUS PROSECUTION—Probable Cause—Indictment.—The finding of an indictment is only prima facie evidence of probable cause for a prosecution, and may be overcome by other evidence. (pp. 125, 126.)

MALICIOUS PROSECUTION—Sufficiency of Complaint.—A complaint alleging that the defendants did willfully and maliciously, and without probable cause, induce the grand jury to find an indictment against the plaintiff, and did willfully and maliciously, and without probable cause, instigate, aid and abet, advise and encourage, the prosecution of the charge under the indictment, states a cause of action. (pp. 126, 127.)

Z. M. Horton, for the appellant.

Charles F. Cole and McCaleb & Reeder, for the appellee.

⁴³⁴ McCULLOCH, C. J. Appellant sued appellees to recover damages for malicious prosecution, and the court sustained a demurrer to the complaint, which is as follows:

"That on the eighth day of April, 1904, the grand jury of Independence county, Arkansas, presented to and filed in the circuit court of said county an indictment against this plaintiff in words and figures as follows, viz.: (Here follows copy of indictment returned against appellant for the crime of embezzlement.)

"That the allegations of said indictment were and are absolutely ⁴³⁵ false. That the prosecution thereon continued from time to time, from said day and date, until the October term, 1907, of the Independence circuit court, at which term of said court the plaintiff herein was put upon his trial on said indictment, and upon a trial by a jury in said court found 'not guilty,' and completely exonerated from all charges and imputation of guilt included and contained in said charge. That at and before the finding of said indictment, and at the finding thereof, and conducive to and causing the finding thereof, the defendants and each of them, jointly and severally conspiring together and desiring and agreeing among themselves to willfully, maliciously and without probable cause to inspire them thereto, did willfully and maliciously induce the said grand jury to find and present said indictment, being prompted thereto by malice toward this plaintiff and without probable cause to believe this plaintiff guilty of the charges contained in said indictment. That the said defendants willfully, maliciously and without probable

cause to believe the plaintiff guilty, caused said indictment to be found and presented by said grand jury and instigated, aided, abetted, advised and encouraged, and procured the institution, continuance and prosecution of said indictment, and the charges therein contained against this plaintiff from time to time until the October term of said court, 1907, at which term of said court said cause was tried at the instigation of said defendants, resulting in an acquittal of this plaintiff as aforesaid. That by the instigation of said prosecution, the finding of said indictment, the continuing of said cause from time to time upon the docket of the Independence circuit court, . . . he has been damaged in the sum of one hundred thousand dollars. That the instigation, backing up, prolonging said prosecution and keeping said case in court was done by the defendants willfully, maliciously and for the purpose of extorting money from this plaintiff, and without probable cause on the part of the defendants to believe this plaintiff was guilty of the charges contained in said indictment."

It is contended by appellees, in support of the court's ruling, that, as the complaint alleges the finding of an indictment by the grand jury, there must be an additional averment, in order to show affirmatively the absence of probable cause, to ⁴³⁶ the effect that the indictment was procured by fraud, perjury or other unfair conduct on the part of the defendants.

The rule seems to be established by the weight of authority that a judgment of conviction by a court of competent jurisdiction is conclusive evidence of the existence of probable cause, even though the judgment be subsequently reversed and set aside, unless it be shown that the judgment was procured by fraud or undue means: *Carpenter v. Sibley*, 153 Cal. 215, 126 Am. St. Rep. 77, 94 Pac. 879, 15 L. R. A., N. S., 1143, and note, 15 Ann. Cas. 484; *Crescent City Livestock Co. v. Butchers' Union*, 120 U. S. 141, 7 Sup. Ct. Rep. 472, 30 L. ed. 614.

In *Wells v. Parker*, 76 Ark. 41, 88 S. W. 602, 6 Ann. Cas. 259, it was urged upon this court that the binding over by a committing magistrate to await the action of the grand jury was conclusive evidence of the existence of probable cause, but we declined to so hold, and decided that such was only prima facie evidence of probable cause. We find no authorities which go to the extent of holding that the mere finding of an indictment, which is only an accusation and not an adjudication of guilt, is anything more than prima facie evidence of the existence of probable cause for the prosecution. The Kentucky court of appeals, in a recent case, stated the following rule on the subject, which we conceive to be sound: "The finding of an indictment by the grand jury is prima facie evidence of probable cause, and the acquittal

of the person indicted is evidence of his innocence; but the acquittal does not of itself show evidence of malice or the want of probable cause, and therefore the plaintiff in an action for malicious prosecution must prove some other facts tending to establish a want of probable cause for the prosecution, and, when he has introduced evidence of this character, malice on the part of the prosecutor will be inferred": *Jones v. Louisville & N. Ry. Co.* (Ky.), 96 S. W. 793.

Now, since the finding of an indictment is only *prima facie* evidence of probable cause, this may be overcome, when the prosecution has been terminated by an acquittal or by a dismissal of the indictment, by proof adduced to the effect that there was in fact no probable cause for the prosecution. The finding of an indictment cannot be given any greater force in establishing the existence of probable cause for the prosecution than the binding over of a committing magistrate; and, since ⁴³⁷ this court held that in the latter case it was only *prima facie* evidence, we consider that decisive of the question that the returning of an indictment was only *prima facie* evidence. To hold otherwise would be to give the same degree of probative force and conclusiveness to the finding of an indictment as to a judgment of conviction by a court of competent jurisdiction.

The following cases support the views we now express, and are precisely in point: *Flackler v. Novak*, 94 Iowa, 634, 63 N. W. 348; *Raleigh v. Cook*, 60 Tex. 438; *Bell v. Pearcey*, 33 N. C. 233.

The North Carolina court, in the above-cited case, after announcing the rule that a judgment of conviction by a court of competent jurisdiction is conclusive of the existence of probable cause, said: "The finding of a grand jury has not this conclusive effect, and an acquittal opens the question, so as to give the party an opportunity to offer evidence to repel the presumption, growing out of the action of the grand jury."

In *Flackler v. Novak*, 94 Iowa, 634, 63 N. W. 348, the court said: "The action of the justice and of the grand jury undoubtedly tended to show probable cause, but would not be conclusive proof of it. If the defendants knew that the real facts did not authorize the action taken, there was no probable cause." The court in that case held that it would have been improper to instruct the jury that the defendants had probable cause for instituting the proceedings unless the plaintiff shows that the action of the grand jury in finding the indictment, and of the justice in binding over, was procured or caused by fraud or false or perjured testimony.

The complaint alleges that appellees did willfully and maliciously, and without probable cause, induce the grand jury to find an indictment against appellant, and did willfully and maliciously, and without probable cause, instigate, aid

and abet, advise and encourage, the prosecution of the charge under said indictment. We are of the opinion that the complaint stated a cause of action. The allegation should have been made more specific by stating the means by which the finding of the indictment was procured and the prosecution instigated; but this defect should have been reached by a motion to make the complaint more definite and certain: *Johnson v. Douglass*, 60 Ark. 39, 28 S. W. 515; *Bush v. Cella*, 52 Ark. 378, 12 S. W. 783.

The court might properly have treated the demurrer as a ⁴³³ motion to make the complaint more definite, and, after sustaining it, given appellant an opportunity to amend. But that is not what the court did. It decided, by sustaining the demurrer, that no cause of action was stated at all, and therefore appellant was not called on to make his complaint more definite.

Reversed and remanded.

Wood, J., dissents.

In Actions for Malicious Prosecution the finding of an indictment is generally treated as prima facie evidence of probable cause: Note to *Boss v. Hixon*, 26 Am. St. Rep. 143; but a conviction of the plaintiff which was reversed on appeal and the plaintiff discharged is not conclusive, but strong prima facie evidence of probable cause, which may be rebutted not only by evidence tending to show that the conviction was obtained by fraud or perjury, but also by any competent evidence which satisfies the jury that the prosecutor did not have probable cause for instituting the prosecution: *Skeffington v. Eylward*, 97 Minn. 244, 114 Am. St. Rep. 711.

'ALEXANDER v. ALEXANDER.

[94 Ark. 438, 127 S. W. 740.]

DIVORCE—Condonation of Desertion.—The fact that a man, after his wife deserts him, contributes money to defray her expenses during illness, and shows himself anxious to receive her should she return, does not constitute a condonation of her desertion. (p. 131.)

Kerby, Midyett & Tucker, for the appellant.

Trimble, Robinson & Trimble and Robertson & Demers, for the appellee.

⁴³³ **WOOD, J.** Appellee sued appellant for a divorce April 28, 1909, alleging that he was married to appellant in Little Rock, Arkansas, April 10, 1908, that he and his wife went to Carlisle to live, and that the next day appellant willfully abandoned him without cause, and has so continued to willfully desert him for a period of more than one year.

Appellant answered, denying that she had willfully deserted and abandoned appellee without reasonable cause. She states the facts to be that:

It was against appellant's will and desire to separate, and has ever been so, and is now her desire to live with appellee, ever ready and willing to return to appellee if he would permit her, and she has repeatedly so informed him, and he refused to give his consent and treated her with silent contempt. That her absence has been caused by will of appellee and against her will and over her protest. She performed her duty as wife, and gave him no cause to refuse her his home, and that the ⁴³⁹ alleged abandonment and desertion is on his part. She prays that divorce be denied, and the complaint dismissed. She also moved the court in writing for suit money and alimony.

The appellee filed what he termed an answer to appellant's cross-complaint, in which he denies all its material allegations, and he sets up, in answer to the motion for alimony, the fact that a suit had been instituted by appellant on the seventeenth day of July, 1908, against appellee for separate maintenance and alimony; sets out as exhibits to his answer the record of the proceedings in that cause, including all the pleadings and depositions and the final order showing her complaint for maintenance dismissed for want of equity, and pleads *res judicata* as to this. The appellant moved that this answer to the so-called cross-complaint be dismissed, which was overruled.

The court, after hearing all the evidence, rendered a decree in favor of appellee for divorce, and denied appellant alimony and attorney's fees.

It was proper for the court to consider the record in the suit for maintenance as a part of the evidence in this case. We gather from the entire record that appellant, who had been twice married, "put matrimonial ad. in Democrat month or two after" she arrived from ⁴⁴⁰ Parsons, Kansas, where she had formerly lived, and "got forty answers." Like the suitors to "fair Portia," "from the four corners of the earth they came to kiss this shrine." Appellee (Dr. Alexander) was among the many who answered her advertisement; she liked his letters. He "visited her once or twice a month, and wrote "a letter every week, except when he was sick"; she was "very well impressed with him." He represented himself as a man of means, having property worth seventeen thousand dollars. He said he had given other wives one thousand dollars on marriage, and would give appellant more. She thought he was a man of honor, and relied upon his representations. She did not know of his drinking before marriage, and thought she would be proud of him. These were the visions of happiness that came to appellant as she contem-

plated marriage with appellee. But alas! Scarcely had the word been spoken that joined them in wedlock, before "a change came over the spirit" of her dream. For he began to drink before they had left Little Rock, and was dazed with liquor, and "smelt so of whisky that it almost made appellant sick as he sat beside her" on the train to Carlisle. When she reached the doctor's home, she found a beautiful yard and a house that looked "real well on the outside." "The porch was covered with roses," but within (according to her version) was reeking with filth. For she "had a notion to hollo, and went through the room as fast as she could go." There was no oil in the cruse and no meal in the barrel. "Two eggs and a little piece of bacon meat" was the provision he had made for the wedding feast. The tableware was meager, old and broken. The household and kitchen furniture was scanty, dilapidated and filthy. The stench was so great she "went out on the porch and cried." Then the appellee's stepson came, and invited them to supper. They went, and, while waiting for supper, appellee went to the drug-store and came back in a dazed condition. His stepdaughter said he was drinking, and that "no decent woman could live with him." After supper they again went to the doctor's house to spend the night, and when bedtime came he was helpless. "She helped him to bed"; "he went to sleep in a stupor," got up at 1 A. M., drank half a glass of alcohol, and then "kept pulling and hauling at me," she says, "until 4 A. M., then up, drank a dose of medicine, which he said he had to take "to quiet his nerves so that he could sleep, went back to bed and to sleep again in a dazed condition," and remained so until 8 or 9 o'clock in the morning. When morning came she appealed to Walker, stating to him that the doctor said he had taken strychnine, and she was alarmed. She was informed by Walker: "That is nothing; takes worse than that." She said on account of his condition would return to Little Rock, refused to go to his house with him, got sick "seeing him the way he was all night," and Mrs. Walker telephoned her daughter to come out that evening. He was drunk Sunday evening; she could not stay with him acting like that; told him she would go. He pleaded with her to stay, saying he would not drink any more; but she left, saying, "If you will do all right, I'll come back."

The above is the picture, before and after, of the matrimonial venture between appellant and appellee, as graphically portrayed by appellant herself. It shows that appellant abandoned the bed and board of appellee after an experience of only one day and night. She said if she had known that the doctor drank before marrying him she would not have married him. She testified in the suit for maintenance that "if the doctor would quit drinking and fix up his house so

it would be comfortable and decent," she did not think she could live with the doctor.

The chancellor was warranted in reaching the conclusion from appellant's own testimony that she had abandoned the appellee forever. She left him, according to her own evidence, with supreme disgust for his person and his home.

If the facts were as horrible as she depicted, she was not without excuse for leaving him temporarily. And if the conditions were as she described on the wedding night, and there was no reformation, she was warranted in leaving him permanently. For no wife would be expected to endure a continuation of the indignities and indecencies which she relates as having occurred the first night. Such conduct, continued, would be a ground for divorce: *Craig v. Craig*, 90 Ark. 40, 114 S. W. 765; *Rie v. Rie*, 34 Ark. 37. The chancellor, however, doubtless concluded, from the testimony on behalf of appellee, that the facts with reference to appellee's person, habits and his home surroundings ⁴⁴² were not as repulsive as portrayed by appellant. The appellee himself denied categorically the charges of drunkenness on his wedding night and the other occurrences which she says took place at his home and at Walker's, his stepson's. He admitted that his carpets were old, and that his furniture was not new and elegant, but maintained that his home was well equipped with the comforts and conveniences of ordinary domestic life as one of his financial ability could be expected to provide. He showed that his stepdaughter and another lady had thoroughly cleansed and prepared his house for their homecoming after the wedding. He proved that he was not in the condition of intoxication at Mrs. Walker's that appellant described. He showed that he protested against her leaving him, and with tender and affectionate letters invited her to return after she had gone, promising to make the home as inviting and comfortable as possible for her. But she declined the invitation. While there was testimony in the record to the effect that appellee would get on occasional sprees and be drunk during those sprees, there was no testimony except the testimony of appellant that he was on such spree on the occasion of his marriage. Witnesses testified on behalf of appellee that he was an upright, honorable gentleman, and that no one in the community was more respectable. Witnesses in his behalf testified that appellant made inquiry about the condition of his property while at Carlisle, whether he had any money in bank, and whether his land was under mortgage, and one witness said when appellant was told that appellee was under mortgage and did not have any money, "her hopes fell right then."

True, appellant testified that she wanted to return to appellee, and repeatedly wrote him letters to that effect, which

letters she says he ignored, and treated with silent contempt. But the only letters she exhibits in the record, protesting her desire to return, were written after the divorce suit was instituted, and after her suit for separate maintenance had been tried and her complaint dismissed for want of equity. The chancellor did not believe that she was sincere in wishing to return to appellee, but doubtless concluded that her desertion of him from the beginning was without any justifiable provocation, and that, notwithstanding his earnest and affectionate entreaties for her ⁴⁴³ return (as shown by his letters), she continued to willfully absent herself from him until one year had passed and his cause for divorce was complete.

The fact that appellee, notwithstanding her desertion, contributed money to defray her expenses during illness, and showed himself anxious to receive her, should she return, was not a condonation of her dereliction in remaining away from his home, but on the contrary, only served to emphasize her delinquency in so doing: *Reed v. Reed*, 62 Ark. 611, 37 S. W. 230; *Craig v. Craig*, 90 Ark. 40, 114 S. W. 765.

Affirm.

A Condonation is Revoked and the original cause of divorce revived where the offending party resumes his or her improper conduct: *Mosher v. Mosher*, 16 N. D. 269, 125 Am. St. Rep. 654. There is a condonation and a wife is not entitled to a divorce on the ground of her husband's cruelty where she made no complaint of his acts at the time and was largely to blame therefor herself; where she apologized for her own acts; where she continued to live with him long after such acts of cruelty were committed; and where there is no future danger to be apprehended as to her life or health: *May v. May*, 108 Iowa, 1, 75 Am. St. Rep. 202. There can be no condonation if the cause exists continuously: *Ryder v. Ryder*, 66 Vt. 158, 44 Am. St. Rep. 833.

ROACH v. WHITFIELD.

[94 Ark. 448, 127 S. W. 722.]

SALE—Reservation of Title—Destruction of Property.—Where goods are sold at a certain fixed price and title is retained solely for security, and passes immediately upon the payment of the purchase money, the vendee in the meantime having the absolute dominion and control over the property, the loss occasioned by a destruction of the goods falls upon the vendee, and the vendor may recover the purchase price. (pp. 133, 134.)

Otis T. Wingo, for the appellant.

Collins & Collins and J. S. Lake, for the appellees.

⁴⁴⁸ WOOD, J. The appellant sued appellees on account for goods alleged to have been sold by appellant to appellees. Appellees answered, denying that they were indebted to appellant in the sum sued for. They set up that they were merchants, and entered into an agreement with appellant whereby she was to ship to appellees such goods as might be necessary and required by appellees on consignment to be paid for when sold, the appellees acting as the agents of appellant in making the sale. They allege that in the transactions out of which the suit grew they were acting as the agents of appellant in making the sale of goods furnished them for that purpose by appellant, and that the account on which appellant sues was for goods in their possession for her, and that the goods while being so held were destroyed by fire without any negligence on the part of the appellees. The appellant replied to the answer, denying that appellees acted as her agents in making sale of the goods, and reiterated her allegation that the goods were sold outright to appellees.

The testimony on behalf of appellant tended to prove that she sold the goods to appellees absolutely, and not on consignment to be disposed of by them as her agents. The testimony in her behalf tended to prove that when she shipped goods under a consignment, she had a written consignment agreement; that in such cases she retained title for the purpose of securing the purchase price only. The goods furnished appellees were not on consignment. Under the consignment contracts she retained title in the goods solely for the purpose of procuring the purchase price, but had no control over the goods, nor did ⁴⁴⁹ she direct what price they should be sold for. The appellees were never her agents in any way.

The testimony on behalf of appellees as to the contract under which the goods were furnished them as given by one of the firm was as follows: "These goods were shipped to us on consignment, and some shipped bill of lading attached. Those that were shipped on consignment were shipped that way for the purpose of securing the purchase price of the goods, and that was the understanding between us. We bought the goods for sale for the purpose of making a profit on them, and did not have to do anything except pay for the goods in order to own them. I understood that the goods would be ours at any time I sent a check to cover the invoice, and that she only retained title as security for the purchase price. I understood that I had absolute control of the goods. I had them in my house for sale, to sell at any price I wanted to, and the only title Roach had in the goods was to secure the purchase price. Roach did not undertake to check up the goods, but I did the checking up myself, reported all goods that had been sold, and gave them either a check or money to cover the amount. The memorandum of the lists of goods burned was

made up from the invoices. I charged them up with the total amount of the feedstuff included in the two invoices. I bought this stuff to hold, for we were satisfied that such stuff was going up."

The court refused the following prayer of appellant for instruction: "Fourth. The jury are instructed that, even though you may find from the evidence that the goods in question were shipped to the defendants on consignment and that the title thereto was retained in the plaintiff, and that such goods were, without fault of the defendants, destroyed by fire, yet, if you further find from the evidence that such goods were delivered to the defendants at a fixed price, to be by them retailed in due course of trade as merchants at any price fixed by them, and that the title was retained by the plaintiff solely as security for the purchase price, and that upon the payment of the purchase price title was to vest in the defendants, then the loss must fall on the defendants."

⁴⁵⁰ The refusal of the court to grant appellant's prayer No. 4 was reversible error. The prayer was warranted by the testimony both on the part of appellant and appellees. The appellant, a wholesale dealer, sold to appellees the goods at a fixed price named at the time. Appellees obtained, the moment the goods were delivered to them, absolute control over them. They resold them at their own price. The title was retained in appellant only for the purpose of security, but for no other purpose. So far as the appellant was concerned, she had done all she could do to pass the title when the goods were shipped to appellees. Nothing remained for her to do. The goods were on delivery under the complete dominion of the appellees to do with them as they chose, and to resell upon their own terms. The facts in this case do not make it a "bailment for mutual benefits." Cases of that character have no application here. Here, although the witnesses speak of the contract as a consignment, yet the facts detailed by them tend to show that, when the goods consigned to appellees were received by them, they became the principal debtors to appellant. The title passed immediately to them on the payment of the purchase price. They were not merely intermediaries to pass the title from appellant to some third parties as the ultimate purchasers. At least, appellant was entitled to an instruction on the specific facts as set forth in the above testimony, telling them if they found the facts to be as recited in prayer No. 4 presented by appellant, that the loss must fall on appellees. We think that, according to the weight of authority and the best considered cases, where the title is retained solely for security and passes immediately to the vendee upon the payment of the purchase money, he in the meantime ⁴⁵¹ having the absolute control and dominion over the property, the rule is that the loss falls

upon the vendee, and the vendor may recover the purchase price undiminished by such loss: *Lavalley v. Ravenna*, 78 Vt. 152, 112 Am. St. Rep. 898, 2 L. R. A., N. S., 97, 6 Ann. Cas. 684; *Osborn v. South Shore Lumber Co.*, 91 Wis. 526, 65 N. W. 184; *Marion Mfg. Co. v. Buchanan*, 118 Tenn. 238, 99 S. W. 984, 8 L. R. A., N. S., 590, 12 Ann. Cas. 707; *Phillips v. Hollenberg M. Co.*, 82 Ark. 9, 99 S. W. 1105, and authorities there cited.

The testimony tending to prove what appellant did in certain bankruptcy proceedings against certain third parties had no connection with this suit, and was therefore incompetent. It is unnecessary to decide whether under the whole case as developed it was also prejudicial.

For the error indicated the judgment is reversed and the cause remanded for a new trial.

The Right of the Vendor, in a Conditional Sale, to Recover the Price of Property Destroyed while in the possession of the vendee is the subject of a note to Harley & Willis v. Stanley, 138 Am. St. Rep. 903.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. NEWMAN.

[94 Ark. 458, 127 S. W. 735.]

ANIMALS—Allowing Stock to Run at Large.—The common-law rule making it the duty of the owner of domestic animals to keep them upon his own land is not recognized in Arkansas; the stock owner in this state is not accountable as a trespasser for permitting his stock to stray upon the open premises of another. (p. 135.)

ANIMALS—Attracting to Dangerous Place.—A land owner owes to the owner of straying cattle the duty to refrain from attracting or drawing them to a dangerous object or substance which he has placed upon his land. (p. 136.)

ANIMALS—Poisonous Oil Along Highway.—A carrier who permits a can of cottonseed oil to leak and remain along the roadside where domestic animals are accustomed to stray, which oil attracts such animals, is guilty of negligence and liable to the owners if the animals are killed by drinking the oil. (pp. 136, 137.)

W. E. Hemingway, E. B. Kinsworthy, P. R. Andrews and James H. Stevenson, for the appellant.

S. Brundidge, Jr., and H. Neely, for the appellee.

⁴⁵⁸ **FRAUENTHAL, J.** One of appellant's freight trains was wrecked at Bald Knob, and several tank cars, containing raw cottonseed oil, were damaged to such an extent that they leaked. These tanks were hauled to Judsonia, Arkansas, and left there for several days, during which time

the oil ran out of them in a steady flow. The cars were first placed near a road crossing, and later a short distance therefrom, and the oil ran down into the ditches by the sides of the track and road, and stood in great pools in these ditches and in the road. The grounds at which the cars were placed were uninclosed, and cattle were accustomed to pass over them at will and there graze at times. A number of cattle drank of this oil, and from twenty to twenty-five head of them died therefrom, amongst which ⁴⁵⁹ was a cow owned by the appellee. The oil gave forth a great stench, and some of the owners who saw their cattle drinking it drove them away because they feared they would be injured by the oil. The appellant made no effort to guard the cattle from the oil or to drive them away. The plaintiff did not see his cow drinking the oil or know of it until some time afterward. He sued the appellant, and recovered judgment for the value of his cow, and this appeal is brought to reverse that judgment.

It is urged by counsel for appellant that under the evidence in this case it owed no duty to appellee, and therefore was guilty of no act of negligence for which appellee would be entitled to a cause of action; and that if the appellant was guilty of any negligence it was not the proximate cause of the injury, and on this account the appellee is not entitled to recover for the death of the cow.

The liability of the appellant for the death of the cow depends upon the right of appellee to permit his cow to range at large and the effect that the act of appellant had in permitting the oil to run in the ditches at an uninclosed place near a public road and in thus attracting the cow to drink the oil which caused its death.

The common law made it the duty of the owner of domestic animals to keep them upon his own land; and if he failed in that duty and permitted them to stray upon the land of another, though uninclosed, he was chargeable with a trespass. But such a doctrine is not recognized in this state; the stock owner in this state is not accountable as a trespasser for permitting his stock to stray upon the open premises of another: *Little Rock etc. Ry. Co. v. Finley*, 37 Ark. 562.

The owner of domestic animals is therefore guilty of no violation of duty nor of any act of negligence in permitting his cattle to run at large on such uninclosed lands of another. On the other hand, the owner of the land is not required to fence out the stock, and ordinarily owes no duty to one who thus suffers his stock to stray upon his land. He has the right to use his own property as he may see fit, but in that use he has no right to do a negligent act which will result in an injury to another. His liability arises in the use of his premises when he fails to ⁴⁶⁰ observe for the protection of the property of another that degree of care and precaution which the cir-

cumstances demand, whereby an injury results to such other person's property. He does owe, therefore, to the owner of straying stock the duty to refrain from attracting or drawing to a dangerous object or substance which he has placed upon his land such stock. Such act becomes one of negligence whereby, if injury results to another, a liability is incurred. The land owner has no right to thus actively draw into peril straying stock. He may not be under any duty to guard the stock from the dangers to which they ordinarily might be exposed, but if he places on his land a dangerous substance which would attract passing animals, and thereby the animals are injured, if the injury is the natural and probable result of the act which a prudent man would have foreseen, then the land owner is liable for the injury resulting therefrom: *Kansas City etc. Ry. Co. v. Kirksey*, 48 Ark. 366, 3 S. W. 190; *Ingham on Law of Animals*, p. 153; *St. Louis etc. Ry. Co. v. Ferguson*, 57 Ark. 16, 38 Am. St. Rep. 217, 20 S. W. 545, 18 L. R. A. 110. Thus, in the case of *Crafton v. Hamilton etc. R. R. Co.*, 55 Mo. 580, some salt was spilled at a depot while the employees were unloading it, and afterward a cow was attracted to the place by the salt, and killed by the cars, and it was held that it was an act of negligence to leave the salt on the track: *Page v. North Carolina R. R. Co.*, 71 N. C. 222.

In the case of *Henry v. Dennis*, 93 Ind. 452, 47 Am. Rep. 378, the defendant placed and left exposed an open barrel of fish brine upon a public street, where the plaintiff's cow was lawfully running at large, and the cow ate and drank of the fish brine and was thereby poisoned. It was held that the defendant was guilty of an actionable wrong: See, also, *Young v. Harvey*, 16 Ind. 314. But we think that the doctrine announced in the case of *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575, is decisive of this case. In that case the appellants were the owners of a cotton-gin, and in an open space under the building a pit was dug for their cotton-press. The appellee's cow fell into the pit, and was killed. In that case the court said: "The pit which the appellants dug, and into which the cow fell in the night-time, was close to the highway; it was uninclosed and was without signal of warning or protection; moreover, cottonseed and corn had been left by the appellants scattered in the neighborhood of it, so that, in the ⁴⁶¹ language of one of the witnesses, it was not only a stock-trap, but was actually baited for the game. The court instructed the jury, in effect, that if they should find such a state of facts from the proof, the appellants were guilty of negligence which would render them liable for the injury done. This proposition cannot be controverted."

In the case at bar the appellant placed in an open space on its land its cars from which the oil leaked until it filled the ditches along the roadside. Here the domestic animals of

the townspeople were accustomed to stray and graze; and they were attracted to the pools of oil and drank of it. This the employees of appellant saw and permitted for some days; and although they saw that the owners of some of the animals seeing this drove them away because they feared the oil would kill them, the appellant's employees made no effort to guard the cattle from the danger or to drive away the animals of the other owners, but permitted them to drink the oil, amongst which was this cow of appellee's. The oil was a poison to the cattle when drunk in the quantities as was done by them, and appellee's cow was killed by the oil which it thus drunk. Under these circumstances, we think that the appellant was guilty of negligence which rendered it liable for the death of the cow.

The instructions given by the court were in accord with this view of the case, and we find no error in the rulings of the court upon any of the declarations of law given or refused.

The judgment is affirmed.

The Common-law Rule as to Domestic Animals that the owner thereof must keep them off the land of other persons, whether it is fenced or unfenced, does not prevail in some of the states: *Kerwhacker v. Cleveland etc. R. R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; *Vicksburg etc. R. R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552; *Waters v. Moss*, 12 Cal. 535, 73 Am. Dec. 561; *Clarendon etc. Co. v. McClelland Bros.*, 89 Tex. 483, 59 Am. St. Rep. 70; *Richards v. Sanderson*, 39 Colo. 270, 121 Am. St. Rep. 167; *Johnston v. Mack Mfg. Co.*, 65 W. Va. 544, 131 Am. St. Rep. 979; *Jones v. Witherspoon*, 7 Jones, 555. The owner of a horse is therefore not guilty of negligence in permitting it to run at large: *Waters v. Moss*, 12 Cal. 535, 73 Am. Dec. 561; and can recover for any injury thereto from the negligence of another: *Murray v. South Carolina R. R. Co.*, 10 Rich. 227, 70 Am. Dec. 219. The owner of a cow may recover where the animal fell into an uninclosed cotton-gin, near the highway, with corn and cottonseed scattered about, and was killed: *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575; or where the animal lawfully running at large in the street drank fish brine left in an open barrel in the street, and died in consequence thereof: *Henry v. Dennis*, 93 Ind. 452. The defendant is also liable if he allows a wire fence to decay so that portions thereof fall on an adjoining field, and are swallowed, with fatal results, by cattle: *Note to Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 835.

HIX v. SUN INSURANCE COMPANY.

[94 Ark. 485, 127 S. W. 737.]

DIVORCE—Interest of Wife in Property.—The act of March 28, 1893 (Kirby's Digest, section 2684), gives to the divorced wife for and during her natural life such interest and amount of the husband's real estate as would be her dower in case of his death. (pp. 139, 140.)

DIVORCE—Effect upon Title to Property.—A decree of divorce awarding the temporary possession of certain of the husband's real estate to the wife, and reserving the question of its division or the designation of the wife's portion, does not affect the title of the husband to the property. Until such division or designation is made he remains the sole owner thereof. (p. 140.)

INSURANCE—Sole Ownership—Effect of Divorce.—A man is not divested of the "sole and unconditional" ownership of property by a decree of divorce awarding possession thereof temporarily to his wife and reserving the question of division for future determination. (p. 140.)

Joe E. and John N. Cook, for the appellant.

Webber & Webber, for the appellee.

485 McCULLOCH, C. J. Appellant instituted separate actions against two fire insurance companies on policies of insurance, one on his household goods for seven hundred and fifty dollars, and the other on his dwelling-house for four hundred dollars. All of the property covered by both the policies was totally destroyed by fire during the period specified in the policies. The two cases were consolidated, as involving the same ⁴⁸⁶ issues, and were tried together. The court gave a peremptory instruction to the jury to return a verdict in favor of each defendant.

Both policies are of the standard form, and liability thereunder is denied on account of alleged breach of the following condition stated in each policy, viz.: "This entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the assured in fee simple."

No written application was made for the insurance, and there was no misrepresentation as to the title or the occupancy, nor did any change take place in the title or occupancy after the issuance of the policies. The title to the real estate, which constituted his homestead, was vested in appellant, and he owned the personal property. A short time before the policies were issued to him, a decree for divorce was rendered against appellant in favor of his wife. That decree, omitting the caption and formal recitals, reads as follows:

"The court is of the opinion that said plaintiff is entitled to a divorce on the above alleged grounds, and also alimony in the sum of twenty-five dollars per month to be paid by the said defendant, and that she keep possession of the two minor children, the defendant to be permitted to visit them at all reasonable hours. The court finds that said parties own a home in the city of Texarkana, Arkansas, which is now occupied by said plaintiff and her two said children, and the court adjudges that she may continue to occupy the same and hold the household goods. As to the sale of said home, the court makes no order, further than at any time said parties may see fit to sell the same, they may do so on such terms as they may agree upon and that is satisfactory to each of them. It is further adjudged that if, before said parties sell said property, the said plaintiff shall marry, then she shall vacate said property, and said defendant shall be released from paying any further alimony. The judgment of the court as to alimony and the occupancy of the home is subject to further orders. It is therefore considered, ordered and decreed that the bonds of matrimony now ⁴⁸⁷ existing between said plaintiff and defendant be dissolved and set aside, that plaintiff keep possession of said home, household goods and children, and that said defendant pay her twenty-five dollars per month for her and her two children's support."

Did that decree divest any part of appellant's title to, or interest in, the property, so that he was no longer the unconditional and sole owner thereof within the meaning of the insurance policies?

The statutes of this state provide that where a final judgment for divorce is rendered in favor of a wife, she "shall be entitled to one-third of the husband's property absolutely, and one-third of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form, and every such final order or judgment shall designate the specific property, both real and personal, to which such wife is entitled; and when it appears from the evidence in the case, to the satisfaction of the court, that such real estate is not susceptible of the division herein provided for without great prejudice to the parties interested, the court shall order a sale of said real estate to be made by a commissioner to be appointed by the court for that purpose, at public auction, to the highest bidder, upon the terms and conditions and at the time and place fixed by the court; and the proceeds of every such sale, after deducting the cost and expenses of the same, including the fee allowed said commissioner by said court for his services, shall be paid into said court, and by the court divided among the parties in propor-

tion to their respective rights in the premises": Act of March 28, 1893; Kirby's Digest, sec. 2684.

This court has construed the statute to give to the divorced wife for and during her natural life such interest and amount of his real estate as would be her dower in case of the husband's death: *Beene v. Beene*, 64 Ark. 518, 43 S. W. 968.

Now, it is seen, from an inspection of the decree, that the court did not "designate the specific property, both real and personal," to which the wife was entitled, nor did it order a sale of the property for division. The effect of the decree, both as to the personal property and real estate, was merely to award the possession thereof temporarily to the wife, reserving the question of division or of designation of the wife's portion for future ⁴⁸⁸ determination. It did not purport to divest any part of appellant's title to the property, nor to diminish his interest therein. The fact that the possession was temporarily awarded to appellant's wife did not affect his title to the property, and, notwithstanding that award, he continued to be the sole and unconditional owner of the property within the meaning of the policies. The conditions named in the policies do not refer to possession, but to title and ownership.

It may be insisted, however, that the statute of its own force vested in the divorced wife title to an undivided interest in the husband's property, which she could have asserted and had set apart at the time the decree for divorce is rendered, or could do so afterward. The statute provides that the specific property to which the wife is entitled shall be designated in the decree for divorce; but, conceding that this may be done afterward by another decree of the court, until it is done the divorced wife's claim is an unascertained one which does not change the husband's interest in the property from that of sole and unconditional ownership. He is still the sole and unconditional owner thereof in fee simple, though the divorced wife's undetermined claim exists, and he cannot convey it without her concurrence. The husband cannot sell his homestead before divorce unless his wife joins in the execution of the conveyance, nor can he convey his other lands free of the wife's inchoate dower right; yet he is the sole and unconditional owner. He is not merely the owner of an undivided interest, but he is the sole and unconditional owner until his wife's interest be asserted and carved out. The title remained vested in the husband solely and unconditionally until it was divested by a decree of the court designating the specific property to which the wife was entitled.

We are therefore of the opinion that the court erred in its peremptory instruction. The testimony is not satisfactory as to the amount of personal property owned by appellant, or as to its value, and we do not undertake to decide what amount

he ought to recover on the policy; but there was testimony sufficient to warrant a finding that appellant owned personal property covered by the insurance policy, and he was entitled to have the jury decide how much he should recover, according to the proof.

Reversed and remanded.

Hart, J., dissenting.

Courts have No Power or Jurisdiction in a Divorce Proceeding to divide or apportion the real estate of the parties, unless given such power by statute: Fall v. Fall, 75 Neb. 120, 121 Am. St. Rep. 767. As to the power of the court under the statute to vest the title of the husband's property in the wife, see Houston v. Timmerman, 17 Or. 499, 11 Am. St. Rep. 848; Powell v. Campbell, 20 Nev. 232, 19 Am. St. Rep. 350.

As to the Meaning of "Sole and Unconditional Ownership," as that expression is used in contracts of fire insurance, see Wyandotte Brewing Co. v. Hartford Fire Ins. Co., 144 Mich. 440, 115 Am. St. Rep. 458; Insurance Co. v. Erickson, 50 Fla. 419, 111 Am. St. Rep. 121; National Fire Ins. Co. v. Three States Lumber Co., 217 Ill. 115, 108 Am. St. Rep. 239.

RANDLEMAN v. TAYLOR.

[94 Ark. 511, 127 S. W. 723.]

BOUNDARIES—Agreed Line—Mistake.—An agreement fixing a boundary line under the belief that it is the true line, when in fact it is not, is not binding, and may be set aside by either party when the mistake is discovered, unless there is some element of estoppel which prevents it. (p. 143.)

BOUNDARIES—Agreed Line—When Binding.—It is only where the true line is unknown, or is difficult of ascertainment, and the parties establish the line to settle a disputed and vexatious question as to the boundary line between them, that the agreement is binding. In such cases the mutual concession between the parties is a sufficient consideration for the agreement. (p. 143.)

REPLEVIN—Timber Cut by Trespasser.—Replevin will lie for timber cut by one from the land of another under a mistaken belief as to the boundary line, and an agreement fixing the line according to such mistake. (p. 143.)

REPLEVIN—Timber Cut by Trespasser.—The Measure of Damages where timber has been cut by an innocent trespasser and delivery cannot be had is the value of the property in its converted form, less the labor expended on it, provided such expense does not exceed the increase in value. (p. 143.)

INSTRUCTIONS—Request Incorrect in Part.—It is not error to refuse a requested instruction which is in part incorrect. (p. 143.)

Spence & Dudley, for the appellant.

Hunter & Castleberry, for the appellee.

⁵¹¹ HART, J. R. R. Randleman was the owner of the south half of section 12, township 21 north, range 7 east, in Clay county, Arkansas. The timber on the north half of said tract of land belonged to J. A. Taylor.

Randleman brought suit in replevin against Taylor to recover the value of a lot of cypress timber alleged to have been wrongfully cut and removed from the land by Taylor and manufactured into lumber by him. A survey of the land showed that ⁵¹² the timber which is the subject matter of this suit was cut by Taylor from the south half of the above-described land. It will be remembered that Taylor only claimed to own the timber on the north half of said tract. Taylor claims that he and Randleman agreed on a boundary line between the two tracts, and he only cut timber to the agreed line. He further stated that subsequently there was a settlement between Randleman and himself in regard to the timber in dispute. Randleman denies this.

Counsel for appellant assign as error the action of the court in giving the following instruction: "IV. Defendant denies that he did in fact cut any timber on the south half of the south half, but says his operations were confined exclusively to the north half of the south half, and he says further that, even though any trees were cut on the said south half of the south half, they were cut under the following circumstances: That the line between the said south half and the north half was undetermined, and was not known accurately to either himself or the plaintiff, and that to adjust any difference as to the true location of the line, they established it by agreement fairly made and free from fraud, and that he cut no timber on the said south half as bounded by said established line. If you find the facts so to be, your verdict will be for the defendant."

⁵¹³ The instruction was erroneous, and should not have been given.

To sustain their contention, counsel for appellant rely upon the case of *Schraeder Min. etc. Co. v. Packer*, 129 U. S. 688, 9 Sup. Ct. Rep. 385, 32 L. ed. 760, in which the court hold: "A consent by coterminous proprietors of real estate to mark a boundary line supposed to run according to the marking between undisputed tracts, given by both in ignorance of the real facts and of the existence of a conflict, does not estop either from claiming his rights when the mistake is discovered; nor can it be construed as a license from the one party to the other, to cut timber on the disputed tract up to the mistaken boundary line."

The evidence in the case at bar shows that appellant and appellee agreed upon a boundary line under the belief that it was the true line, when in fact it was not, and that immediately the timber was cut and removed from the land.

In short, it was an erroneous line agreed upon by mistake. In such cases the agreement is not binding, but may be set aside by either party when the mistake is discovered, unless there is some element of estoppel which prevents him: 4 Am. & Eng. Ency. of Law, 2d ed., 862.

It is only where the true line is unknown, or is difficult of ascertainment, and the parties establish the line to settle a dispute and vexatious question as to the boundary line between them, that the agreement is binding. In such cases the mutual concessions between the parties is a sufficient consideration for the agreement. In the present case the boundary line was not incapable of ascertainment. The parties agreed to the line under the mistaken belief that it was the true line.

The measure of damages in cases like this, where the property has been cut by an innocent trespasser and delivery cannot be had, is the value of the property in its converted form, less the labor expended on it, provided such expense does not exceed the increase in value: *Eaton v. Langley*, 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474; *Nashville Lumber Co. v. Barefield*, 93 Ark. 353, 124 S. W. 758.

Counsel for appellant also insists that the court erred in not giving the following instruction: "You are instructed that, as to the alleged settlement and establishment of the line, the burden of proof is upon the defendant." The court did not ⁵¹⁴ err in refusing this instruction; for, while the burden was on the defendant (appellee) to show payment, as declared in *Hays v. Dickey*, 67 Ark. 169, 53 S. W. 887, and cases cited, the burden was not on him to prove the "establishment of the line." Under the well-settled rules of the court, appellant could not complain of the action of the court in refusing an instruction which was in part incorrect.

For the error in giving instruction No. 4 as indicated in the opinion, the judgment will be reversed and the cause remanded for a new trial.

A Boundary Line Agreed upon by Mistake as being the true line is not binding by way of estoppel or otherwise: *Brewer v. Boston etc. R. R. Co.*, 5 Met. 478, 39 Am. Dec. 694; provided the rights of innocent third parties have not intervened: *Knowlton v. Smith*, 36 Mo. 507, 88 Am. Dec. 152. The owners are not bound by the supposed line, and must conform to the true line when it is ascertained: *Battner v. Baker*, 108 Mo. 311, 32 Am. St. Rep. 606.

The Conclusiveness of Established Boundaries is the subject of a note to *Washington Rock Co. v. Young*, 110 Am. St. Rep. 677.

The Measure of Damages in Replevin for Logs cut from an adjoining tract through a bona fide mistake as to the boundary line, and transported to a boom, is the value of the logs at the boom, less the cost of cutting, hauling and driving them there: *Herdie v. Young*, 55 Pa. 176, 93 Am. Dec. 739.

BLACKSHARE v. STATE.

[94 Ark. 548, 128 S. W. 549.]

CRIMINAL LAW—Construction of Verdict.—In a criminal case the verdict should be construed with reference to the indictment or information and the entire record, and if, when so construed, it is definite and clearly expresses the manifest intention of the jury, and is otherwise legal, mere inaccuracies of expression will not render it void. (p. 146.)

RECEIVING STOLEN PROPERTY—Sufficiency of Verdict.—Under an indictment charging that the defendant "did unlawfully, feloniously and knowingly" receive certain stolen property, a verdict, "We, the jury, find the defendant guilty of receiving stolen property and fix his punishment at one year in the penitentiary," is sufficient, as, when taken in connection with the indictment, the evidence and the charge of the court, it leaves no room for doubt as to the intent of the jury. (p. 148.)

LARCENY—Estrayed Animals.—The Taking Up of an estray with the felonious intent to convert it to one's own use is larceny. An effort, but failure, to comply with the estray law would be evidence to be considered as tending to prove the absence of a felonious intent in making a conversion, but that is as far as it could go. (pp. 149, 150.)

LARCENY—Estrayed Animals—Rule as to Lost Goods.—The rule that if the finder of lost goods neither knows nor has any immediate means of ascertaining the owner, and appropriates them to his own use, he is not guilty of larceny, does not apply to estrayed animals. (p. 150.)

CRIMINAL TRIAL—Remarks of District Attorney.—It is not prejudicial error for the district attorney in his closing argument in a prosecution for receiving stolen property, to say: "Why are all these people here? They came here to see if the law can be enforced; and I want to know, and they want to know, if property can be stolen and no explanation be offered, and a man go scot free." (p. 152.)

L. Hunter and Spence & Dudley, for the appellant.

Hal L. Norwood, attorney general, and W. H. Rector, assistant, for the appellee.

549 WOOD, J. The grand jury of the eastern district of Clay county, at its January term, 1910, indicted the appellant, Lin Blackshare, for larceny and knowingly receiving stolen property, with the intent to deprive the true owner of his property, which indictment, omitting the formal parts, is as follows:

"Count 1.

"The grand jury, in and for the district, county and state aforesaid, under and by the authority of the state of Arkansas, accuse the person named in the caption hereof as defendant of the crime of larceny, committed as follows, to wit: On the tenth day of June, 1909, in the district, county and state aforesaid, the person named in the caption hereof

did unlawfully and feloniously take, steal and drive away two head of cattle of the value of _____ dollars, of the value of _____ dollars, and of the value of _____ dollars, the property of A. W. Zoll, against the peace and dignity of the state of Arkansas.

“Count 2.

550 “The grand jury, in and for the district, county and state aforesaid, under and by the authority of the state of Arkansas, accuse the person named in the caption hereof as defendant, of the crime of receiving stolen property, committed as follows, to wit: On the tenth day of June, 1909, said person named in the caption hereof did unlawfully, feloniously and knowingly receive into and have in his possession, with intent to deprive the true owner of his property, two head of cattle of the value of one hundred dollars, of the value of _____ dollars, of the value of _____ dollars, and of the value of _____ dollars, the property of A. W. Zoll, all of which property had at the said time been stolen, and the said person named in the caption hereof, at the time of receiving and taking said personal property in his said possession, well knew that the same had been stolen; against the peace and dignity of the state of Arkansas.”

The appellant was convicted upon the second count of the indictment which correctly charged him with the crime of receiving stolen property, knowing that the same had been stolen. The jury returned the following verdict: “We, the jury, find the defendant guilty of receiving stolen property, and fix his punishment at one year in the penitentiary.”

1. It is contended by appellant that this verdict is insufficient to constitute a verdict of conviction for knowingly receiving stolen property, because the verdict does not contain a finding that it was done knowingly. The following authorities support the contention that a verdict simply finding defendant guilty of receiving stolen property is not sufficient: *State v. Whitaker*, 89 N. C. 472; *O'Connell v. State*, 55 Ga. 191; *Dreyer v. State*, 11 Tex. App. 631; *State v. Burdon*, 38 La. Ann. 357; *Miller v. People*, 25 Hun, 473; *O'Neal v. State*, 54 Fla. 96, 44 South. 940; *Harris v. State*, 53 Fla. 37, 43 South. 311; *People v. Tilley*, 135 Cal. 61, 67 Pac. 42. In all of the above cases except the one in 11 Tex. App., the verdict of the jury did not assess the punishment at imprisonment in the state penitentiary. In the case from New York (*Miller v. People*, 25 Hun, 473) the form of the verdict was: “We find the person guilty of receiving stolen goods, knowing them to be stolen.” The charge was that the prisoner “feloniously” received, etc. The court held that the verdict was in form a special verdict, ⁵⁵¹ and was fatally defective in omitting the word “feloniously,” which former decisions of that court had held to be essential. The

form of the verdict in the case at bar is distinguished from the form of the verdict in all of the above cases except the Texas case, in that the jury prescribe the punishment, showing expressly an intention to find the accused guilty of an offense punishable by imprisonment in the penitentiary. The verdict under consideration is not a special verdict.

"A special verdict is one which sets out the facts, leaving the court to draw therefrom the conclusion of law": Bishop's Criminal Procedure, sec. 1006. A general verdict "is a conviction of everything well charged in the indictment": 1 Bishop's Criminal Procedure, sec. 1006a. "A partial verdict is one of conviction as to a part of the charge, and acquittal or silence as to the residue": 1 Bishop's Criminal Procedure, sec. 1009.

The verdict in this case is a partial verdict upon the second count of the indictment and in the form of a general verdict on that count.

Mr. Bishop says: "The test is, that if the verdict sufficiently finds anything, whether for or against the defendant, judgment will be rendered on the one side or the other for what is thus found. . . . The language of the verdict, being that of 'lay people,' need not follow the strict rules of pleading, or be otherwise technical. Whatever conveys the idea to the common understanding will suffice, and all fair inferences will be made to support it": 1 Bishop's Criminal Procedure, secs. 1004 (subd. 5), 1005a.

In *O'Neal v. State*, 54 Fla. 96, 44 South. 940, the form of the verdict was: "We, the jury, find the defendant [naming him] guilty of receiving stolen goods." The supreme court of Florida, while holding the verdict to be a nullity in that case, announced a rule of construction which we approve, to wit: "In a criminal case the verdict should be construed with reference to the indictment or information and the entire record, and if, when so construed, it is definite and clearly expresses the manifest intention of the jury, and is otherwise legal, mere inaccuracies of expression will not render the verdict void."

This court has heretofore adopted that rule of construction for verdicts. In *Strawn v. State*, 14 Ark. 549, the appellant was indicted for maiming Jesse Edwards, the offense being a felony ⁵⁵² under the statute. The same statute provided: "That if persons fight by mutual agreement, and one of them is maimed, it shall not be deemed maiming within the meaning of this act; but the parties shall be punished by fine and imprisonment as for an aggravated affray," etc. The latter offense was a misdemeanor, but embraced in the same indictment with the felony. The verdict was: "We, the jury, do find the within named John Strawn not guilty as charged in the within indictment, but

find that he and the within named Jesse Edwards fought by mutual agreement." The prisoner moved in arrest of judgment, because the verdict, which acquitted him of the offense charged in the indictment, failed to show that he was guilty of any minor offense. Passing on the motion, this court, through Chief Justice Watkins, said: "Certainly, it might have been proper for the verdict to have stated more explicitly that the accused was not guilty, as charged, of the offense of maiming, but that he and Edwards fought by mutual agreement, whereby the latter was maimed. But, looking at the indictment, the statute and the verdict as returned, the conclusion is reasonable, if not unavoidable, that such was the meaning and intention of the jury; and although the verdict does not state, in express terms, that Edwards was maimed, it will bear that construction, and was therefore sufficient to warrant the sentence."

In *Fagg v. State*, 50 Ark. 506, 8 S. W. 829, the appellant was indicted for murder in the first degree. The jury returned the following verdict: "We, the jury, find the defendant guilty of manslaughter, but cannot agree upon the punishment." The court sentenced him as for voluntary manslaughter. This was assigned as error. Chief Justice Cockrill, for the court, said: "The verdict did not designate the degree of manslaughter, nor assess the punishment. The duty of fixing the penalty, therefore, devolved upon the court. On conviction of murder the statute requires the degree of the offense to be found by the jury. It is not so as to manslaughter; it is only necessary that the court should have a certain guide to the intention of the jury. Verdicts receive a reasonable construction in order to reach the jury's meaning, and, when that is found, they are enforced as though the intention was express. Viewing the verdict in this case in the light of the evidence and the court's charge, the conclusion ⁵⁵³ is reasonable, if not irresistible, that the jury intended a conviction of voluntary manslaughter. The court had charged them specifically upon that offense, and had made no mention of involuntary manslaughter. If they knew that there was such a grade of homicide, it is not probable that they understood that the defendant could be convicted of it in this prosecution. A verdict of involuntary manslaughter would have been inappropriate to the evidence, and the jury would have been unmindful of their duty to have returned such a verdict. In the absence of an expression to the contrary, a presumption of an intention to violate a duty is not indulged against a juror more than any other officer. The evidence certainly warranted a verdict of murder in the first degree; that the jury did not intend to acquit is shown by the verdict."

Applying the above doctrine of our own cases to the verdict in the present case, it is sufficient to sustain the judgment of conviction for receiving stolen property knowing same to have been stolen. The fact that the jury prescribed the punishment at two years in the penitentiary showed that they intended to convict of some offense charged in the indictment. They designated it as "receiving stolen property," showing that they did not intend to convict of larceny as charged in the first count. The only other count charged the offense of receiving stolen property knowing same to have been stolen. The words used in the verdict, when taken in connection with the second count of the indictment and the evidence, the charge of the court pertaining to that, leave no room to doubt that the intention of the jury was to find him guilty on that count. Under the charge of the court, the jury could not have found the defendant guilty on that count without finding that he received the property knowing same to have been stolen. The language of the verdict was tantamount to a general verdict of guilty on that count, and, according to the rules for the construction of verdicts, it met every requirement of the law, and furnished a certain and correct basis for the judgment of the court.

2. Without going into detail, it suffices to say that the evidence tended to prove and warranted the jury in finding that one George Johnson took up the cattle in controversy that estrayed from their owner and were running around his place. ⁵⁵⁴ They were known in the neighborhood as stray cattle. When approached by the owner for the cattle, Johnson claimed that he had turned them out with his cattle, but did not know what had become of them. It was shown that Johnson disposed of the cattle under circumstances which tended to prove, and which warranted the jury in finding, a felonious intent on his part to convert the same to his own use. There was testimony to the effect that it was generally understood that the cattle were posted. But there was no evidence in the record on the part of appellant tending to prove that George Johnson had complied with the estray laws. There was no testimony showing that he attempted to comply with the estray laws or showing what efforts, if any, he had made in that direction.

Appellant asked the court to grant the following prayer: "You are instructed that, if you find from the evidence that George Johnson took up the steers as estrays and made an effort to post them, and later converted them to his own use, he would not be guilty of larceny, and hence the defendant, Lin Blackshare, would not be guilty."

The court refused, and appellant duly preserved his exceptions. The court gave the following prayers:

"No. 7. Evidence has been offered in regard to the posting of the steers as estrays. You will consider this evidence, as you will all other evidence in the case, as bearing upon the question of the defendant's intent. It is for you to consider the evidence upon that question and decide the weight, if any, it shall have in determining whether or not the defendant is guilty of either the larceny of these steers or of the offense of knowingly receiving them into his possession, knowing them to have been stolen.

"No. 8. If you believe from the evidence that George Johnson took up the steers as estrays, and attempted to post them, and that the defendant in good faith believed that they had been posted in such way as to vest in Johnson the title, and that the said Johnson had the right to sell them, and defendant bought them in good faith, then you will find the defendant not guilty."

The instructions given by the court concerning estrays was as favorable to appellant as the evidence warranted. The court ⁵⁵⁵ did not err in refusing the prayer of appellant. An effort on the part of one who takes up cattle as estrays to post them would not justify such one in converting such cattle to his own use. The law requires one taking up estrays to do something more than simply to make an effort to post them: See Kirby's Digest, c. 149. An effort, but failure, to comply with the estray laws before converting estrayed animals to one's own use would be evidence to be considered by the jury as tending to prove the absence of a felonious intent in making such conversion. But that is as far as it could go. Where one has taken and converted the animals of another to his own use, if at the time of the taking there was the felonious intent to deprive the true owner, whoever he might be, of the permanent use and benefit of his property, the one so taking the animals of another under our statute would be guilty of larceny. One so charged may set up in defense an effort to comply with the estray laws, and the testimony adduced to establish such defense may be considered by the jury in determining the question as to whether the accused took the animals with a felonious intent at the time of the taking to convert them to his own use and to permanently deprive the owner of his property.

"When an estray is taken up by one who has at the time of the taking the felonious intent to convert same to his own use, it is larceny": Starck v. State, 63 Ind. 285, 30 Am. Rep. 214. See, also, Commonwealth v. Mason, 105 Mass. 163, 7 Am. Rep. 507. In the recent case of Brewer v. State, 93 Ark. 479, 125 S. W. 127, 30 L. R. A., N. S., 339, we said, speaking of lost goods: "The rule clearly deducible from the authorities is that if the finder of lost articles neither knows nor has any immediate means of ascertaining the owner,

and appropriates them to his own use, he is not guilty of larceny, whatever may be his intent at the time." But this doctrine has no application to estrayed domestic animals. As is said in *State v. Martin*, 28 Mo. 530: "It is with no propriety, either in view of custom or statutory law, that animals can be called lost goods here, simply because they are outside the owner's inclosures, and the owner does not know where they are. Such animals are not lost in the proper sense of the term; nor can the person who comes across them and feloniously appropriates them to his own use with any propriety be called the finder, as he might be if he, with the same ⁵⁵⁸ felonious intent, picked up a purse upon the highway. . . . And the fact that they are not branded with the owner's name is perfectly immaterial. It is sufficient for the person who comes across them to know they are not his property; and if he drives them off and converts them feloniously to his own use, he is as much guilty of larceny, when he is ignorant of their true owner, and their owner is ignorant of where they are, as he would be if both had full knowledge on both these points. . . . They [estrays] have nothing to do with the criminal law, and are merely directory to promote commerce and afford facilities for the reclamation of stray animals": See, also, *People v. Kaatz*, 3 Park. C. C. 129.

3. Instruction No. 4 is as follows: "If you find from the evidence that the defendant did, in fact, buy the steers and pay a consideration therefor, this would be no defense if it was a part of an agreement, or understanding, or conspiracy between the defendant and Johnson by which the larceny of the steers might be accomplished."

It is contended that there was no evidence of any conspiracy between Johnson and appellant, and that therefore the latter part of the above instruction is abstract. It was in evidence that a certain party was asked why he did not buy the cattle, and replied, in the presence of appellant, "that he didn't want the cattle; that somebody told him that they had not been posted, and that he did not want any trouble," whereupon appellant stated with an oath: "I will buy them."

A witness who lived with Johnson is shown to have testified as follows: "One night Blackshare came over there and stayed until bedtime. Blackshare and Johnson went out in the lot, and were out there probably an hour. Next morning Johnson went to his (witness') room before day and told him to get up, that he wanted him to help drive this yoke of cattle across the slough, and, I think, described the cattle. He called them butt-headed cattle—one lined black and one black. He got up and helped Johnson cross the slough; went across the country through the woods. When

they came to a cypress slough, Johnson told him to go up the slough and see if he could find a place to cross, and while he was gone Johnson took the cattle and went ⁵⁵⁷ down the slough and tied them, and came back and met him, and he saw a couple of men ride up and untie these cattle and ride off with them. Believe he said there was some horse tracks there, and he asked who had been there. Johnson asked if he didn't see Blackshare pass and he said no, and Johnson told him that Blackshare came by and threw him the money for the cattle, and he took it from his pocket. It was wrapped in a brown paper and counted out fifty dollars. Couldn't see any road where the cattle were led. Witness asked George Johnson what he was taking the cattle through the woods for, and George said there was a fellow named Happy Jack that he didn't want to know anything about it."

There was no objection to this testimony. This testimony, taken in connection with the evidence that appellant admitted that he bought the cattle from Johnson, paying for same the sum of fifty dollars, was sufficient, in connection with the other evidence, to warrant the court in submitting to the jury whether or not there was a conspiracy between appellant and Johnson to steal the cattle. The instruction was not abstract.

4. The second count of this indictment, as stated, charges that the defendant knowingly received property stolen by another. This second count charges that the defendant did unlawfully, feloniously and knowingly receive into and have in his possession, with the intent to deprive the owner of his property, the two steers in question, and the material allegations of this count are that in this district, of this county, and within three years before the date of this indictment, the defendant received from a person who had stolen the steers in question, knowing them to have been stolen, with the intent to deprive the true owner of his property by so receiving them. If the evidence warrants it and requires it, the defendant could be found guilty of either of these counts, but not of both of them.

It is urged that the instruction, as read to the jury, did not contain the words "knowing them to have been stolen." But we find nothing in the record to show that the instruction containing these words was not read to the jury. The bill of exceptions contains the instruction as above set out, and it shows that the words "knowing them to have been stolen" were inserted in the instruction before "either of defendant's counsel ⁵⁵⁸ had argued the case to the jury." There is no affirmative showing that the words mentioned were not read. The bill of exceptions indicates that they were read,

and, in the absence of a showing to the contrary, that would be the presumption.

5. The last contention is that the court erred in permitting the prosecuting attorney to make improper remarks in his closing argument. Counsel assert that the remarks were as follows: "That the defendant failed to put George Johnson [the alleged thief] and Josiah Johnson, his father, and Jim Blackshare, a son of defendant, on the witness-stand to contradict statements made in the trial." We find no such assignments of error in the motion for new trial. Hence cannot consider it. The record does show that the prosecuting attorney in his closing argument made the following remarks: "Why are all these people here? They came here to see if the law can be enforced; and I want to know, and they want to know, if property can be stolen and no explanation be offered, and a man go scot free." The ruling of the court in permitting the above remarks is properly presented for our consideration. The remarks were but the expression of the opinion of the prosecuting attorney. They were not calculated to influence a jury of sensible men to disregard the oath they had taken to try the cause according to the law and the evidence and a true verdict render. A majority of the court do not consider the remarks prejudicial error. For, fairly construed, the comments of the attorney could hardly be said to have reference to the failure of appellant to testify as a witness in explanation of the charge, but rather to the failure of the evidence adduced, in the opinion of the attorney, to afford an explanation.

The judgment is therefore affirmed.

Domestic Animals are the Subject of Larceny: Note to People v. Miller, 88 Am. St. Rep. 587; including those running at large: Crockford v. State, 73 Neb. 1, 119 Am. St. Rep. 876; if the taking is accompanied with a felonious intent: Commonwealth v. Mason, 105 Mass. 163, 7 Am. Rep. 507. But when one converts an estray to his own use, there must have been a felonious intent to steal it at the moment of taking in order to constitute larceny: Starck v. State, 63 Ind. 285, 30 Am. Rep. 214; and see Commonwealth v. Mason, 105 Mass. 163, 7 Am. Rep. 507.

Misconduct of Counsel in Argument, when so seriously improper as to call for a reversal of judgment, is the subject of a note to McDonald v. People, 9 Am. St. Rep. 559.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

McINTURFF v. INSURANCE COMPANY OF NORTH AMERICA.

[248 Ill. 92, 93 N. E. 369.]

EVIDENCE—Testimony on Former Trial—Witness Since Deceased.—Evidence given on a former trial of the same action, or a former action involving the same issues between the same parties, is admissible if it is established that the witness is dead. (p. 155.)

EVIDENCE—Testimony on Former Trial—Witness Since Deceased.—In order to render the testimony of a deceased witness admissible on a second trial, it is necessary that there should be a substantial identity of parties, at least in interest, with the parties on the trial in which the testimony was given. (p. 156.)

EVIDENCE—Testimony on Former Trial.—A Criminal Proceeding is not in any sense an action between the person instituting it and the prisoner, and testimony given in such a proceeding is not admissible in a subsequent civil suit between the party instituting the criminal proceeding and the defendant therein. (p. 157.)

INSURANCE—Action on Policy—Testimony of Witness on Former Criminal Trial.—The testimony of a witness in a prosecution of the owners of insured property for burning it to defraud the insurance company is not admissible, after his death, in a subsequent civil action by the owners on the policies of insurance. (p. 157.)

APPEAL—Judgment of Appellate Court Conclusive.—The question whether or not the conduct of an insurance company amounted to a waiver of proof of loss is a mixed question of law and fact, upon which the judgment of the appellate court is final. (p. 158.)

EVIDENCE—Criminal Act in Civil Case.—Where in a civil action, a criminal act is charged, the authorities are in conflict upon the question whether the rule applicable to a criminal prosecution or that applicable to a civil suit should prevail in respect to the degree of proof required. In Illinois a criminal offense charged in a civil case must be proved beyond a reasonable doubt. (p. 158.)

INSTRUCTIONS—Error in Those Requested.—A party cannot complain of an error in instructions when the same error is found in the instructions offered by him. (p. 158.)

W. A. Spann and George E. Martin, for the plaintiff in error.

W. A. Wall, for the defendants in error.

⁹³ VICKERS, C. J. Defendants in error recovered a judgment in the circuit court of Pulaski county for three thousand nine hundred and fifty-two dollars and twenty-three cents for a loss by fire of property covered by insurance written by an agent of plaintiff in error, and that judgment has been affirmed by the appellate court for the fourth district. The record has been transferred to this court for a review by certiorari.

The only questions which are not conclusively settled by the judgment of affirmance in the appellate court arise on the exceptions of plaintiff in error preserved to the rulings of the trial court in excluding certain evidence offered by plaintiff in error and to the giving of an instruction on behalf of the defendants in error.

The property insured was burned on March 13, 1908. At the April term, 1908, of the Pulaski county circuit court the grand jury returned an indictment against John McInturff and his wife, Sarah, charging them with feloniously and willfully setting fire to and burning the property covered by the insurance, with an intent to damage and defraud ⁹⁴ plaintiff in error. On the trial of the defendants in error on said charge Thomas Blay was called as a witness for the state and gave much damaging testimony, tending to prove that defendants in error were guilty of the criminal charge against them. Defendants in error were acquitted of the criminal offense. After the trial of the criminal case, and before the trial of the case at bar, defendant in error John McInturff shot and killed the witness Thomas Blay. In the present action defendants in error sued plaintiff in error in assumpsit, the declaration consisting of two special counts on the policies, to which are added the common counts. Plaintiff in error filed a plea of the general issue, accompanied with notice of special defenses as follows: (1) That defendants in error willfully burned the insured property with the intent to defraud plaintiff in error; (2) that defendants in error caused said house to be burned with intent to defraud, etc.; (3) that defendants in error made false and fraudulent representations, after the fire, as to property lost and damaged, with an intent to defraud; (4) that defendants in error failed and refused to furnish proofs of loss, as required by the said policies; and (5) that defendants in error furnished to the appraisers a list of property which they did not own, with intent to defraud. The case was finally tried upon a stipulation that all matter that would be competent under properly drawn pleas might be introduced in evidence under the general issue. Upon the trial of the issues thus formed, plaintiff in error, after making proof of the death of the witness Blay, offered to introduce his testimony given on the trial of the criminal case against the defendants in error.

The court below sustained an objection to this testimony, and an exception to that ruling presents the first question for our consideration.

There is a general agreement of authorities that evidence given on a former trial of the same action, or a former action involving the same issues between the same parties, is admissible if it be established that the witness is dead: ⁹⁵ 3 Greenleaf on Evidence, secs. 326, 341, 342; 1 Elliott on Evidence, sec. 499; *Ruch v. City of Rock Island*, 97 U. S. 693, 24 L. ed. 1101; *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *Doyle v. Wiley*, 15 Ill. 576; *Wade v. King*, 19 Ill. 301; *Goodrich v. Hanson*, 33 Ill. 498; *Chicago and Eastern Illinois R. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263.

Elliott, in his work on Evidence (volume 1, section 495), after stating the general rule as above, states the following limitations to its application: It is necessary, says this learned author, "(a) that the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness; (b) that the questions in issue were substantially the same in the first as in the second proceeding; (c) that the proceeding, if civil, was between the same parties or their representatives in interest; (d) that in criminal cases the same person is accused upon the same facts"; and he cites numerous authorities to support the text. An examination of the authorities will show that the only point of divergence concerns the requirement of the rule as stated by Mr. Elliott, that the parties to both actions should be identical.

Section 163a of the sixteenth edition of Greenleaf on Evidence, which was enlarged and annotated by Professor Wigmore in 1899, reads, in part, as follows: "As to the parties, all that is essential is that the present opponent should have had a fair opportunity of cross-examination. Consequently, a change of parties which does not effect such a loss does not prevent the use of the testimony—as, for example, a change by which one of the opponents is omitted or by which a merely nominal party is added. And the principle also admits the testimony where the parties, though not the same, are so privy in interest—as, where one was an executor or perhaps a grantor—that the same motive and need for cross-examination existed." This paragraph is not in the original text of Greenleaf, but is added by the annotator. If this paragraph is read as laying down the ⁹⁶ rule broadly that a fair opportunity for cross-examination by the party against whom the evidence is offered is all that is necessary to render it admissible, then the overwhelming weight of authority is against the accuracy of the rule as stated; but if it is read, as no doubt its author intended it should be, as stating the rule that a mere nominal change of parties is of no conse-

quence, provided the parties in the second action are so privy in interest with those on the former trial that the same motive and need for cross-examination existed, then the rule stated is in accord with the great weight of authority.

Plaintiff in error insists that the admissibility of this class of evidence turns on the right of the party against whom it is offered to be present and cross-examine the witness rather than on the identity of the parties. The test, it is said, is whether or not the party against whom the evidence is offered was a party on the former trial and had the right to cross-examine the witness. In support of this contention the plaintiff in error relies on *Charlesworth v. Tinker*, 18 Wis. 633, *Kreuger v. Sylvester*, 100 Iowa, 647, 69 N. W. 1059, and other authorities. In the Wisconsin case the deceased witness had testified on a prosecution against a defendant for an assault, and the court permitted the testimony to be read upon the trial of a civil action against the same defendant for the same assault. The decision is based upon a statute of Wisconsin which permits the complainant in a criminal prosecution for assault and battery to control the prosecution and examine all witnesses that are sworn on the trial. This case is not an authority of any persuasive force except in states having a statute similar to the one upon which the court bases its decision. The Iowa case seems to lend some support to the contention of plaintiff in error. In that case the Iowa court holds that the testimony of a deceased witness given on the trial of an indictment for an assault is competent in a civil action based on the same assault. The opinion in that case is very brief and does ⁹⁷ not disclose whether a statute similar to the Wisconsin statute was in force in that state. The only authorities cited by the Iowa court is the Wisconsin case, which has already been considered, and section 164 of Greenleaf. The citation from Greenleaf does not support the proposition announced in the opinion. The other cases cited by plaintiff in error have been examined, and none of them appear to go to the extent of the two cases above referred to. The three Illinois cases cited (*Wade v. King*, 19 Ill. 301, *Goodrich v. Hanson*, 33 Ill. 498, and *Pratt v. Kendig*, 128 Ill. 293, 21 N. E. 495), do not support plaintiff in error's contention, but in so far as the question is considered those cases are in harmony with the rule laid down by Mr. Elliott, to the effect that in order to render the testimony of the deceased witness admissible on a second trial it is necessary that there should be a substantial identity of parties, at least in interest, with the parties on the trial in which the testimony was given. The following cases support the rule that the parties must be substantially the same, or privies in blood, in law or in estate: *Goodlet v. Kelly*, 74 Ala. 213; *Smith v. Keyser*, 115 Ala. 455, 22 South. 149; *Wright v. Cumpsty*, 41

Pa. 102; *Orr v. Hadley*, 36 N. H. 575; *Boardman v. Reed*, 6 Pet. 328, 8 L. ed. 415; *Yale v. Comstock*, 112 Mass. 267; *Jackson v. Lawson*, 15 Johns. 539; 1 Phillips on Evidence, 10th ed., 306; 2 Best on Evidence, sec. 496.

A case very similar to the one at bar is *Harger v. Thomas*, 44 Pa. 128, 84 Am. Dec. 122, which was an action on a note, and the record of the prosecution of the plaintiff in error, Harger, for the forgery of the same note, and the testimony of a number of witnesses given in the criminal prosecution, who were dead, was offered in evidence in the civil suit. The court refused to admit either the record or the evidence given on the former trial, and in disposing of that question said: "The rule on this point is thus stated by Mr. Justice Yeates in *Miles v. O'Hara*, 4 Binn. 108, where he says: 'It is a settled rule of law that what a witness has ⁹⁸ sworn on a former trial between the same parties for the same cause of action may be given in evidence in case of his death.' Phillips on Evidence (vol. 1, p. 337, 3d Am. ed.) is to the same effect, but the rule is a little more exactly stated. It is thus: 'Where the witness has been examined on trial at a former action between the same parties, where the point in issue was the same in the second trial, there his testimony may be proved, if deceased.' A criminal prosecution, although instituted by an individual, is not in any sense an action between the person instituting it and the prisoner. . . . The issue is between the government and the prisoner on a question of guilt or innocence of the latter. It is not a question of property. Very different is the issue, as also the parties, in a civil suit to recover on a forged instrument." The conclusion was reached that the court had erred in admitting the evidence in the criminal trial.

We do not deem it necessary to go further into the authorities upon this question. The testimony given by the deceased witness, Blay, on the trial of the indictment of defendants in error was properly excluded by the court on the trial of the civil action on the policies of insurance. We think this rule is established by a very decided weight of authority and is supported by good reason as well. If the rule contended for by plaintiff in error were good law, then in an action against a carrier by a passenger for a personal injury the testimony of a witness since deceased would be admissible against the same carrier for an injury sustained in the same accident by another passenger, an employee, a licensee or a trespasser, simply because the carrier against whom the testimony was offered had on the former trial an opportunity to cross-examine the witness. This rule would carry us too far afield for proof, and we cannot sanction it.

The question as to the weight of the evidence, discussed by the plaintiff in error, is not open for review in this court.

Neither is the question concerning the waiver of proofs of ⁹⁹ loss. Whether or not the conduct of the plaintiff in error amounted to a waiver of proofs of loss is a mixed question of law and fact, upon which the decision of the appellate court is final.

The court instructed the jury that plaintiff in error was required to prove, beyond a reasonable doubt, that defendants in error burned or caused the property to be burned before such defense could be regarded as established, and complaint is made of this ruling. In *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599 (22 N. E. 489), this court, on page 612, said: "Appellant not only interposed the defenses its policy was void because there was other insurance on the property and because the house was vacant and unoccupied, but made the further defense that appellee himself set fire to the building. Where, in a civil action, a criminal act is charged, the authorities are in conflict upon the question whether the rule applicable to a criminal prosecution or that applicable to a civil suit should prevail in respect to the degree of proof required. In this state it has been held that where, in civil cases, a criminal offense is charged in the pleadings, such offense must be proved beyond a reasonable doubt: *Crandall v. Dawson*, 1 Gilm. 556; *McConnel v. Mutual Ins. Co.*, 18 Ill. 228; *Sprague v. Dodge*, 48 Ill. 142, 95 Am. Dec. 523; *Harbison v. Shook*, 41 Ill. 141."

There is, however, another satisfactory answer to the contention of plaintiff in error in this regard. Plaintiff in error, by its eighth, ninth, fifteenth and sixteenth instructions, procured the trial court to declare the same rule as to the quantity of proof required as that laid down in the instruction complained of. A party cannot complain of an error in instructions when the same error is found in the instructions offered by the complaining party: *Springer v. City of Chicago*, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609.

The judgment of the appellate court is affirmed.

The Constitutional Right of an Accused Person to be Confronted With the Witnesses Against Him, and what is an invasion of that right, is the subject of an extended note to *Wray v. State*, 129 Am. St. Rep. 23, the admissibility of testimony taken on a preliminary examination, former trial or other proceeding being particularly considered at pages 40-42.

The Admissibility of the Testimony of an Absent Witness in a criminal trial is the subject of a note to *Cline v. State*, 61 Am. St. Rep. 886. The absence or inaccessibility of a witness, who is not shown to be dead or without the state, does not render admissible the evidence which he gave on a former trial: *Wyatt v. State*, 58 Tex. Cr. 115, 137 Am. St. Rep. 926. It must be first shown that the witness is dead, beyond the jurisdiction of the court, or upon diligent inquiry cannot be found: *Somers v. State*, 54 Tex. Cr. 475, 130 Am. St. Rep. 901. On a trial of theft from the person, the testimony of witnesses residing without the state, taken on the examining trial, is admissible

if a sufficient predicate has been laid. The constitutional guaranty that the accused shall be confronted by the witnesses against him is not thereby violated: *Somers v. State*, 54 Tex. Cr. 475, 130 Am. St. Rep. 901.

Testimony Taken Before an Examining magistrate on a charge of a different offense is not admissible on a criminal trial: Somers v. State, 54 Tex. Cr. 475, 130 Am. St. Rep. 901.

The Admissibility of Evidence Given on a Former Trial in Civil Cases is the subject of a note to *Atchison etc. R. R. Co. v. Osborn*, 91 Am. St. Rep. 192; and see *Pew v. Johnson*, 35 Mont. 173, 119 Am. St. Rep. 852; *Garvie v. Burlington etc. Ry. Co.*, 131 Iowa, 415, 117 Am. St. Rep. 432; *Delahunt v. United Telephone & Telegraph Co.*, 215 Pa. 241, 114 Am. St. Rep. 958; *Kansas etc. Coal Co. v. Galloway*, 71 Ark. 351, 100 Am. St. Rep. 79.

Stenographer's Notes as Evidence, is the subject of a note to *Pladgitt v. Moll*, 81 Am. St. Rep. 358.

HOWARD v. BURKE.

[248 Ill. 224, 93 N. E. 775.]

OFFICERS DE FACTO—What Constitutes.—A Mere Claim to be a public officer and exercising the office will not constitute one an officer de facto. There must be at least a fair color of right or an acquiescence by the public in his official acts so long that he will be presumed to act as an officer either by right of election or appointment. (p. 162.)

OFFICERS.—Color of Office is That Which in Appearance is title, but which in reality is no title. It is authority derived from an election or an appointment, however irregular or informal, so that the incumbent is not a mere volunteer. (p. 162.)

SCHOOL DISTRICTS—Officers De Jure and De Facto.—Where an election for a board of education is held at two polling places and two boards are elected, one at each place, both of which qualify, one not attempting or assuming to do any business after qualifying, but the other assuming to act and transact the business of the board, the latter will be held to be the board de facto, although the former may be the board de jure. (p. 162.)

OFFICERS DE FACTO—Validity of Acts.—The acts of officers de facto, so far as they affect third parties or the public, in the absence of fraud, are as valid as those of officers de jure. (p. 163.)

SCHOOL DISTRICTS—Levy of Tax by De Facto Board.—Injunction does not lie to restrain the collection of a school tax on the ground that it was levied by a board of education composed of de facto but not de jure officers. (p. 163.)

INJUNCTION SUITS—Solicitor's Fees.—A prima facie show-ing of the employment of certain solicitors by the defendants is shown where it appears from the record that such solicitors appeared in the injunction suit, in the preparation of the pleadings, the taking of evidence, and the arguing of a motion to dissolve the injunction, which was dissolved. (p. 164.)

INJUNCTION SUITS—Solicitor's Fees.—When the statute makes it the duty of the state's attorney to appear for county officials, there is no law precluding the employment of other counsel or the allowance of fees for them. (p. 164.)

C. F. Mortimer and Hogan & Wallace, for the appellant.

E. S. Smith and A. D. Stevens, for the appellees.

²²⁵ CARTER, J. Appellant filed this bill in the circuit court of Christian county praying for an injunction to restrain the collection of certain taxes levied for township high school purposes. ²²⁶ The court, after a hearing, dissolved the temporary injunction and dismissed the bill, awarding two hundred and fifty dollars damages against the complainant. From that order and decree this appeal has been prosecuted.

In April, 1909, a township high school for township 13 north, range 4 west of the third principal meridian, lying partly in Sangamon and partly in Christian county, was established by a vote. No question is here urged as to the legality of that vote. May 3, 1909, the trustees of schools of that township met and decided to call an election for June 5th to choose a high school board. They instructed the township treasurer to post notices of election on May 24th, but named no polling place, deciding to allow Riddle and Davis, two of the trustees, time to investigate as to the proper place for holding the election. The treasurer prepared the notices and inserted as the place for election the town hall of Pawnee, a village situated in the northwest part of said township. Said town hall had been for many years used as the polling place for school elections in the district. May 21st the president of the board of trustees, McTaggart, caused these notices to be posted. A few days later Riddle and Davis held a meeting of the board and authorized notices for an election on June 5th, naming as the polling place the Hopewell schoolhouse, some three or four miles from Pawnee. These notices were also posted. The evidence tends to show that the schoolhouse was much nearer the center of the township than the town hall. Elections were held on the day in question in both places, and five members of the high school board were declared elected at the town hall meeting, each receiving four hundred and forty-five votes, and five other candidates each received two hundred and fifty-three or two hundred and fifty-four votes at the Hopewell schoolhouse election. All the voters at the town hall voted for one set of candidates and all the voters but one at the schoolhouse voted for the other set. Certificates of election were filed with the township treasurer as to both of these boards. On June 14th the ²²⁷ Hopewell board met and determined by lot the term of office of its members and elected a president and secretary, the certificate of such election being filed with the township treasurer. No further meetings appear to have been held by that board nor any other business transacted. Several of its members testified that they did not want to do anything

until they found how the court proceedings came out. The board of education elected at the town hall meeting met on June 8th, determined by lot the tenure of office of its members, elected a president and secretary, and later filed a certificate of such election with the township treasurer. On the same day it resolved to erect a high school building and hold an election to decide on the questions of issuing bonds and the selection of a site. Notices were thereafter posted as to such election, and it was held on June 19th, the vote being two hundred and twenty-six for and six against the issuance of the bonds, and a site was also selected by the voters at the same election. July 31st this board held another meeting and resolved that the sum of five thousand dollars be levied as a tax for high school purposes. August 7th the same board employed a principal for nine months of school, and on September 4th accepted a proposition from the district board to furnish the high school board with a room, heat and janitor service for nine months for five hundred dollars. October 2d an assistant principal was employed, and from time to time other orders were entered and payments authorized. This high school seems to have been in actual operation under the management of this board elected at the town hall meeting until about the time of the judgment of ouster in the quo warranto proceedings. June 18, 1909, quo warranto proceedings were instituted in the circuit court of Sangamon county against the persons composing the so-called town hall board, and a judgment of ouster was entered against them January 14, 1910, on the ground that the notices of election were illegal because the trustees had not designated the town hall as the place of election. As ²²⁸ stated above, the town hall board, at a meeting held on July 31, 1909, passed a resolution that the sum of five thousand dollars should be levied against the taxable property of the district for high school purposes, and a certificate of levy was thereafter filed with the township treasurer and with the clerks of Sangamon and Christian counties. The bill in the case at bar sought to enjoin the clerks and county treasurers of both these counties and all the members of the two high school boards from taking any steps toward the collection of said tax. On the hearing the court found that the town hall board was exercising its duties and acting as a high school board of education de facto when it made such levy, and that the Hopewell board was not at that time exercising the duties of the high school board, and dissolved the temporary injunction.

The chief question in dispute in this case is whether the so-called town hall high school board was a de facto board at the time the resolution to levy such taxes was passed. It is conceded by both sides that on the record in this case the Hopewell board was the de jure board on that date. Coun-

sel for appellant insist that the Hopewell board on that date was also the de facto board, and that therefore the town hall board could not have been a de facto board; that two persons cannot be officers de facto in the same office at the same time, as there cannot be two incumbents at once: *State v. Blossom*, 19 Nev. 312, 10 Pac. 430; *Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382; *Throop on Public Officers*, sec. 641.

A mere claim to be a public officer and exercising the office will not constitute one an officer de facto. There must be at least a fair color of right or an acquiescence by the public in his official acts so long that he will be presumed to act as an officer either by right of appointment or election: *Brown v. Lunt*, 37 Me. 423. A de facto officer was defined by Lord Ellenborough as "one who has the reputation of being the officer he assumes to be and yet is not ²²⁹ a good officer in point of law": *Rex v. Bedford Level*, 6 East, 356; *Barlow v. Stanford*, 82 Ill. 298; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; 8 Am. & Eng. Ency. of Law, 2d ed., p. 781, and cases cited. Color of title to an office has been defined to be "that which in appearance is title but which in reality is no title": *Wright v. Mattison*, 18 How. 50, 15 L. ed. 280; 8 Am. & Eng. Ency. of Law, 2d ed., 794. Color of authority (which is usually considered synonymous with color of title) to an office is held to be authority derived by an election or an appointment, however irregular or informal, so that the incumbent be not a mere volunteer: *McCrary on Elections*, 4th ed., sec. 253; *State v. Oates*, 86 Wis. 634, 39 Am. St. Rep. 912, 57 N. W. 296; *People v. Lieb*, 85 Ill. 484. The board of education elected at the town hall meeting was the only board of education that assumed or attempted to transact any business for said township high school district up to and after the time of making the levy in this case and the beginning of this proceeding. Its members were not mere volunteers. They were elected at an election held under notice, at which they received a much larger vote than was cast for the Hopewell board of education. They had a certificate of election from the proper officials if a proper notice for the town hall election had been given. We are disposed to hold that under the decisions they had such color of authority to act as would make them de facto officers under the circumstances of this case. It must be conceded on this record that there existed de jure offices, as to said high school board, to be filled, and that the Hopewell board were the de jure officers. While there cannot be a de facto officer if a de jure officer is exercising the functions of the office in question (*McCahon v. Commissioners*, 8 Kan. 437; *Powers v. Commonwealth*, 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245; 29 Cyc. 1392), such was not the case here. The Hopewell school board, after it was organized, did not attempt to

act as a board. The so-called town hall board, from the time of their election until they were ousted in the quo warranto ²³⁰ proceedings, assumed to act as such board of education. They were the only officials that did attempt to so act. They were in actual possession of the office. Their possession was acquiesced in and acknowledged by the public to such an extent that, so far as the public and third persons are concerned, they must be held to be the de facto board of education at the time this levy was made: *City of Chicago v. Burke*, 226 Ill. 191, 80 N. E. 720; *Samuels v. Drainage Commrs.*, 125 Ill. 536, 17 N. E. 829; *Pritchett v. People*, 1 Gilm. 525; *Attorney General v. Crocker*, 138 Mass. 214; 29 Cyc. 1393, and cases cited.

Judicial decisions are practically a unit in holding that the acts of officers de facto, so far as they affect third parties or the public, in the absence of fraud, are as valid as those of officers de jure. This is a wise and salutary rule. This being so, equity will not enjoin the collection of a tax levied in proper form by officials who are acting as de facto officers: *Schofield v. Watkins*, 22 Ill. 66; *Merritt v. Farris*, 22 Ill. 303; *Metz v. Anderson*, 23 Ill. 463, 76 Am. Dec. 704; *Union Trust Co. v. Weber*, 96 Ill. 346; *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61.

It is further urged that the damages allowed of two hundred and fifty dollars for solicitors' fees cannot be sustained because there is no evidence preserved in the record showing that such fees were reasonable or should have been allowed. The temporary injunction was dissolved on hearing. Suggestions in writing were filed stating the nature and amount of the damages claimed. Instead of hearing evidence as to the amount of the damages, a stipulation was filed by which it was agreed that "the evidence, if heard, would show that the damages for the defendants, by reason of solicitors' fees, etc., would be in the sum of two hundred and fifty dollars." The authorities cited by counsel for appellant, such as *Hamilton v. Stewart*, 59 Ill. 330, to the effect that under the practice in our courts a party should not be mulcted in damages until he ²³¹ shall first have had an opportunity to be heard in his own defense after the nature of the demand has been stated in court, are not in point. The reason for this rule does not apply when there is a stipulation in the record which waived the hearing and the preservation of the evidence on the question in dispute.

It is further insisted that the record does not show the employment by the defendants of the solicitors who were allowed fees in this case. The record shows that the solicitors appeared for the defendants in the injunction suit, in the preparation of the pleadings, the taking of evidence and the arguing of the motion for dissolution of the injunction,

and that the injunction was dissolved. This work was for the benefit of the defendants. The court, in making the order allowing defendants' solicitors' fees, specifically named the counsel here in question as the solicitors for defendants. These facts are prima facie proof that these solicitors were employed by the defendants, and it will be presumed that they were properly employed until the contrary is shown. It is also insisted that some of these defendants were county officials, and, as it was the duty of the state's attorney to appear for them, it was not lawful to allow solicitors' fees to counsel here in question. While it is true the statute makes it the duty of the state's attorney to appear for county officials, there is no law precluding the employment of other counsel. On this record the services of these solicitors appear to have been proper and necessary, and the court did not err in allowing the fees in question.

We have considered all the questions raised in the record and find that the decree of the circuit court must be affirmed.

DE FACTO OFFICERS.

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a. Definitions.—"An officer de facto," said Lord Ellenborough in *Rex v. Bedford Level*, 6 East, 356, "is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." This broad and comprehensive definition was but a generalization of Lord Holt's definition in *Parker v. Kett*, 1 Raym. 658, 12 Mod. 467, viz.: "A steward de facto is no other than he who has the reputation of being such steward, and yet is not a good steward in point of law." In that case the authorities were reviewed by Lord Holt, and the doctrine reaffirmed, that the deputy of a deputy, although his appointment was wholly without authority of law (inasmuch as a delegated authority could not be delegated), derived sufficient color from it to constitute him an officer de facto.

Lord Holt's definition, as generalized and made applicable to all officers by Lord Ellenborough, has been adopted and prevails in the English law, and the same principle appears in the definitions of de facto officers by the courts of this country. "An officer de facto," said Storrs, J., in *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574, "is one who exercises the duties of an office, under color of an appointment or election to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any color of right; and, on the other, from an officer de jure, who is, in all respects, legally appointed and qualified to exercise the office."

In *Kimball v. Alcorn*, 45 Miss. 151, appears the following definition: "An officer de facto is one who comes in by the forms of an election or appointment, but in consequence of some omission, informality or want of qualification, fails to be legally invested. He cannot maintain his possession when called on to show by what title he holds the office. The mere performance of official acts does not make an officer de facto, but there must be color of right, by election or appointment, or an acquiescence on the part of the public for a length of time, which would afford strong presumption of colorable right."

In *Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89, an officer de facto was defined to be "one who has the color of right or title to the office he exercises—one who has the apparent title of an officer de jure"; and in *Brown v. Lunt*, 37 Me. 423, as "one who actually performs the duties of an office with apparent right, and under claim and color of an appointment or an election." In the *Matter of Ah Lee*, 6 Saw. 410, 5 Fed. 899, Deady, D. J., said: "A person actually in office by color of right or title—not a mere usurper or intruder—although not legally appointed or elected thereto, or qualified to hold the same, is still an officer de facto, or in fact, and, as a matter of public convenience and utility, his acts, while so in office, are held valid and binding as to third persons."

In *People v. White*, 24 Wend. 520, Chancellor Walworth said: "An officer de facto is one who comes into a legal and constitutional office by color of a legal appointment or election to that office; and, as the duties of the office must be discharged by some one for the benefit of the public, the law does not require third persons, at their peril,

to ascertain whether such officer has been properly elected or appointed before they submit themselves to his authority, or call upon him to perform official acts which it is necessary should be performed."

In the leading case on the subject of *de facto* officers, *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, Chief Justice Butler not only reviewed all the leading cases on the subject, but gave a comprehensive and discriminating definition of a *de facto* officer. "An officer *de facto*," he said, "is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like. Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public. Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

b. *Color of Title*.—To constitute a person an officer *de facto*, a mere claim to be such officer, and exercising the duties of the office, are not sufficient. There must be color for the claim, and a colorable title to the office: *Rochester & G. V. R. R. v. Clarke Nat. Bank*, 60 Barb. 234. Said Mr. Justice Daniel, in *Wright v. Mattison*, 18 How. (U. S.) 50, 15 L. ed. 280: "The courts have concurred, it is believed without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title." "Color of title to an office is analogous to color of title to land. The latter does not mean a good title, or even a defective conveyance from one having title, but only the appearance of title; that is, a deed to the premises in due form of law": *In re Ah Lee*, 6 Saw. 410, 5 Fed. 899. The distinction between an officer *de jure* and an officer *de facto* is, that the former is one who has the lawful right or title, without the possession of the office, while the latter has the possession and performs the duties under the color of right, without being actually qualified in law so to act, both being distinguished from the mere usurper, who has neither lawful title nor color of right: *Hamlin v. Kassafer*, 15 Or. 456, 3 Am. St. Rep. 176, 15 Pac. 778.

In drawing the distinction between an officer *de facto* and a mere usurper, the court, in *Thompson v. State*, 21 Ala. 48, per Ligon, J., said: "The true distinction between those irregular appointments to office which are void, and those which are voidable only, I apprehend to be this: where the authority under which the officer assumes to act shows, upon its face, that it emanates from a power which had no right to confer it, it is void; but where it is regular on its face, and emanates from a source which has the legal or constitutional

right to bestow it, and it requires a reference to facts not disclosed in the commission or order of appointment, to show that the power of appointment has been illegally or irregularly exercised, the appointment is voidable only. In the former case, all the acts of the appointee, done in reference to such appointment, are void for every purpose; while in the latter, they are valid as to the public and third persons; and this, for the reason, as it has been well said, that "the affairs of society cannot be carried on upon any other principle."

The case of *Van Amringe v. Taylor*, 108 N. C. 196, 23 Am. St. Rep. 51, 12 S. E. 1005, 12 L. R. A. 202, affords an example of an intruder or usurper of an office, acting without the necessary color of right to make him an officer de facto. In this case a duly appointed registrar of voters appointed a clerk to assist him, who fraudulently got possession of the registration books and refused to surrender them, and proceeded in defiance of the demands and protest of the registrar to appoint judges of election, open polls, receive, canvass and make returns of the votes. It was held that the clerk was a mere usurper and the election was void, even though conducted fairly and honestly. Said Merrimon, C. J.: "The ascertainment of the popular will or desire of the electors under the mere semblance of an election unauthorized by law is wholly without legal force or effect, because such election has no legal sanction. In settled, well-regulated government, the voice of electors must be expressed and ascertained in an orderly way prescribed by law. It is this that gives order, certainty, integrity of character, dignity, direction and authority of government to the expression of the popular will. An election without the sanction of the law expresses simply the voice of disorder, confusion and revolution, however honestly expressed. Government cannot take notice of such voice until it shall in some lawful way take on the quality and character of lawful authority. This is essential to the integrity and authority of government." And further: "A mere intruder or usurper is not ordinarily, but may become, an officer de facto in some cases. This can happen only by the continued exercise of the office by him and the acquiescence therein by the public authorities and the public for such length of time as to afford citizens generally a strong presumption that he had been duly appointed. But when without color of authority he simply assumes to act, to exercise authority as an officer, and the public know the fact, or reasonably ought to know that he is a usurper, his acts are absolutely void for all purposes. The mere fact that, apart from his usurpation, his supposed official acts were fair and honest could not impart to them validity and efficiency."

In *Keeler v. City of New Bern*, 61 N. C. 505, the plaintiff sued upon a contract made with certain persons acting as mayor and councilmen of the city. It was proved that they had not been elected, and had never held office in any previous year, and that the charter of the city required its officers to be elected. It was held that the regular induction of these persons into office could not be presumed, and that they were therefore mere intruders or usurpers, and had no authority to bind the city. And in *Denny v. Mattoon*, 2 Allen (Mass.), 361, 79 Am. Dec. 784, where a judge of insolvency, whose jurisdiction was limited to a particular county, undertook to act, and to take jurisdiction of cases in another county, it was held that he was not, in the legal sense of the term, a judge de facto. Said the court: "He had no color or show of right to exercise the duties of the office. He

did not act under any appointment or commission which conferred on him a title to perform official duties, or hold jurisdiction of cases in that county. This was essential to give to him the character of a judge in fact. In the absence of any legal or *prima facie* right to fill the office, he was, within the legal signification of the word, a mere usurper or intruder, whose acts and doings were not even colorably valid."

c. **Reputation and Acquiescence.**—A person may, irrespective of any question of appointment or election, become an officer *de facto* where he has acted under such circumstances of reputation or acquiescence as are calculated to induce people, without inquiry, to submit to or invoke his action in the supposition that he is in truth the officer he assumes to be: *Cary v. State*, 76 Ala. 78; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *Gumberts v. Adams Exp. Co.*, 28 Ind. 181; *Fowler v. Bebee*, 9 Mass. 231, 6 Am. Dec. 62; *State v. Cartwright*, 122 Mo. App. 257, 99 S. W. 48; *Bishop v. Fuller*, 78 Neb. 259, 110 N. W. 715; *Snyder v. Schram*, 59 How. Pr. 404; *Gilliam v. Reddick*, 26 N. C. 368; *Heard v. Elliott*, 116 Tenn. 150, 92 S. W. 764; *Ex parte Tracey* (Tex. Cr. App.), 93 S. W. 538; *State v. Elliott*, 13 Utah, 471, 45 Pac. 346; *Nofre v. United States*, 164 U. S. 657, 17 Sup. Ct. Rep. 212, 41 L. ed. 588; *United States v. Alexander*, 46 Fed. 728.

As said by the court in the last-named case: "The possession by the claimant of the office and the indicia thereof, the performance by him of the duties, in such an open and public manner as will justify the public generally in the belief that he is the officer, and especially the recognition by the people of and their acquiescence in his acts as such officer, are all elements which go to establish the character of a *de facto* officer." And Chief Justice Ruffin, in *Burke v. Elliott*, 4 Ired. (26 N. C.) 355, 42 Am. Dec. 142, discussing the subject of *de facto* officers generally, says: "What shall constitute an officer *de facto* may admit of doubt in different cases. The mere assumption of the office by performing one or even several acts appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute him an officer *de facto*. There must, at least, be some colorable election and induction into office, *ab origine*, or so long an exercise of the office and acquiescence therein of the public authorities as to afford to the individual citizen a presumption strong, that the party was duly appointed, and, therefore, that every person might compel him, for the legal fees, to do his business, and for the same reason was bound to submit to his authority as the officer of the country. A public office is to be supposed necessary for the public service and for the convenience of all the various members of the community; and, therefore, that it will be duly filled by the public authority. When one is found actually in office, and openly and notoriously exercising its functions in a limited district, so that it must be known to those whose official duty it is to see that the office is legally filled and also that it is not illegally usurped; and when this goes on for a great length of time, or for a period which covers much of the time for which the office may be lawfully conferred; it would be entrapping a citizen and betraying his interests, if, when he had applied to the officer *de facto* to do his business, and got it done, as he supposed, by the only person who could do it, he could yet be told that all that was done was void, because the public had

not duly appointed that person to the office, which the public allowed him to exercise."

In the case of *Wilcox v. Smith*, 5 Wend. 231, 21 Am. Dec. 213, the question arose as to the validity of an execution issued by one who was reputed to be a justice of the peace, and had acted as such for three years preceding the trial. For the first year of that time the town in which he resided was a part of the county of Genesee, for the last two it was a part of the county of Orleans. It was shown that he had not been appointed by the officers of the county of Orleans, nor did it appear that he had ever been appointed by the officers of the county of Genesee. All that was shown was that he took the oath and acted as a justice, while the town was a part of the county of Genesee. There being no color by election or appointment shown, the court of common pleas charged the jury that process issued by him was void. The case went to the supreme court, where the question for review was whether the acts of an officer involving the interests of third persons, when no color of election or appointment was shown, could be validated or not. The court held that they could be, and put the decision upon the ground that, without color of election or appointment, he should, under the circumstances, be presumed to be an officer *de facto*, and said: "The mere claim to be a public officer, and the performance of a single or even a number of acts in that character, would not perhaps constitute a man an officer *de facto*. There must be some color of an election or appointment, or an exercise of the office, and an acquiescence on the part of the public for a length of time which would afford a strong presumption of at least a colorable election or appointment."

The reason of public policy, upon which it is held that the acts of an officer *de facto* are not to be called in question collaterally, but are valid as to third persons, may apply even to the case where such officer is a usurper and intruder. This principle has been applied in England to the most important office. After Edward IV obtained the crown, the kings of the line of Lancaster, who had preceded him, were spoken of as "*nuper de facto et non de jure reges Angliæ*," but although Henry VI had been declared a usurper by act of parliament, attempts against his authority (not having been in aid of the rightful king) were capitally punished: 1 Blackstone's Commentaries, 204; 4 Blackstone's Commentaries, 77. Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority; if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question: *Brown v. Lunt*, 37 Me. 423; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409. If the party thus recognizing the officer *de facto* were aware that such officer had some appointment or election, it would strengthen his belief, but without this he would be justified in believing that an authority publicly exercised and assented to was rightfully assumed: *Wilcox v. Smith*, 5 Wend. 231, 21 Am. Dec. 213.

Although it is enough, in cases where the authority of officers comes incidentally in question, and in which they are not parties to the action, to show that they were acting officers, without producing proof of their election or appointment, yet, to give them the char-

acter of de facto officers, it is not enough merely to show that they acted in that capacity in the particular instance in which their authority is questioned: *Buck v. Hawley & Hoops*, 129 Iowa, 406, 105 N. W. 688; *Hall v. Manchester*, 39 N. H. 295. Nor can a person acquire, by merely acting as an officer, such reputation as will constitute him an officer de facto, unless the office is of such a nature that it cannot be exercised without the fact of such exercise being publicly known: *Lambert v. People*, 76 N. Y. 220, 32 Am. Rep. 293.

In the last-named case it was held that perjury could not be predicated of an affidavit sworn to before a notary public who professed to act in the city of New York, but who was a nonresident of the state at that time and at the time of his appointment. Said Earl, J.: "The de facto character of officers is never established by simple proof that they have acted as such. In addition to such proof, it must be shown that they had color of office, or some semblance of competent authority. This is generally shown by proof of some election or appointment, formal, but irregular or defective, under which the officer has assumed to act. I am not, however, prepared to deny that an officer may have sufficient color, in some cases, without any appointment or election whatever; as when he takes possession of the public building or room where the duties are to be discharged, and has possession of the public property pertaining to the office, and is thus clothed with all the indicia of official position, and has for a considerable time, with the acquiescence of the public, and without dispute, openly and notoriously exercised the duties of the office. Such a case could rarely, if ever, occur in this country; but if it should occur, it might give color of office. To illustrate more clearly my meaning: if one should take possession of a county clerk's office, claiming to be clerk, and should there act as clerk for a considerable time, by the general acquiescence of the public, there being no one else to exercise the duties of the office, he might have sufficient color of office to make him clerk de facto. But a notary public having no public office, clothed with none of the symbols or outward tokens of official position, being one of thousands who may, anywhere in the same county, exercise the duties of the same office, cannot get color of office by simply acting from time to time as he might have opportunity. He can get color of office only by an appointment emanating from the appointing power, or from some power having, at least, a colorable right to make the appointment. If the governor should commission him, without confirmation by the Senate, or while he was a nonresident, and he should then act, he would be in office under color of appointment, and thus become a notary de facto."

In reading the above opinion, the particular point decided in the case should be kept in view. This was that a notary public having no public office and clothed with none of the symbols or outward tokens of official position, could not get color of office by simply acting from time to time as he might have opportunity; and therefore, not having the status of a de facto officer, perjury could not be predicated of an affidavit sworn to before him. When, however, the learned justice says that the de facto character of officers is never established by simple proof that they have acted as such, and qualifies this statement by conceding that such color might, under certain circumstances, be acquired by a rank intruder or usurper, the statement is manifestly too broad, and the illustration that qualifies

it, while not open to legal criticism, is not a very apposite one. Color of title by reputation and acquiescence is better illustrated in the case of Wilcox v. Smith, 5 Wend. 231, 21 Am. Dec. 213, where the court had squarely before it the question of the validity of the acts of an officer holding by that somewhat dubious tenure.

d. Invalid or Irregular Election or Appointment.

1. In General.—One coming into office by color of an election or appointment is an officer *de facto*, and his acts in relation to the public or third persons are valid until he is removed, although it is conceded that his election or appointment was illegal: *Jeffords v. Hine*, 2 Ariz. 162, 11 Pac. 351; *People v. Roberts*, 6 Cal. 214; *Smith v. State*, 19 Conn. 493; *Waller v. Perkins*, 52 Ga. 233; *Stickney v. Stickney*, 77 Iowa, 699, 42 N. W. 518; *Yancy v. Town of Fairview (Ky.)*, 66 S. W. 636; *Coquillard Wagon Works v. Melton*, 137 Ky. 189, 125 S. W. 291; *Bonner v. Lynch*, 25 La. Ann. 267; *Wayne County Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382; *City of Vicksburg v. Lombard*, 51 Miss. 111; *Green v. Village of Rienzi*, 87 Miss. 463, 112 Am. St. Rep. 449, 40 South. 17; *Attorney General v. Megin*, 63 N. H. 378; *Savage v. Ball*, 17 N. J. Eq. 142; *People v. McDowell*, 70 Hun, 1, 23 N. Y. Supp. 950; *Commissioners of Trenton v. McDaniel*, 52 N. C. 107; *In re Krickbaum's Contested Election*, 221 Pa. 521, 70 Atl. 852; *Turney v. Dibrell*, 62 Tenn. (3 Baxt.) 235; *Nalle v. City of Austin*, 23 Tex. Civ. App. 595, 56 S. W. 954; *Dean v. Gleason*, 16 Wis. 1; *Cardoza v. Baird*, 30 App. Cas. (D. C.) 86.

Said Mr. Justice Field in *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. ed. 178: "The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Officers are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, if in every proceeding before such officers their title could be called in question."

"The *de facto* doctrine is exotic," said Spear, J., in *State v. Poulin*, 105 Me. 224, 134 Am. St. Rep. 543, 74 Atl. 119, 24 L. R. A., N. S., 408, "and was ingrafted upon the law as a matter of policy and necessity to protect the interests of the public and individuals where those interests were involved in the official acts of persons exercising the duty of an office without being lawful officers. It would be unreasonable to require the public to inquire into the title of an officer, or compel him to show title, and these have become settled principles in law. To protect those who deal with officers apparently holding office under color of law in such manner as to warrant the public in assuming that they are officers and in dealing with them as such, the law validates their acts as to the public and third persons on the ground that as to them, although not officers *de jure*, they are officers in fact, whose acts public policy requires to be construed as valid. This was not because of any character or quality conferred upon the officer, or attached to him by reason of any defective elec-

tion or appointment, but as a name or character given to his acts by the law for the purpose of making them valid."

2. **Irregular Election or Appointment.**—Officers acting under an irregular appointment or election are officers *de facto*, and their acts will not be held void on the ground of such irregularity: *Waller v. Perkins*, 52 Ga. 233; *Carleton v. People*, 10 Mich. 250; *State v. Gray*, 23 Neb. 365, 36 N. W. 577; *Tucker v. Aiken*, 7 N. H. 113; *Brinkerhoff v. City of Jersey City*, 64 N. J. L. 225, 46 Atl. 170. Thus, in *Stuart v. Inhabitants of Elsworth*, 105 Me. 523, 75 Atl. 59, where the returns on warrants for the election of mayor and alderman were defective in not alleging that the places where the attested copies thereof were posted were either public or conspicuous places, but the mayor and aldermen chosen at the election proceeded to organize on the day and in the manner provided in the city charter, and apparently were recognized by the citizens as mayor and aldermen, and claimed the right to perform, and did perform, the duties appertaining to the respective offices, and the citizens acquiesced in their so doing, it was held that, despite the imperfections in the returns, they were *de facto* officers, and in controversies to which they were not parties their title to their offices and their acts therein could not be questioned.

In *Butler v. Walker*, 98 Ala. 358, 39 Am. St. Rep. 61, 13 South. 261, it was held that where, in the belief that a municipal charter had been forfeited for nonuser, proceedings were taken for the reincorporation of the municipality which were void because of the pre-existing incorporation, and the officers provided for in the new and the old charters were the same, as were also the duties of their offices, officers elected under proceedings prosecuted in the manner authorized by the new charter, who took and exercised the duties of their offices in the mistaken belief that they had been elected and were acting under the new charter, were *de facto* officers of *de jure* offices, and all their acts as between the corporation and the public or third persons, in their official capacity, were valid for all purposes, and to the same extent as if they had been chosen at elections held under the original organization of the municipality. It was further held in this case that where an election was ordered by these *de facto* officers for the selection of their successors in office as prescribed by the statute, and as the same would have been ordered had there been no lapse in corporate organizations, the persons elected thereat became officers *de jure*, and their title could not be assailed on the ground that the officers ordering such election were not themselves officers *de jure*.

In *Hawkins v. Town of Jonesboro*, 63 Ga. 527, it was held that town officers, elected by votes cast by persons who had never registered, were *de facto* officers, and could levy and collect taxes, although the right to vote for town officers was by law confined to registered voters.

In *Attorney General v. Parsell*, 99 Mich. 381, 58 N. W. 335, the law provided for the appointment by the governor of a board of control of three members, not more than two from the same political party, the governor to be *ex officio* a member of the board. It was held that the board's official acts could not be impeached on the ground that appointments to the board had been made for political purposes, since the appointees were at least *de facto* officers.

In *Hamlin v. Dingman*, 5 Lans. 61, the complaint was for conversion of the plaintiff's property. The defense was that the defendant was sole trustee of the school district in which the property was taken, and that it was taken and sold for a tax levied against the plaintiff and others for school purposes, by a collector, pursuant to a warrant issued by the defendant to such collector. The collector, however, had been verbally appointed by the defendant, instead of in writing as required by law. It was held that the tax collector was an officer *de facto*, and that the defendant was not liable for his acts in enforcing the warrant.

The same ruling as to the *de facto* character of an officer irregularly appointed by parol was made in *Village of Canaseraga v. Green*, 88 N. Y. Supp. 539.

3. **Want of Power in Electing or Appointing Body.**—It is not necessary in all cases, in order that the acts of one acting as an officer without legal right may be held valid as to the public and third persons, as the acts of an officer *de facto*, that he should have color of election or appointment by the only body which has power to elect or appoint him, or that the appointing or electing body should in all cases possess the legal power: *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409. When an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon such office, and performs its duties, his official acts will be valid with respect to the public and to third persons with whom he deals officially, and he will be an officer *de facto*, notwithstanding there was a want of power to appoint in the body or person who professed to do so: *Ray v. Murdock*, 36 Miss. 692; *Brady v. Howe*, 50 Miss. 607; *Usher v. Western Union Tel. Co.*, 122 Mo. App. 98, 98 S. W. 84; *Mallett v. Uncle Sam Gold-Silver Min. Co.*, 1 Nev. 188, 90 Am. Dec. 484; *Erwin v. City of Jersey City*, 60 N. J. L. 141, 64 Am. St. Rep. 584, 37 Atl. 732; *People v. Stevens*, 5 Hill, 616; *McLean v. State*, 55 Tenn. (8 Heisk.) 22; *State v. Hoff* (Tex. Civ. App.), 29 S. W. 672.

It was held, however, in *Brumby v. Boyd*, 28 Tex. Civ. App. 164, 66 S. W. 874, that where an appointment to office is not merely irregular or informal, but is void, the appointee has no colorable right to the office, and is not, therefore, an officer *de facto*, but a mere intruder. In that case the city charter provided that in the event of a vacancy in any elective office, the council, upon nomination by the mayor, should fill such vacancy. The mayor, the council not being in session, filled a vacancy in the health office, an elective office, by his individual appointment; and the aldermen also, without the consent of the mayor, appointed another person to perform the duties of such office. It was held that inasmuch as under the city charter the vacancy could be filled only by the mayor and board of aldermen acting together as the city council, both appointments were void, and neither appointee was either a *de jure* or *de facto* officer.

A claim, under appointment, of title to an office which by law is elective, is, it was decided in *People v. Albertson*, 8 How. Pr. 363, no color of title, and cannot constitute the claimant an officer *de facto*. The same ruling was made in *Village of Canaseraga v. Green*, 88 N. Y. Supp. 539, although the situation was reversed, the claim to the office, appointive under the law, resting upon an election thereto. Said the court in the former case: "An officer *de facto* is

one who acts under color of title, which color can only be given by power having authority to fill the office. In the case of elective officers, the electors of the proper district confer the title, or color of title; and in the case of officers who must be appointed, it is the appointing power who does this. An elective officer who acts under color of an election is a good officer, so far as the public and third persons are concerned, until he is ousted by proceedings upon a quo warranto. Whether there was error or fraud in that election, whether the result was properly or improperly declared, and generally, whether the election is valid or not, are questions which cannot be raised in a collateral proceeding or cause. It is sufficient that the office is elective, that the voters of the district he represents have authority to fill it, and that this has been done, or purports to have been done, and to have resulted in his election, as appears by the prima facie evidence of such a fact. The correctness of the result in such a case can only be questioned by quo warranto, as before remarked. But when by law the office is not elective, as in the case of a notary public, and the like, no election, however correct in form, would give the man elected a title to the office, or even color of title, for the plain reason that the electors had no power to fill the office. And so in regard to an office, which by law must be filled by appointment. If the proper appointing power have acted in his case, and given him an appointment, no matter how defective in form, he is, *de facto*, an officer acting under color of title, and his acts are good, so far as the public and third persons are concerned. If, in fact, his appointment is voidable by reason of fraud or defects, or from any cause, other than the want of authority in the appointing power, it can only be taken advantage of in proceedings upon a quo warranto, and can in no case be raised in a collateral action or proceeding. But when the appointment is made by persons having no authority to appoint at all, the appointment is not voidable merely, but absolutely void. It gives no color of title. And this, in all cases, may be attacked collaterally; at all events, this defendant, on trial upon an indictment charging him with perjury, committed in an examination before a magistrate, may show, if he can, that the magistrate at the time was not acting under color of title—in other words, that the three justices who appointed him had no authority to fill the office at all."

In *State v. Cross*, 44 W. Va. 315, 29 S. E. 527, it was held that where the record fails to show an order for the election of a special judge, made by the regular judge, as provided by law, such special judge is without jurisdiction to act, and his proceedings are void.

The cases we have cited in support of the proposition that an election or appointment is void in the absence of power or authority in the electing or appointing body, should not be considered as squarely deciding that one taking office under such want of title may not, nevertheless, through reputation and acquiescence, acquire the status of a *de facto* officer. In *Village of Canaseraga v. Green*, 88 N. Y. Supp. 539, the principle was recognized that the mere occupying of an office and assuming its duties for a long time, with acquiescence therein by the general public, and being recognized by the public as such officer, may constitute one a *de facto* officer. But this rule could not be applied to the case under consideration when the only claim to the office was based on the fact that the claimant had assumed to act for about three months. In *Brumby v. Boyd*, 28

Tex. Civ. App. 164, 66 S. W. 874, the controversy was really between the two claimants to the office, the rights of the public and of third persons being only indirectly involved. *People v. Albertson*, 8 How. Pr. 363, and *State v. Cross*, 44 W. Va. 315, 29 S. E. 527, were both criminal cases, and in such cases a liberal rule is always adopted to protect a person from being branded as a criminal when the crime depends on whether a person is an officer de facto or not. In the last-named case, moreover, there was a dissenting opinion, the dissent resting upon the firmly settled rule that where a judge assumes to act under lawful authority, and there is color of authority, his acts will be valid as those of a de facto officer. The case of *People v. Albertson*, 8 How. Pr. 363, it should be remembered, was decided a long time prior to the decision in *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, and at a time when there was some confusion, and perhaps conflict, in the cases on the point involved. In any case that deliverance should have little weight as opposed to *State v. Carroll*, which, with its exhaustive marshaling of cases and cogent reasoning, may be said to have set the current of American authority steadily flowing in the channel there marked out.

e. Persons Ineligible or not Qualified.

1. **Ineligibility or Want of Qualification.**—The eligibility of an officer is as difficult of ascertainment as his actual election; and sound policy requires that the public should be no more required to investigate the one than the other before according respect to his official position. Ineligibility, therefore, does not prevent one becoming a de facto officer if he has the requisite color of right to the office: *Farrier v. Dugan*, 48 N. J. L. 613, 7 Atl. 881, affirming *Dugan v. Farrier*, 47 N. J. L. 383, 1 Atl. 751.

"The validity of an election," said the court in *Satterlee v. San Francisco*, 23 Cal. 314, "does not depend upon the eligibility of the candidates, for if it did, it might be contended that an election would be invalid because an unsuccessful candidate was disqualified from holding the office voted for. The validity of an election depends upon its being held and conducted at the proper time and place, in the manner and by the proper persons and officers, as required by law. The election in this case was thus held, and it was therefore valid. The person receiving a majority of the votes cast at a valid election may not possess the necessary qualifications to entitle him to take or hold the office to which he is elected; but that is a question to be adjudicated by the proper tribunals."

In *People v. Coco*, 70 Misc. Rep. 195, 128 N. Y. Supp. 409, it was held that the presence in the grand jury-room of a temporarily designated stenographer when evidence was being taken, the stenographer lacking the statutory qualifications as to residence and citizenship, did not invalidate the indictment. The stenographer was at least a de facto official, and his service stood as a public act.

In *Morford v. Territory*, 10 Okl. 741, 63 Pac. 958, 54 L. R. A. 513, it was held that a person elected to fill the office of probate judge, who duly qualified and entered upon the discharge of his duties, was a de facto judge, though he was not a licensed attorney, as required by law.

In *Johnson v. Sanders*, 131 Ky. 537, 115 S. W. 722, it was held that while the offices of postmaster and school trustee were, under the law, incompatible, and both could not legally be held at the same

time by one person, one who, under appointment duly made, exercises the office of school trustee is a *de facto* officer in that office, although disqualified by reason of his being the postmaster.

In *Bates v. Dyer*, 9 Humph. (28 Tenn.) 162, a sheriff was held to be a *de facto* officer, although ineligible by reason of the fact that he was a defaulter at the time of his election.

In the case of *In re Danford*, 157 Cal. 425, 108 Pac. 322, a judge was held to be a *de facto* officer, although he was ineligible by reason of the fact that he was an alien.

In *St. Louis County Court v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355, and in *Trinity College v. City of Hartford*, 32 Conn. 452, the claimants to the offices were not freeholders, and were therefore disqualified by law to hold their respective offices. They were, however, held to be *de facto* officers, and their acts, until removal, were valid. Said the court in the first-named case: "When the appointing power has made an appointment, and a person is appointed who has not the qualifications required by law, the appointment is not therefore void. The person appointed is *de facto* an officer; his acts in the discharge of his duties are valid and binding. He may be guilty of usurpation, and be punished for acting without being qualified; but the peace and repose of society imperiously require that his official acts, so far as others are concerned, should be valid. This is true of the highest and lowest officers from the governor to the constable. . . . A statute prescribing qualifications to an office is merely directory, and although an appointee does not possess the requisite qualifications, his appointment is not therefore void, unless it is so expressly enacted."

The rule we have been illustrating applies, however, only to cases in which the common law on the subject has not been repealed. Where the constitution or a statute has interposed and declared that the official acts of persons who have not been duly appointed to office, or who have not qualified by the requisite tests, shall be absolutely void, of necessity, a different rule must be applied. In such cases, no court could be justified, upon an assumed principle of public expediency, in disregarding the imperative declarations of the law: *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169. In this case it was held that an unconstitutional appointment of a member of the legislature to an office was absolutely void, and did not make him an officer *de facto*.

2. **Failure to Properly Qualify.**—The failure of an officer to file a bond before entering upon the duties of his office, or mere irregularities in his bond, will not prevent his being a *de facto* officer, nor invalidate his acts as to the public and third persons: *Chancey v. State* (Ala.), 54 South. 522; *Wheeler & Wilson Mfg. Co. v. Sterrett*, 94 Iowa, 158, 62 N. W. 675; *Murphy v. Lentz*, 131 Iowa, 323, 108 N. W. 530; *McCormick v. Fitch*, 14 Minn. 252 (Gil. 185); *Powers v. Braley*, 41 Mo. App. 556; *Holt County v. Scott*, 53 Neb. 176, 73 N. W. 681; *Haskell v. Dutton*, 65 Neb. 274, 91 N. W. 395; *Fairport Union Free School v. Fonda*, 77 N. Y. 350; *Kottman v. Ayer*, 3 Strob. 92; *State v. Messervey*, 86 S. C. 503, 68 S. E. 766; *Vaccari v. Maxwell*, Fed. Cas. No. 16,810 (3 Blatchf. 368).

The same principle has been uniformly adopted where the officer has failed to take the preliminary oath required by law: *Murphy v. Shepard*, 52 Ark. 356, 12 S. W. 707, following *Stell v. Watson*, 51 Ark. 516, 11 S. W. 822; *Coles County v. Allison*, 23 Ill. 437; *Caskey*

v. City of Greensburg, 78 Ind. 233; Akers v. Kolkmeier, 97 Mo. App. 520, 71 S. W. 536; Tucker v. Aiken, 7 N. H. 113; Perkins v. Perkins, 24 N. J. L. 409; Rosell v. Board of Education of Neptune City, 68 N. J. L. 498, 53 Atl. 398, affirmed Rosell v. Borough of Avon by the Sea, 70 N. J. L. 336, 57 Atl. 1132; Gregg Tp. v. Jamison, 55 Pa. 468.

The same rule applies where there have been other mere irregularities in an election or appointment, as, for instance, where no certificate of election has been issued to one duly elected: Montgomery v. O'Dell, 67 Hun, 169, 22 N. Y. Supp. 412, affirmed 142 N. Y. 665, 37 N. E. 570; or where an appointment has merely been deposited in the office of the county clerk, instead of being recorded, as required by law: Dane v. State, 36 Tex. Cr. App. 84, 35 S. W. 661.

In the case of Margate Pier v. Hannam, 3 Barn. & Ald. 266, 5 Eng. Com. L. 278, where a statute provided for the appointment of justices of the peace in a certain place, and declared that no person should be authorized to act as justice unless he had taken certain oaths, it was decided that the acts of a justice appointed under that law were valid, although he had not taken the oaths, and although he might be punished for so acting; and that, therefore, persons seizing goods under a warrant of distress, signed by such justice, were not trespassers.

"It is obvious," said Abbott, C. J., "that if the act of the justice, issuing a warrant, be invalid on the ground of such an objection as the present, all persons who act in the execution of the warrant will act without any authority. A constable who arrests, and a jailer who receives, a felon will each be a trespasser; resistance to them will be lawful; everything done by either of them will be unlawful; and a constable, or persons aiding him may, in some possible instance, become amenable even to a charge of murder, for acting under an authority which they reasonably considered themselves bound to obey, and of the invalidity whereof they are wholly ignorant."

In *People v. Collins*, 7 Johns. 549, a peremptory mandamus was issued to the defendant, who was a town clerk, to record a highway laid out and established by the commissioners of highways, in the town, although it appeared, by the return of the clerk to the alternative mandamus, that the commissioners had not taken the oath of their office, and a certificate of such oath had not been filed in the clerk's office, as required by law. The court said that the commissioners were liable to a penalty; but that they were commissioners de facto, as they came into office by color of title, and that their acts, as such, were valid as far as the rights of third persons and of the public were concerned.

In *Nason v. Dillingham*, 15 Mass. 170, a levy of an execution on a pew in a meeting-house, made by a coroner who had not given bond for the faithful execution of his office, and in *Buckman v. Ruggles*, 15 Mass. 180, 8 Am. Dec. 98, an execution upon real estate, made by a deputy sheriff, who had not taken the oath required by law, were held to be valid; the court saying, in the latter case, that such a rule was necessary to prevent a failure of justice and great public mischief.

In *People v. Hopson*, 1 Denio, 574, it was held that on the trial of an indictment for resisting a constable, while engaged in executing process against the defendant's property, the defendant is not en-

titled to show that the officer had not taken the oath of office, or given the security required by law; it being sufficient, in such a case, that the party resisted was an officer *de facto*.

In *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574, it was held that a grand juror who takes the oath after having once refused to qualify and having paid the fine for his refusal, is an officer *de facto* as to any presentment in which he may join thereafter. Said Storrs, J., in this case, after citing a number of authorities: "The principle established by these cases, in regard to the proceedings of officers *de facto*, acting under color of title, is one founded in policy and convenience; is most salutary in its operations; and is, indeed, necessary for the protection of the rights of individuals, and the security of the public peace. The rights of no persons claiming a title or interest under or through the proceedings of officers having an apparent authority to act would be safe, if he were obliged to examine the legality of the title of such officer up to its original source, and the title or interest of such person were held to be invalidated by some accidental defect or flaw in the appointment, election or qualification of such officer, or in the rights of those from whom his appointment or election emanated; nor could the supremacy of the laws be maintained, or their execution enforced, if the acts of officers having a colorable, but not a legal, title were to be deemed invalid."

f. *Acting After Expiration of Term*.—Where an officer continues in the exercise of the duties of the office after his term of office has expired, or after his authority to act has ceased, he is an officer *de facto*, and the validity of his official acts cannot be questioned collaterally: *Smith v. Bondurant*, 74 Ga. 416, 58 Am. Rep. 438; *People v. Beach*, 77 Ill. 52; *Morton v. Lee*, 28 Kan. 286; *Hale v. Bischoff*, 53 Kan. 301, 36 Pac. 752; *Petersilia v. Stone*, 119 Mass. 465, 20 Am. Rep. 335; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374; *People v. Village of Highland Park*, 88 Mich. 653, 50 N. W. 660; *Hilgert v. Barber Asphalt Pav. Co.*, 107 Mo. App. 385, 81 S. W. 496; *Oliver v. City of Jersey City*, 63 N. J. L. 634, 76 Am. St. Rep. 228, 44 Atl. 709, 48 L. R. A. 412; *In re Collins*, 77 N. Y. Supp. 702, 75 App. Div. 87; *Village of Canaseraga v. Green*, 88 N. Y. Supp. 539; *People v. Lister*, 106 App. Div. 61, 93 N. Y. Supp. 830; *State v. Jacobs*, 17 Ohio, 143; *Hamlin v. Kassafer*, 15 Or. 456, 3 Am. St. Rep. 176, 15 Pac. 778; *Keeling v. Pittsburg V. & C. Ry. Co.*, 205 Pa. 31, 54 Atl. 485; *State v. McJunkin*, 7 S. C. (7 Rich.) 21; *Maley v. Tipton*, 2 Head (39 Tenn.), 403; *Nalle v. City of Austin*, 41 Tex. Civ. App. 423, 93 S. W. 141; *Roche v. Jones*, 87 Va. 484, 12 S. E. 965; *Waite v. City of Santa Cruz*, 89 Fed. 619.

In *Hilgert v. Barber Asphalt Paving Co.*, 107 Mo. App. 385, 81 S. W. 496, the facts were these: The legislative functions of cities of the second class in Missouri, prior to Sess. Acts Mo. 1901, p. 55, were by law vested in a common council, composed of two aldermen from each ward. The act referred to, which was passed March 13, 1901, provided that the legislative department of cities of the second class should consist of a municipal assembly, composed of two houses, members to be elected at the annual election on the first Tuesday after the first Monday of April in 1901; and in the emergency section of the act it was provided that as there were cities of the second class desirous of effecting the change contemplated at

the election to be held in April, 1901, the act should be in force and take effect from its passage. It was held that, conceding that the common council of a city of the second class ceased to exist immediately on the passage of the act, and did not continue legally in office until the election in April, nevertheless, after the passage of the amendatory act, the members of the council were de facto officers, so that an ordinance passed after the amendatory act, confirming a paving contract, was valid. Said the court, per Smith, P. J.: "But if the members of the common council after the passage of said act were not de jure officers, they were de facto. They were, it seems to me, in office under such apparent circumstances of color as would lead men to suppose them to be legal officers entitled to exercise the legislative function of the city. There is nothing to show that they did not act in good faith in continuing to exercise the legislative function. There was no other officer or body then in existence authorized by law to exercise such functions. Even though their office had been abolished, and there was no longer any such office to fill, yet, as there was color of right for their action as such officers, and, though their offices had been abolished, the new legislative officers or body had not been elected nor organized, their acts, so far as affected the rights of third persons and the public, were valid as the acts of a de facto legislative body. The members of the common council were not mere intruders or usurpers. The offices which they pretended to fill were originally legal offices, so that they were valid in their birth. They continued, after the passage of the repealing and amendatory act, by common consent of the people and the government, to exercise the legislative functions, and it is difficult to see why they were not at least de facto officers."

In *Waite v. City of Santa Cruz*, 89 Fed. 619, it was held that where a mayor and council of defendant city had been elected and qualified, but did not assume the duties of their respective offices until several weeks thereafter, and in the meantime, the outgoing officers continued to act publicly and without objection, the latter were de facto officials, and could bind the city in the signing and delivery to a purchaser of municipal bonds.

Magneau v. City of Freemont, 30 Neb. 843, 27 Am. St. Rep. 436, 47 N. W. 280, 9 L. R. A. 786, was a somewhat similar case. It involved the validity of an ordinance purporting to have been passed by the city council. Two persons were elected as councilmen of the defendant city as the successors to two others whose terms had expired; and two days before the passage of the ordinance referred to, the newly elected members had qualified as such councilmen, and, upon such qualification, became de jure members of the council. They did not, however, actually enter upon the duties of their office immediately upon qualifying, and the outgoing councilmen, notwithstanding the expiration of their terms of office, were present, and acted as members of the council when the ordinance in question was passed. The court thus stated the question before it: "It is conceded that all who participated at the meeting when the ordinance was adopted were legal members of the council except Peterson and Lowery, whose right to act is questioned on the ground that their successors had previously qualified on April 7th. The statute requires that two-thirds of all the members of the council shall be necessary to constitute a quorum for the transaction of business. It is obvious that, if Peterson and Lowery could not lawfully act with

the council at that meeting, no quorum was present, and the ordinance is invalid."

Then, after proceeding to show that under the laws of Nebraska the terms of Peterson and Lowery expired upon the qualification of their successors, the court said: "While Morse and Hein had qualified, they had not, as yet, taken their seats in the council, or participated in the proceedings of that body. The names of Lowery and Peterson appeared upon the roll of members, and they were recognized as such by other members of the council as well as by the mayor and city clerk. They took part in the proceedings of the council on April 9th without objection from anyone, although Morse and Hein were, at the time, in the council chamber. We conclude, therefore, that Morse and Hein were *de jure* officers, and that Lowery and Peterson were *de facto* members of the city council. The cases are numerous which hold that the acts of a *de facto* officer, so far as they involve the interests of the public, or third persons, are as valid and binding as though he was an officer *de jure*." "It follows," concluded the court, after citing a number of cases, "from the reason of these cases that the acts of Lowery and Peterson are valid, and that there was a quorum of the city council present at the time the ordinance was adopted."

Morton v. Lee, 28 Kan. 286, was a suit brought to enjoin the collection of a judgment rendered by a justice of the peace after his term of office had expired, and after the election and qualification of his successor. It was held that the justice was a justice of the peace *de facto*, and his acts, as such, were valid.

In State v. Williams, 5 Wis. 308, 68 Am. Dec. 65, it was held that where a governor continued to hold over, after the expiration of his term, and after the taking of the oath of office by his rightful successor, on the assumption of his re-election, and under the certificate of the state canvassers, and so continued the acting governor, his approval of an act of the legislature was valid, as the act of an officer *de facto*.

In Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374, one Hawkes, while holding the office of justice of the peace, was elected to the state legislature and had qualified and entered upon his duties, but continued to act as justice, although the state constitution provided that, upon accepting another office, that of justice should become vacant. Said the court by Justice Gray: "If Mr. Hawkes, upon taking his seat in the House of Representatives, ceased to be a justice *de jure*, he was, by color of the commission which he still assumed to hold and act under, having the usual signs of judicial office—sitting in the court, using its seal, and attended by its clerk—and no other person having been appointed in his stead, a justice *de facto*. Upon well-settled principles, it would be inconsistent with the convenience and security of the public, and with a due regard to the rights of one acting in an official capacity under the color of, and a belief in, lawful authority to do so, that the validity of his acts as a justice should be disputed, or the legal effect of his election and qualification as a representative be determined, in this proceeding to which he is not a party."

A person who is legally elected to, and qualifies and enters upon the duties of, an office, and subsequently is appointed to and accepts another and incompatible office, but continues to publicly discharge the duties of the first during the term thereof, without any attack

made upon his title, or the appointment or election of any other person thereto, is a *de facto* officer: *Oliver v. City of Jersey City*, 63 N. J. L. 634, 76 Am. St. Rep. 228, 44 Atl. 709, 48 L. R. A. 412.

It was held, however, in *Biencourt v. Parker*, 27 Tex. 558, that the single act of taking a deposition by a notary who had vacated his office by accepting another and incompatible office, did not make him a notary public *de facto*, and the deposition was properly suppressed.

Where there has been a judgment of a competent tribunal against the right of one to hold an office, all color of authority ceases, and his subsequent acts in the office will not be considered the acts of a *de facto* officer: *Hugg v. Ivins*, 59 N. J. L. 139, 36 Atl. 635; *Rochester & G. V. R. R. v. Clark Nat. Bank*, 60 Barb. 234.

It was held in *Fitzgerald v. Pawtucket St. Ry.*, 24 R. I. 201, 52 Atl. 887, which was followed by *Devlin v. White*, 27 R. I. 173, 61 Atl. 172, that where a city charter fixes the time for the expiration of the term of the board of aldermen, and the inauguration of city officers for the new year, a resolution or ordinance passed by the retiring board of aldermen after the time so fixed is not valid as the act of a *de facto* body.

In *Potomac Oil Co. v. Dye* (Cal. App.), 113 Pac. 130, it was held that the secretary of a corporation elected by a board of directors who have gone out of office does not acquire such color of right to the office as to make him an officer *de facto*.

One who holds over after the expiration of his term, and after his successor has duly qualified and is ready to serve, virtually usurps the office, and cannot be considered an officer *de facto*: *Olson v. Board of Commrs. of Trego County*, 8 Kan. App. 414, 54 Pac. 305; *Commonwealth v. Bush*, 131 Ky. 384, 115 S. W. 249; *Chandler v. Starling* (N. D.), 121 N. W. 198; *State v. Lane*, 16 R. I. 620, 18 Atl. 1035; *State v. Oates*, 86 Wis. 634, 39 Am. St. Rep. 912, 57 N. W. 296. Said the court in this last case: "It seems very clear to us that the power to decide the *prima facie* right to an office lies with the canvassing board. This *prima facie* right, if it means anything, must mean that the person having it has the right to the possession of the office and its books, papers, and other property when his term of office begins, if he has duly qualified. To this, we think, there is but one exception, and that is when the office is already filled by a *de facto* officer. There has been much discussion as to what will constitute a *de facto* officer. It is not material here to consider who may be a *de facto* officer as to third persons and the public in general. The question is, Who is a *de facto* officer, as against the person holding a certificate of election, who has duly qualified as required by law? On this question the law is well settled. A *de facto* officer is one who is in possession of an office, and discharging its duties under color of authority: *McCrary on Elections*, 3d ed., sec. 218; 2 *Dillon on Municipal Corporations*, sec. 892. By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer: *McCrary on Elections*, sec. 218. Tested by this rule, it is apparent that the defendant is in no proper sense a *de facto* officer as against the relator. There has been no canvass or determination by anyone in his favor, nor has he any certificate, commission or authority from any person, officer or board purporting to authorize him to discharge the duties of the office.

The defendant not being a *de facto* officer, it was his duty to surrender to the relator the property of the office at the commencement of the relator's term. Such a surrender would have been simply a recognition of the relator's *prima facie* title to the office under the canvass and certificate. It would not have affected any right the defendant might have to contest the election of relator in a proper proceeding."

g. Incumbents of Offices Which have No Legal Existence.—According to many authorities, an appointment or election of one to an office that has no legal existence gives no color of existence to the office or color of authority to the person so appointed or elected; in other words, there must be an office *de jure* in order to have an officer *de facto*: *Schulte v. Wilke*, 167 Ala. 663, 52 South. 526; *Caldwell v. Barrett*, 71 Ark. 310, 74 S. W. 748; *Bedingfield v. First Nat. Bank*, 4 Ga. App. 797, 61 S. E. 30; *In re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255, 68 Pac. 639; *Hildreth's Heirs v. McIntire's Devisee*, 24 Ky. (1 J. J. Marsh.) 206, 19 Am. Dec. 61; *People v. Knopf*, 183 Ill. 410, 56 N. E. 155; *Carleton v. People*, 10 Mich. 250; *Ex parte Snyder*, 64 Mo. 58, affirmed *State v. O'Brien*, 68 Mo. 153; *Weesner v. Central Nat. Bank*, 106 Mo. App. 668, 80 S. W. 319; *Flaucher v. City of Camden*, 56 N. J. L. 244, 28 Atl. 82; *In re Quinn*, 152 N. Y. 89, 46 N. E. 175; *State v. Shuford*, 128 N. C. 588, 38 S. E. 808; *Hawver v. Seldenridge*, 2 W. Va. 274, 94 Am. Dec. 532; *Herring v. Lee*, 22 W. Va. 661; *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. ed. 178.

The rule is usually applied where an office is created or attempted to be created by an unconstitutional act. A leading case on the point is that of *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. ed. 178. In this case railroad bonds issued by a board of county commissioners on behalf of the county were held invalid on the ground that the legislative act creating the board of county commissioners was unconstitutional. It was contended that if the act creating the board was void, and the commissioners were not officers *de jure*, they were nevertheless officers *de facto*, and that the acts of the board as a *de facto* body were binding upon the county. "This contention," said the court, speaking by Mr. Justice Field, "is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the supreme court of the state. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers. . . . The idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is that a legislative act, although unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give

validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The decision in *Hildreth's Heirs v. McIntire's Devisee*, 24 Ky. (1 J. J. Marsh.) 206, 19 Am. Dec. 61, further illustrates the rule. The legislature of Kentucky attempted to abolish the court of appeals established by the state constitution, and create in its stead a new court. Members of the new court were appointed and undertook to exercise judicial functions. It was held that they were not incumbents of *de jure* or *de facto* offices, nor were they *de facto* officers of *de jure* offices. The court said: "Although they assumed the functions of judges and clerk, and attempted to act as such, their acts in that character are totally null and void, unless they had been regularly appointed under, and according to, the constitution. A *de facto* court of appeals cannot exist under a written constitution which ordains one supreme court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them. There cannot be more than one court of appeals in Kentucky as long as the constitution shall exist, and that must necessarily be a court 'de jure.' When the government is entirely revolutionized, and all its departments usurped by force or the voice of a majority, then prudence recommends, and necessity enforces, obedience to the authority of those who may act as the public functionaries, and in such a case the acts of a *de facto* executive, a *de facto* judiciary, and of a *de facto* legislature, must be recognized as valid. But this is required by political necessity. There is no government in action excepting the government *de facto*, because all the attributes of sovereignty have, by usurpation, been transferred from those who had been legally invested with them, to others, who, sustained by a power above the forms of law, claim to act and do act in their stead. But when the constitution or form of government remains unaltered and supreme, there can be no *de facto* department or *de facto* office. The acts of the incumbents of such departments or office cannot be enforced conformably to the constitution, and can be regarded as valid only when the government is overturned. When there is a constitutional executive and legislature, there cannot be any other than a constitutional judiciary. Without a total revolution, there can be no such political solecism in Kentucky as a 'de facto' court of appeals. There can be no such court whilst the constitution has life and power. There has been none such. There might be under our constitution, and there have been, 'de facto' officers. But there never was and never can be, under the present constitution, a 'de facto' office."

Similarly, in the case of *In re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255, 68 Pac. 639, it was decided that though an election is authorized to be held to determine whether a court shall exist, and after such election returns are canvassed, the proper officers certify that the proposition has carried, and a judge and other necessary officers are appointed and assume to exercise the duties of their offices, yet if it is afterward established that the result of such election was not in favor of creating such court, it cannot be treated as a court *de facto*, and one convicted and sentenced in such court

is illegally imprisoned, and is entitled of right to be discharged. Said the court: "While it is admitted by the respondent that the court of common pleas had no legal existence, it is contended that it was recognized by the chief executive in appointing a judge therefor, by the sheriffs of both counties, who served its processes, and by the people, who elected a judge . . . to preside over it, and as such court it tried many cases, and was in operation for several months, and was, therefore, a *de facto* court, and its judgment conclusive and unimpeachable. The argument is, that the same reasoning and necessity that demand and obtain recognition by courts of the acts of *de facto* officers demand in this instance the recognition of the court of common pleas as a *de facto* court. We cannot accede to this. While there is some authority for this conclusion, and while cases may arise where it would be proper so to hold, yet mere form or color of an office should not be permitted to stand between a citizen and his liberty. There must be a reality in the existence of the court that undertakes to deprive one of the liberty. In all cases where the acts of *de facto* officers have been upheld, there existed a *de jure* office. The strongest reasoning why the acts of *de facto* officers are sustained is that the office is created by the public and put in operation as part of a system of organized society, and a continued administration of the office becomes necessary to the proper adjustment of its affairs and to the perpetuity of the system. This reasoning loses force when we undertake to apply it to a *de facto* office. Such office, not having been created by the public, and not having been adopted into the organized system, never becomes a part of it, and its displacement does not disturb the harmony of the organization. The act attempting to create the court of common pleas was never a consummated reality. Its existence as a completed act depended wholly on a precedent condition—the affirmative vote of the electors of the counties to be affected."

There is respectable authority, however, and perhaps better reason, for the proposition that there may be an officer *de facto* where there is no office *de jure*. In *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472, 18 N. W. 285, it was held that a municipal court, created by an unconstitutional statute, was a *de facto* court, and that its legal existence could not be questioned in a collateral proceeding. And in a later case in the same state it was held that a municipal corporation, though not legally organized, is a *de facto* corporation, and its acts and officers are, as to third persons, lawful and binding, and its legal existence and the right to continue to exercise its functions can be questioned only by the state in a direct proceeding: *State v. Bailey*, 106 Minn. 138, 130 Am. St. Rep. 592, 118 N. W. 676, 19 L. R. A., N. S., 775, 16 Ann. Cas. 338. Said the court in the first-named case, speaking through Chief Justice Gilfillan: "It would be a matter of almost intolerable inconvenience, and be productive of many injustices, of individual hardship and injustice, if third persons, whose interests or necessities require them to rely upon the acts of the occupants of public offices, should be required to ascertain at their peril the legal right to the offices which such occupants are permitted by the state to occupy. Taking even the narrowest definition of an officer *de facto*, viz., that he is one who is exercising the duties of an office under color of legal right to the office, the reasons that justify the doctrine apply with equal force to a court or office where the same may be said to exist under color of right; that is under color of law."

The doctrine that there may be a *de facto* officer without a *de jure* office, as where the statute creating the office proves unconstitutional, is also supported in the case of *State v. Pooler*, 105 Me. 224, 134 Am. St. Rep. 543, 74 Atl. 119, 24 L. R. A., N. S., 408. "We are unable," said the court, "to discover any difference, in reason, for declaring an officer to be *de facto*, whether he holds a *de facto* or *de jure* office, if he has occupied it with the usual insignia of a *de facto* officer. The authorities are in harmony that the *de facto* doctrine was invented to deal with effects, not with causes. The effects only can be reached. The causes cannot. The official acts are accomplished. If the effects are alike, it is immaterial that the causes differ. The effects, whether from a *de jure* or *de facto* office, are alike. Hence the acts of the officer occupying either position should be declared *de facto*."

The case of *Lang v. Bayonne*, 74 N. J. L. 455, 122 Am. St. Rep. 391, 68 Atl. 90, 15 L. R. A., N. S., 93, 12 Ann. Cas. 961, is a strong case upholding the *de facto* character of incumbents of *de facto* offices. Overruling the case of *Flaucher v. Camden*, 56 N. J. L. 244, 28 Atl. 82, the court held that the provisions of a solemn act of the legislature, so long as it has not received judicial condemnation, are as binding upon the citizen as is the judgment of a court rendered against him, and remaining unreversed, and that therefore an officer appointed under authority of a statute to fill an office created thereby is at least a *de facto* officer, whose acts, performed antecedent to a judicial declaration that the statute is unconstitutional, are valid so far as they involve the interests of the public and of third persons. Taking square issue with Mr. Justice Field on the point involved, Chief Justice Gummere, delivering the opinion of the court, said: "Notwithstanding the great weight which the opinion of so distinguished a jurist carries with it; notwithstanding that *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. ed. 178, has been frequently cited with approval in other jurisdictions, I am unable to accept as sound the doctrine upon which it is rested, namely, that an unconstitutional law is void *ab initio*, and affords no protection for acts done under its sanction. That it works injustice in its application to the citizen is apparent. The *Flaucher* case (56 N. J. L. 244, 28 Atl. 82) is a pregnant example of the truth of this assertion. The legislature had enacted a general law, making the unlicensed sale of intoxicating liquor a criminal offense, but legalizing such sales when made by a person holding a license from the proper authority. It then, by a subsequent statute, created the county board of license commissioners the proper authority to grant such licenses in the county of Camden. *Flaucher* applied to, and received from, this board a license to sell liquors at his saloon in the city of Camden. At that time the law creating the county board stood upon the statute book, apparently as valid, as much entitled to be respected and obeyed as the enactment which prohibited the sale of liquor without a license. And yet, notwithstanding that he scrupulously observed the law, as declared by the legislature, he was made a criminal by judicial decision, a decision which in its operation and effect was as much *ex post facto* as any statute which makes criminal an antecedent act which violated no law at the time when it was done. The vice of the doctrine of *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. ed. 178, as it seems to me, is that it fails to recognize the right of the citizen, which is to accept the law as

it is written, and not to be required to determine its validity. The latter is no more the function of the citizen than is the making of the law. Each of these functions has been delegated by the constitution, the one to the judicial and the other to the legislative branch of the government. And it is to be observed that the judicial function of determining the validity of statutes is confined within a very narrow scope. Courts are not vested with the general supervision of legislation. They have received no authority from the people to inspect each statute, as it comes from the hands of the legislature, and declare whether or not it infringes constitutional limitations. The function of the judicial department with respect to legislation deemed unconstitutional is not exercised in rem; but always in personam: *Allison v. Corker*, 67 N. J. L. 596, 52 Atl. 362, 60 L. R. A. 564. Only such statutes as affect the rights of parties to judicial proceedings are ever subjected to the scrutiny of the courts. And these are comparatively few. Of the two thousand four hundred and more acts of the legislature passed in this state during the last ten years, less than four hundred have received judicial consideration. The remaining two thousand which are upon the statute-book (except those which have been repealed by the legislature) are accepted and enforced as a part of the law of the land. And this, in my judgment, is the only way in which a government such as ours can be safely administered. To require the citizen to determine for himself, at his peril, to what extent, if at all, the legislature has overstepped the boundaries defined by the constitution in passing this mass of statutes would be to place upon him an intolerable burden, one which it would be absolutely impossible for him to bear—a duty infinitely beyond his ability to perform. In my opinion, the provisions of a solemn act of the legislature, so long as it has not received judicial condemnation, are as binding upon the citizen as is the judgment of a court rendered against him so long as it remains unreversed."

It is interesting to note that both Justice Field and Chief Justice Gummere seek to draw authority for their decisions on the point involved from the same source—*State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409. A careful reading of the opinion in that case, and the searching analysis of it by Chief Justice Gummere, will, we think, make it clear, as said by Spear, J., in *State v. Pooler*, 105 Me. 224, 134 Am. St. Rep. 543, 74 Atl. 119, 24 L. R. A., N. S., 408, that the whole intention of this masterly resumé by Chief Justice Butler is in support of the contention declared in *Lang v. City of Bayonne*, 74 N. J. L. 455, 122 Am. St. Rep. 391, 68 Atl. 90, 15 L. R. A., N. S., 93, 12 Ann. Cas. 961.

h. Unconstitutional Incumbency of De Jure Offices.—While, as has been seen, there is sharp conflict in some of the leading authorities on the question of the validity of the acts of one occupying an office that has no legal existence, there is little, if any, diversity of judicial opinion as to the validity of the acts of an incumbent of a legally existing office who has been appointed or elected under and pursuant to an unconstitutional law. The official acts of such an officer, performed before the unconstitutionality of the law has been judicially determined, have been invariably held valid, as respects the public and third persons, as the acts of an officer *de facto*: *Walker v. State*, 142 Ala. 7, 39 South. 242; *Butler v. Phillips*, 38 Colo. 378, 88 Pac. 480, 12 Ann. Cas. 204; *Rude v. Sisack*, 44 Colo. 21, 96 Pac. 976; *Brown*

v. O'Connell, 36 Conn. 432, 4 Am. Rep. 89; State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; Leach v. People, 122 Ill. 420, 12 N. E. 726; Samuels v. Drainage Commrs., 125 Ill. 536, 17 N. E. 829; Lavin v. Board of Commrs. of Cook County, 245 Ill. 496, 92 N. E. 291; Watson v. McGrath, 111 La. 1097, 36 South. 204; Sherrill v. O'Brien, 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124; Ex parte Strang, 21 Ohio St. 610; King v. Philadelphia Co., 154 Pa. 160, 35 Am. St. Rep. 817, 26 Atl. 308, 21 L. R. A. 141; Roche v. Jones, 87 Va. 484, 12 S. E. 965; Chicago & N. W. Ry. Co. v. Langlade County, 56 Wis. 614, 14 N. W. 844; In re Ah Lee, 5 Fed. 899, 6 Saw. 410.

The harmony in the cases on this point may be due to the fact that this was the very point decided in the case of State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409, although that "landmark of the law" is usually cited whenever any question arises on the subject of de facto officers. The holding in this case was that where the constitution prescribed that the judges of the supreme, superior and inferior courts should be elected by the general assembly, and a judge of the city court was so elected, and it was further provided by law that in case of his sickness or absence a justice of the peace should be called in by clerk to hold the court as acting judge during such temporary sickness or absence, and a justice of the peace was so called in and acted, whether the law was constitutional or not, and whether the call had been recorded according to law or not, he was an officer de facto, if not de jure, and a conviction had before him was legal.

So far as the particular point decided is concerned, the court merely followed a previous decision of the court: Brown v. O'Connell, 36 Conn. 432, 4 Am. Rep. 89. But in the Carroll case, Chief Justice Butler took the whole subject of de facto officers under consideration; and his exhaustive and convincing treatment of the subject has elicited the highest praise. Justice Field refers to the case as a "landmark of the law," "an elaborate and admirable statement of the law"; and no one can read it without concurring in this encomium upon it, says Chief Justice Gummere in Lang v. City of Bayonne, 74 N. J. L. 455, 122 Am. St. Rep. 391, 68 Atl. 90, 15 L. R. A., N. S., 93, 12 Ann. Cas. 961. And Spear, J., in State v. Pooler, 105 Me. 224, 134 Am. St. Rep. 543, 74 Atl. 119, 24 L. R. A., N. S., 408, speaks of it as a case undoubtedly presenting the most comprehensive and critical analysis upon the question of de facto offices and officers to be found in the history of the common law.

A case somewhat similar to the Carroll case and decided about the same time was that of Ex parte Strang, 21 Ohio St. 610. The case was this: A statute authorized the mayor of Cincinnati, in the absence or disability of the police judge, to appoint a temporary substitute. In pursuance of this authority the mayor made such an appointment, and the appointee, in the discharge of the duties of the office, committed Strang to prison for the nonpayment of a fine. The prisoner sued out a habeas corpus, and on the argument it was claimed in his behalf that the statute was contrary to the constitution and void. The court held that, admitting the act to be void, yet the appointee of the mayor was a judge de facto, saying: "The direct question in this case is, whether the reputed or colorable authority required to constitute an officer de facto can be derived from an unconstitutional statute. The claim that it cannot seems to be based upon the idea that such authority can only emanate from a person or body legally competent to invest the officer with a good

title to the office. We do not understand the principle to be so limited. We find no authorities maintaining such limitation, while we find a number holding the contrary: *Fowler v. Bebee*, 9 Mass. 231, 6 Am. Dec. 62; *Commonwealth v. Fowler*, 10 Mass. 290. The true doctrine seems to be, that it is sufficient if the officer holds the office under some power having color of authority to appoint; and that a statute, though it should be found repugnant to the constitution, will give such color."

In *Chicago etc. Ry. Co. v. Langlade County*, 56 Wis. 614, 14 N. W. 844, it was held that where appointments to county offices were made by the governor, which were invalid by reason of a constitutional provision making the incumbents of such offices elective, the offices being properly created and existing *de jure*, the persons appointed thereto, having entered upon the duties of such offices, were officers *de facto*, whose official action could not be questioned collaterally.

In *King v. Philadelphia Co.*, 154 Pa. 160, 35 Am. St. Rep. 817, 26 Atl. 308, 21 L. R. A. 141, it was held that when municipal work has been done by virtue of municipal authority and in strict conformity with an existing statute, the legality of such work, and the authority of officers having it done, cannot be questioned after its completion because the statute under which the work was done has since been judicially declared unconstitutional.

In *Roche v. Jones*, 87 Va. 484, 12 S. E. 965, it was decided that city councilmen acting under an unconstitutional charter are *de facto* officers, and the levy by them of a license tax as authorized by such charter is valid and binding.

In *Sherrill v. O'Brien*, 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124, it was held that a legislature elected under an unconstitutional apportionment was a *de facto* legislature, and its acts were valid, so long as its members remained actual incumbents of their offices.

1. **Incumbents of Offices Under Illegal Governments.**—Southern courts have frequently been called upon to pass on the validity of the acts of officers holding office under the authority of the seceding states during the Civil War. For example, in *Brown v. Wylie*, 2 W. Va. 502, 98 Am. Dec. 781, following *Hawver v. Seldenridge*, 2 W. Va. 274, 94 Am. Dec. 532, it was held that the acts of officers of a county within the state of West Virginia, elected before the organization of that state, who after its organization claimed to hold and exercise their offices under the authority of the usurped government at Richmond, were void. Such persons were not officers either *de jure* or *de facto*.

In *Simpson's Ex. v. Loving*, 3 Bush (66 Ky.), 458, 96 Am. Dec. 252, it was held that the "provisional government of Kentucky," attempted to be established during the Civil War, was never in any sense a *de facto* government, never having been recognized as such by the political department of the United States nor of the state of Kentucky; and an officer holding under such provisional government was not a *de facto* officer, and a deed recorded upon an acknowledgment taken before him could not be considered as constructive notice, nor could a certified copy of it be regarded as evidence.

It was held, however, in *Estes v. Prince*, 47 Ala. 269, following *Griffin v. Ryland*, 45 Ala. 688, that the acts of the courts and their officers in Alabama during the Civil War were valid. And in *Sadler*

v. Gayle, 22 La. Ann. 155, it was held that the official acts of a sheriff during the Civil War must be recognized as legal, since the necessities and interests of society required such an officer during the war.

In *Loekhart v. City of Troy*, 48 Ala. 579, it was held that although certain city officials were disqualified from holding office in consequence of having held office under the state government before the war, and afterward having participated in the rebellion, their acts as officials were not void. They were officers *de facto* under a rightful government, and as such, their acts were valid until their titles to the offices they held were adjudged insufficient.

In *Ensley v. City of Nashville*, 61 Tenn. (2 Baxt.) 144, it was held that while the city of Nashville was under military control, its mayor and city council constituted a government *de facto*, and the corporation was liable for property taken from individuals, though its agents, by whose authority the act was done, were not legally elected in pursuance of the city charter.

In *Quinn v. Commonwealth*, 20 Gratt. 138, it was held that where a judge, holding by military appointment, held court and tried a criminal after the restoration of civil government in Virginia, his act was valid as that of a *de facto* officer.

In *State v. McFarland*, 25 La. Ann. 547, it was held that persons assuming to hold office under what was known as the "McEnery Government," in opposition to the authority of the state and of the United States, were mere usurpers and not *de facto* officers.

A somewhat peculiar situation was disclosed in *Reddy v. Tinkum*, 60 Cal. 458. By an act of the legislature passed in 1861, for the creation of the county of Mono, the eastern boundary of the state was made the eastern boundary of the county, and it was provided that the seat of justice should be at Aurora; but upon the definite location of the state boundary line under legislative authority it was ascertained that Aurora was within the then territory of Nevada, and thereupon, in the year 1864, an act was passed establishing the county seat at Bridgeport, a point west of the state line. By the former act an election of county officers was provided for, and certain persons, all of them residents of Nevada Territory, were named to constitute a board of commissioners to designate the election precincts in the county, canvass the returns and issue certificates of election; and officers were accordingly elected and qualified and assumed to perform official functions. On an application for a writ of mandamus to the treasurer of the county of Mono to compel him to pay certain warrants drawn by the auditor thus elected in the years 1862 and 1863, indorsed "presented and not paid for want of funds" by the person then assuming to act as county treasurer, it was held that the writ was properly denied; that neither the warrants nor the claims upon which they were based formed any basis for a legal demand against the county as now organized.

II. Possession of the Office.

A *de facto* officer must be in fact the officer. He must be in actual possession of the office, and have the same under his actual control: *McCahon v. Leavenworth County Commrs.*, 8 Kan. 437; *City of Somerset v. Somerset Banking Co.*, 109 Ky. 549, 60 S. W. 5; *Woods v. Inhabitants of Bristol*, 84 Me. 358, 24 Atl. 865; *Bench v. Otis*, 25 Mich. 29; *Hallgren v. Campbell*, 82 Mich. 255, 21 Am. St. Rep. 557, 46 N.

W. 381, 9 L. R. A. 408; Cohn v. Beal, 61 Miss. 398; State v. Dorton, 145 Mo. 304, 46 S. W. 948; State v. Blossom, 19 Nev. 312, 10 Pac. 430; Boardman v. Halliday, 10 Paige, 223; Morgan v. Quackenbush, 22 Barb. 72; Montgomery v. O'Dell, 67 Hun, 169, 22 N. Y. Supp. 412, affirmed 142 N. Y. 665, 37 N. E. 570; People v. McAdoo, 96 N. Y. Supp. 362; Baker v. Hobgood, 126 N. C. 149, 35 S. E. 253; Williams v. Clayton, 6 Utah, 86, 21 Pac. 398; School Dist. of St. Johnsbury v. Smith, 67 Vt. 566, 32 Atl. 484; Schenck v. Peay, 1 Dill. 267, Fed. Cas. No. 12,451.

A person in possession of an office may be an officer de facto, while some other person may be the officer de jure, though there cannot be an officer de jure and an officer de facto both in possession of the same office at the same time: *Fulton v. Town of Andrea*, 70 Minn. 445, 73 N. W. 256; *Brinkerhoff v. City of Jersey City*, 64 N. J. L. 225, 46 Atl. 170.

In *Fulton v. Town of Andrea*, 70 Minn. 445, 73 N. W. 256, it was held that an appointment to the office of chairman of the board of supervisors of the defendant town, made by the appointing board thereof, having by law the power to appoint only in case of vacancy (which vacancy they assumed really existed), and the acceptance of the appointment by the appointee, and his entering into possession of the office and discharging its duties, constituted him the chairman of the board de facto, although no vacancy in fact existed, and hence bonds of the town issued by such board were valid obligations.

One who has lawfully been in office, and has been recognized as the officer de facto, and not lawfully removed, indicates his claim to to hold the office by his refusal to deliver up the property, books and papers belonging thereto; and if he has never yielded, but has continued to act, then a subsequent appointee to the office, who has never had possession, cannot be regarded as an officer de facto: *Hallgren v. Campbell*, 82 Mich. 255, 21 Am. St. Rep. 557, 46 N. W. 381, 9 L. R. A. 408.

In *Morgan v. Quackenbush*, 22 Barb. 72, the facts were these: At a charter election for the city of Albany, P. and Q. were candidates for the office of mayor. The common council, at the next meeting after the election, proceeded to canvass the returns, and to determine and declare who was elected to the office of mayor; and they determined and declared that P. had received the greatest number of votes and was duly elected mayor, and made and filed a certificate of that determination. When the term of office commenced, P. took the prescribed oath and entered on the discharge of his duties. On the same day the new council proceeded to recanvass the votes for mayor, and on such canvass it was determined and declared that Q. was duly elected mayor, and a certificate of that determination was made and filed. It was held that the determination of the first board in favor of P., however erroneous it might be, had furnished him with prima facie evidence of his election; and that having acted upon that evidence, qualified, and entered upon the discharge of the duties of the office, he became mayor de facto, and could not be displaced, except by an action brought for that purpose by one claiming to be entitled to the office. And that P., being mayor de facto, Q., whatever his right, could not be mayor in fact at the same time, and did not derive even a colorable title to the office, from the determination of the second board of canvassers.

A *de facto* officer in possession of an office and discharging its duties is, as against persons having no right thereto, entitled to continue in office: *Elliott v. Burke*, 113 Ky. 479, 68 S. W. 445; a holding that suggests the familiar saw that possession is nine points of the law.

But in order to give a person in possession of an office the status of a *de facto* officer, his possession must be a lawful one, or have the appearance of legality. An intruder into a public office cannot, when his acts are called in question, justify by the mere fact that he has possession, or by force has taken possession of the books or belongings of the office: *People v. Dike*, 37 Misc. Rep. 401, 75 N. Y. Supp. 801.

Nor does one become an officer *de facto* by ousting the one in possession by strategy. Thus, where an office is in dispute between two persons, and the one in actual possession of the office steps out of the place where the business is usually performed, but with no intention of abandoning the office, or of giving it to the other person, and such other person, with full knowledge of the facts, steps in and immediately proceeds to do business as though he was in fact the officer, as between such two persons, the one previously in possession must be considered as the officer *de facto*: *Braidv v. Theritt*, 17 Kan. 466.

Where an office becomes vacant, and an individual, with claim and color of title, enters it and assumes the duties thereof, he is to be considered the officer *de facto*, and in possession of the office. And the fact that he has been forcibly removed from the rooms occupied for the transaction of the business of the office, and from the presence of the property pertaining to it, will not affect his legal rights. Nor will the fact that a deputy of the former incumbent refuses to yield to the person claiming to be appointed to fill the vacancy possession of the books and papers, and continues himself to transact the business of the office as such deputy, affect the rights of the claimant, or his possession: *Conover v. Devlin*, 24 Barb. 587.

There cannot be two incumbents of an office, which has been created to be held by one person, and if one who is legally entitled to the office is ousted and a successor placed in possession, who is recognized as such officer and performs the duties of the office and draws the salary without contest or resistance, he is the incumbent *de facto*, and no one else by mere force of law or right can claim to be such: *Lee v. City of Wilmington*, 1 Marv. (Del.) 65, 40 Atl. 663.

III. Emoluments of the Office.

a. **Public Disbursements to De Facto Officers.**—Disbursing officers charged with the duty of paying official salaries have, in the discharge of that duty, a right to rely upon the apparent title of an officer *de facto*, and to treat him as an officer *de jure*, without inquiring whether another has the better right; and payment of the salary of an office to a *de facto* public officer, made while he is in possession, is a good defense to an action brought by the *de jure* officer to recover the same salary after he has acquired or regained possession: *Shaw v. Pima County*, 2 Ariz. 399, 18 Pac. 273; *Board of Commrs. of El Paso County v. Rhode*, 41 Colo. 258, 95 Pac. 551; *Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224, 50 Atl. 1025; *Saline County Commrs. v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171; *Bradley v. City of Georgetown*, 118 Ky. 735, 82 S. W. 303; *Walters v. City of Paducah (Ky.)*,

123 S. W. 287; Wayne County Auditor v. Benoit, 20 Mich. 176, 4 Am. Rep. 382; Parker v. Board of Supervisors of Dakota County, 4 Minn. 59 (Gil. 30); State v. Clark, 52 Mo. 508; State v. Milne, 36 Neb. 301, 38 Am. St. Rep. 724, 54 N. W. 521, 19 L. R. A. 689; Dolan v. City of New York, 68 N. Y. 274, 23 Am. Rep. 168; Terhune v. City of New York, 88 N. Y. 247; Demarest v. New York, 147 N. Y. 203, 41 N. E. 405; Chandler v. Hughes County, 9 S. D. 24, 67 N. W. 946; Samuels v. Town of Harrington, 43 Wash. 603, 117 Am. St. Rep. 1075, 86 Pac. 1071.

But payment of salary of the office to a mere usurper, intruder, or one without any color of title to the office will not absolve a municipality, county or state from liability to the one legally entitled to the office: People v. Smyth, 28 Cal. 21; State v. Carr, 129 Ind. 44, 28 Am. St. Rep. 163, 28 N. E. 88, 13 L. R. A. 177; Howard v. Town of Port Royal, 85 S. C. 361, 67 S. E. 449; Williams v. Clayton, 6 Utah, 86, 21 Pac. 398; Warden v. Bayfield County, 87 Wis. 181, 58 N. W. 248; Kempster v. City of Milwaukee, 97 Wis. 343, 72 N. W. 743. Nor will payment to a de facto officer after it has been judicially determined that another is entitled to the office: Scott v. Crump, 106 Mich. 288, 58 Am. St. Rep. 478, 64 N. W. 1; Fylpaa v. Brown County, 6 S. D. 634, 62 N. W. 962. Nor if at the time of such payment the city has notice from the officer de jure that he claims the office and its emoluments: Andrews v. Portland, 79 Me. 484, 10 Am. St. Rep. 280, 10 Atl. 458.

b. Rights of De Facto Officers as to Emoluments.—When an officer de facto seeks to recover the emoluments of the office, he must show his right to possession of the office: People v. Potter, 63 Cal. 127; McCue v. County of Wapello, 51 Iowa, 60, 50 N. W. 488; Mullery v. McCann, 95 Mo. 579, 8 S. W. 774; Richards v. McMillin, 36 Neb. 352, 54 N. W. 566; People v. Tieman, 8 Abb. Pr. 359.

In the last case a city inspector of the city of New York held over after the expiration of his term by reason of the failure of the proper authorities to appoint an officer in his place at the expiration of his term, and sought by mandamus to compel payment of his salary during the time he held over. The writ was denied. The court said: "The salary and fees are incident to the title, and not to the usurpation and colorable possession of an office. An officer de facto may be protected in the performance of acts done in good faith in the discharge of the duties of an office under color of right, and third persons will not be permitted to question the validity of his acts by impeaching his title to the office. Public interests require that acts of public officers, who are such de facto, should be respected and held valid as to third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice: 2 Kent's Commentaries, 295. But it does not follow that a right can be asserted and enforced on behalf of one who acts merely under color of office, without legal authority, as if he were an officer de jure. When an individual claims by action the office or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defense, but cannot as against the public be converted into a weapon of attack to secure the fruits of the usurpation and the incidents of the office."

And Holmes, J., in Phelan v. Inhabitants of Granville, 140 Mass. 386, 5 N. E. 269, where an illegal appointee to an office sought to recover for services actually rendered, said: "It is argued that the

plaintiff is entitled to recover for services actually rendered as collector de facto. The objections to collaterally impeaching the title of an officer de facto in a proceeding to which he is not a party, and when the rights of third persons are in question, . . . do not apply when the officer himself seeks to recover on the strength of his title. The services rendered are statutory services. The statutes require that they shall be performed by an officer appointed in a certain way, and provide for his compensation. . . . The plaintiff is not an officer de jure, as against the town, until the statutory conditions are complied with. There is nothing, therefore, to hinder the town from denying his title, if he claims compensation by virtue of his office, or, if he sets up a contract, express or implied, the answer is that it is a contract which the statutes do not intend shall be made. The statutes exclude other and more informal methods of binding the town than the one which they point out, on grounds of public policy. Under circumstances like the present, the current of authority elsewhere is that no action can be maintained: *Riddle v. Bedford Co.*, 7 Serg. & R. 386; *Commonwealth v. Slifer*, 25 Pa. 23, 64 Am. Dec. 680; *People v. Hopson*, 1 Denio, 574, 579; *Dolan v. Mayor etc.*, 68 N. Y. 274, 23 Am. Rep. 168; *Matthews v. Supervisors etc.*, 53 Miss. 715, 24 Am. Rep. 715; *People v. Potter*, 63 Cal. 127; *Samis v. King*, 40 Conn. 298, 310."

A similar ruling was made in *State v. Schram*, 82 Minn. 420, 85 N. W. 155, where it was held that a de facto village marshal, who had not properly qualified for the office, was not entitled to recover for services performed as such marshal.

In *Atchison v. Lucas*, 83 Ky. 451, it was held that a woman who acted as jailer under color of title, although constitutionally ineligible to the office, was entitled to an allowance for dieting prisoners, though not entitled to fees for committing and releasing them.

The rule that the salary of an office is an incident of the title thereto, and that therefore an officer de facto has no legal title to the salary attached to the office he is filling, does not apply in Missouri. The rule there has long been established that in an action for fees, the title to the office cannot be decided, and that a de facto officer, while in possession of the office, can recover the fees of the office: *State v. Draper*, 48 Mo. 213; *State v. Clark*, 52 Mo. 508; *State v. John*, 81 Mo. 13. Such also is the law in New Jersey: *Erwin v. Jersey City*, 60 N. J. L. 141, 64 Am. St. Rep. 584, 37 Atl. 732. The Missouri rule, however, is founded upon the prima facie title of the officer de facto. In a case where such prima facie title does not exist, the rule does not apply: *Dickerson v. City of Butler*, 27 Mo. App. 9. And in New Jersey, it was decided that one who had intruded into public office by force and fraud could not recover from the public the salary attached to the office, although he had performed the duties devolving upon the officer: *Meehan v. Freeholders of Hudson*, 46 N. J. L. 276, 50 Am. Rep. 421.

This case should be distinguished from that of *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353, which was an action by a de jure officer who had, by quo warranto, ousted from his office an intruder who had, during his intrusion, performed the official duties and received the salary attached to the office, to recover from the de facto officer the salary thus received. A majority of the court held that the intruder into the office, who had become such under a certificate

of election regular on its face and without fraud on his part, could retain the salary he had received while he performed the duties of the office, as against him who had, during the performance of such services, the *de jure* title to the office. It was declared that, in this country, public office is not property, and public officers have no proprietary interest in their offices, and it was deduced therefrom that the right to the emoluments of the office arises not out of title to the office, but out of the actual rendition of services for which such emoluments were designed to be compensatory.

The court in this case, however, carefully pointed out that, upon grounds of public policy, a limitation to the doctrine stated must be applied so that one who obtained an office dishonestly and fraudulently could not demand the emoluments of the office. And that limitation was applied in the case of *Meehan v. Freeholders of Hudson*, 46 N. J. L. 276, 50 Am. Rep. 421.

c. **Rights of De Jure Officers as to Emoluments.**—The case of *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353, is the only case we have been able to find that holds that as between the *de jure* and *de facto* officer, the latter is entitled to the emoluments of the office for the time he has actually occupied it and performed the services incident to it. The great weight of authority establishes the contrary rule, that a *de jure* officer, who has been kept out of his office by the intrusion of another person may recover from such person all salary, lawful perquisites, fees, and emoluments which he would have received had he exercised the office: *Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224, 50 Atl. 1025; *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52; *Krutz v. Behrensmeyer*, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59; *Douglass v. State*, 31 Ind. 429; *Rice v. Tevis' Admr.* (Ky.), 50 S. W. 1101; *Sigur v. Crenshaw*, 10 La. Ann. 297; *Nichols v. McLean*, 63 How. Pr. 448; *Wenner v. Smith*, 4 Utah, 238, 9 Pac. 293; *Bier v. Gorrell*, 30 W. Va. 95, 8 Am. St. Rep. 17, 3 S. E. 30; *United States v. Addison*, 73 U. S. (6 Wall.) 291, 18 L. ed. 919.

The case of *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353, is, however, a well-reasoned case. Some justification, moreover, may be found for that decision, upon equitable grounds. For the *de facto* officer took the office in perfect good faith under a certificate of election thereto, and, under the New Jersey statute, would have been subjected to a penalty had he not accepted the office after being duly declared elected.

When the compensation affixed to an office is made to depend upon fees for services rendered to the public and to individuals, the *de jure* officer is entitled to recover from a *de facto* incumbent only the profits of the office; that is, the fees and perquisites, less the necessary expenses of earning them: *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52; *Rice v. Tevis' Admr.* (Ky.), 50 S. W. 1101; *Bier v. Gorrell*, 30 W. Va. 95, 8 Am. St. Rep. 17, 3 S. E. 30.

Where, however, an incumbent refuses to surrender the office upon the demand of his qualified successor, the latter is entitled to recover from the former the gross emoluments of the office received by him while unlawfully withholding the office, without any deduction for services or clerk hire: *Douglass v. State*, 31 Ind. 429.

Where the salary has not been paid to either claimant to the office, it may be recovered from the municipality by the *de jure* officer, and he has no claim against the *de facto* officer therefor: *Whitaker v. City of Topeka*, 9 Kan. App. 213, 59 Pac. 668.

Before the *de jure* officer can maintain an action for the emoluments of the office, he must first establish his right to the office in some direct proceeding for that purpose: *Lee v. City of Wilmington*, 1 *Marv.* (Del.) 65, 40 *Atl.* 663; *Wagner v. City of Louisville* (Ky.), 117 *S. W.* 283. But in *Nichols v. McLean*, 63 *How. Pr.* 448, it was held that an action may be maintained by a person entitled to hold an office against one who has unlawfully obtained possession of it, for the emoluments or salary attaching to the office, before a judgment of ouster has been rendered against the defendant.

Where the title of a *de jure* officer is not judicially determined until after the expiration of the term for which he was elected, the fact that he has not obtained a commission from the governor nor qualified for the office by giving the statutory bond will not affect his right to sue the *de facto* official for the salary of the office: *Kreitz v. Behrensmeyer*, 149 *Ill.* 496, 36 *N. E.* 983, 24 *L. R. A.* 59.

d. *Equitable Remedies*.—Equity will not restrain by injunction a *de facto* officer from receiving the salary or fees of his office, unless an action at law for such salary or fees could be fruitless: *Colton v. Price*, 50 *Ala.* 424; *Stone v. Wetmore*, 42 *Ga.* 601. Nor where sufficient appropriations for the payment of salary can be compelled: *Keating v. Fitch*, 14 *Misc. Rep.* 128, 35 *N. Y. Supp.* 641.

Nor will equity, pending a controversy under a *quo warranto* against one in possession of a public office, appoint a receiver to take and hold the same until the controversy is settled: *Stone v. Wetmore*, 42 *Ga.* 601.

In *Tappan v. Gray*, 9 *Paige*, 507, affirmed 7 *Hill*, 259, it was held, upon a bill praying for an injunction and a receiver of the fees and emoluments of an office until the rights of the parties could be determined at law, that the court of chancery had no jurisdiction to grant the relief sought, though the *de facto* incumbent of the office was utterly insolvent.

IV. Proceedings to Test Title to Office.

a. *Quo Warranto*.

1. *In General*.—The difference, and the only difference, between an officer *de jure* and an officer *de facto* is that an officer *de jure* cannot be removed from his office in a proceeding instituted directly for that purpose, while an officer *de facto* can be so removed: *Commonwealth v. Wotton*, 201 *Mass.* 81, 87 *N. E.* 202. And a *de facto* officer is entitled to hold his office until he is ousted by a judgment in a direct proceeding to adjudge him a usurper: *Sherrill v. O'Brien*, 188 *N. Y.* 185, 117 *Am. St. Rep.* 841, 81 *N. E.* 124.

The authority of a *de facto* officer is open to attack by the sovereign power alone, and the proper proceeding, therefore, to test his title to the office and to oust him if such title is not good is by a writ of *quo warranto* sued out by the attorney general, representing the sovereignty of the state: *State v. Hempstead*, 83 *Conn.* 554, 78 *Atl.* 442; *State v. Bedman*, 18 *N. D.* 434, 121 *N. W.* 614; *Leeds v. Atlantic City*, 52 *N. J. L.* 332, 19 *Atl.* 780, 8 *L. R. A.* 697; *Satterlee v. San Francisco*, 23 *Cal.* 314; *Coyle v. Commonwealth*, 104 *Pa.* 117. In the last case the authority of a judge was sought to be impeached collaterally. Said the court: "The question sought to be raised by the prisoner's special plea to the jurisdiction is not properly before us. The rightful authority of a judge, in the full exercise of his

public judicial functions, cannot be questioned by any merely private suitor; nor by any other, excepting in the form especially provided by law. A judge de facto assumes the exercise of a part of the prerogative of sovereignty, and the legality of that assumption is open to the attack of the sovereign power alone. If the question may be raised by one private suitor, it may be raised by all, and the administration of justice would, under such circumstances, prove a failure. It is not denied that Judge McLean was a judge de facto, and if so, he is a judge de jure as to all parties, except the commonwealth. The attorney general representing the sovereignty of the state, by a writ of quo warranto, might properly present this constitutional question for our consideration, but it cannot come before us from any other source, or in any other form."

To the same effect was the language of the court in *People v. Dillon*, 26 N. Y. Supp. 778, from the opinion in which case we quote as follows: "We are at a loss to understand how, upon a trial before a court of special sessions, the defendant can raise the question as to the regularity of the official bond of the presiding magistrate here suggested. It would be somewhat extraordinary for a judicial officer gravely to take evidence regarding the validity of his own title to the office which he fills, and to then determine, from the weight of that evidence, whether or not he was qualified to act. The embarrassment which would result from such a procedure is so apparent as to make comment or citation of authority unnecessary. If, in fact, the justice is not legally qualified, the law affords an adequate and speedy method of ousting him from the office which he usurps; but our system of jurisprudence hardly goes to the extent of authorizing a proceeding so abounding with possibilities for making the administration of justice ridiculous as to permit him to act as a judge in determining whether or not he is one."

2. **Office Vacated.**—The proceeding by quo warranto being strictly a proceeding to obtain possession of an office, and the judgment therein, if the relator prevails, being one of ouster, it is not to be resorted to merely to try the title to the office after it has been vacated by the alleged de facto officer: *Williams v. Clayton*, 6 Utah, 86, 21 Pac. 398. It was held, however, in *Burton v. Patton*, 47 N. C. 124, 62 Am. Dec. 194, that commissioners appointed by the legislature to select a townsite and lay out and sell lots thereon, who have performed every act required of them, and are *functi officio*, may be proceeded against by information in the nature of a quo warranto, where their conviction is sought for the purpose of invalidating their acts, where such acts would affect the general administration of affairs in the community.

In *Queen v. Blizzard*, L. R. 2 Q. B. 55, it was held that a resignation of a defendant in quo warranto was no answer to the application for a writ, because without judgment of ouster the relator could not get in.

b. **Mandamus.**

1. **To Determine Title.**—Mandamus will not lie to determine the title of an incumbent to an office, the functions of which he is exercising as an officer de facto: *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 398; *Kelly v. Edwards*, 69 Cal. 460, 11 Pac. 1; *State v. Hempstead*, 83 Conn. 554, 78 Atl. 442; *Keeler v. Deo*, 117 Mich. 1, 75 N. W. 145;

St. Louis County Court v. Sparks, 10 Mo. 117, 45 Am. Dec. 355; State v. John, 81 Mo. 13; State v. Roe, 35 N. J. L. 123.

2. To Oust Usurpers.—An occupant of an office having no color of title cannot claim the office against one ousted from it and having a clear legal title to it. In such a case the title *de jure* draws to it possession *de facto*, and mandamus is the proper remedy to restore him to his office, since there is no title to try: State v. Hempstead, 83 Conn. 554, 78 Atl. 442.

The supreme court of New Jersey, in an action on a rule to show cause why mandamus should not issue to compel the restoration to office of the relator, says: "But while it is true that the illegality of the election by virtue of which an incumbent has gained entrance to an office does not prevent the office from being full of him *de facto*, it is also to be noted that from the earliest periods it has been held requisite that the illegality in question must be consistent with honesty of purpose. Elections based upon mistakes of fact or misconceptions of law may impart a color of right which will bar the allowance of a mandamus, but palpable disregard of law renders the action by which an office is seized merely colorable, and in a clear case will be brushed aside, as affording no obstruction to the exercise of a plain legal duty": Leeds v. Atlantic City, 52 N. J. L. 332, 19 Atl. 780, 8 L. R. A. 697.

In State v. Oates, 86 Wis. 634, 39 Am. St. Rep. 912, 57 N. W. 296, it was held that one *prima facie* entitled to an office under the authorized canvass of votes and certificate of election may enforce his right to possession by writ of mandamus, as against one who holds the office without color of authority after the expiration of his term.

It was also held in People v. Head, 25 Ill. 325, that mandamus will lie in favor of a person who has the proper title or certificate, against a prior officer who claims to hold over, under a new election, to compel him to respect the official certificate, and seek his remedy as a relator in proceedings by *quo warranto*.

In the case of Street v. County Commissioners of Gallatin County, Breese (Ill.), 50, the supreme court issued a mandamus to the defendants, commanding them to admit the petitioner, whom they had illegally removed and appointed another in his place, to the office of clerk of the county commissioner's court.

In People v. Kilruff, 15 Ill. 492, 60 Am. Dec. 769, it was held that mandamus is a proper remedy against an ex-mayor to obtain possession of a seal, books, papers, etc., the property of the corporation; and a pretended intrusion into or retention of the office of mayor will not justify the withholding of such property, so as to drive the relator to resort to a *quo warranto*. In that case the court said: "A *quo warranto* is the proper writ to try the question of title to the office. This writ is not asked for that purpose. It is asked to deliver to the mayor elect and qualified the seal, the insignia of office. And to defeat the application, and prevent the issuing of the writ for this purpose, this groundless, colorless claim is set up to the office itself; and the party's pretended intrusion into or retention of it is sought to create such a doubt of the true title, or controversy about the title, as to justify the withholding of the writ and sending the informant to his *quo warranto*."

3. To Determine De Facto Incumbency.—Although the rule is well established that mandamus will not lie to determine the title to an

office, such a writ may issue when it becomes necessary to pass upon the question as to who is the de facto incumbent of the office. Thus in *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644, it was held that the fact that two distinct tax levies have been made by conflicting boards of supervisors, and that the inquiry upon mandamus to the auditor to compel the entry of one of the levies incidentally involves the determination as to which of the conflicting boards is de facto in office, and has the better apparent legal right to make the tax levy, constitutes no objection to the proceeding in mandamus against the auditor. Said Henshaw, J.: "It is the undoubted rule that mandamus does not lie to try title to office. But this is founded upon the just and expedient principle that the writ will never issue when the remedy at law is plain, speedy and adequate. An application for a writ of mandate to try title to office would be answered at once by the suggestion that the law affords adequate process and procedure by an action of quo warranto or usurpation of office. But when the writ is invoked to enforce a specific duty, and remedies at law are not adequate, aid will not be refused merely because occupancy or incumbency or title is incidentally involved. It will act under such circumstances as does equity, and inquire into and determine rights so far as, but no further than, may be necessary to the granting of the relief sought. The cases in which the doctrine is invoked that mandamus will not lie to try title to office are those like *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 398, and *Kelley v. Edwards*, 69 Cal. 460, 11 Pac. 1, where, the respondent being admitted or proved to be at least a de facto officer, the express purpose of the action upon the part of the petitioner is to establish in himself a superior legal right to the office. And this the courts uniformly hold may not be done in mandamus. For it once being established that the respondent is a de facto officer, as the law, for grave reasons of public policy, holds valid the acts of such an officer, the question of legal title, which alone is sought to be litigated, will be relegated to another forum. So in a case such as the present, if it be either admitted or established that one or another of the boards is a de facto body, the need of further inquiry comes to an end, since the official acts of that body are entitled to recognition by the auditor and are valid."

In *McKannay v. Horton*, 151 Cal. 711, 121 Am. St. Rep. 146, 91 Pac. 598, 13 L. R. A., N. S., 661, it was held that where there were two persons each claiming to be the de facto mayor of the city and county of San Francisco, each of whom had appointed a different person as his secretary, the situation was one of sufficient urgency to warrant the maintenance by one of such appointees of a proceeding in mandamus against the auditor for the approval of his claim for salary, in which it might be incidentally determined who was the de facto mayor.

In *Putnam v. Langley*, 133 Mass. 204, plaintiff claimed to have been elected one of the board of water commissioners of the town of Danvers. One Josiah Ross also claimed to have been elected, and there was a matter of disputed title between plaintiff and Ross. Langley and Richards were the other commissioners whose title was apparently undisputed. It was held that mandamus was a proper remedy to compel Langley and Richards to recognize, receive and act with the plaintiff as a member of the board.

A somewhat similar case was that of *Delgado v. Chavez*, 140 U. S. 536, 11 Sup. Ct. Rep. 874, 35 L. ed. 578. In that case it was held that mandamus may issue to compel a county clerk to discharge his duties as clerk and recognize and act with a de facto board of county commissioners, and to forbid him to assume to determine any contest between rival commissioners. The supreme court, speaking by Justice Brewer, said: "This was not a proceeding to try the title to office. The direct purpose and object was to compel the defendant to discharge his duties as clerk, and to forbid him to assume to determine any contest between rival commissioners. It was enough in this case for the court to determine, and it must be assumed that the evidence placed before it was sufficient to authorize an adjudication, that the petitioners were commissioners de facto. As such, the clerk was bound to obey their commands and record their proceedings. It is true, the pleadings disclose the existence of a contest between these petitioners and other parties, and it is true that the answer would tend to show that the others were the commissioners de facto; but that was a question of fact to be determined by the court hearing this application, and it, as must be assumed from the decision, found that these petitioners, rather than their contestants, were the commissioners de facto. It was proper for it then to issue a mandamus to compel the defendant to recognize them as the commissioners of the county, and this irrespective of the question whether or no the petitioners were also commissioners de jure. No one would for a moment contend that this adjudication could be pleaded as an estoppel in quo warranto proceedings between the several contestants. If that has not already been determined in a suit to which all the contestants are parties, it is still a matter open for judicial inquiry and determination. Who would doubt, if these petitioners were the unquestioned commissioners of the county, that mandamus would lie to compel the clerk to recognize them and record on the county books their proceedings as such? Does the fact that certain parties are contesting their rights as commissioners oust the court of jurisdiction, or forbid it to compel other county officers to recognize them? Must the office of county commissioners remain practically vacant, and the affairs of the county unadministered, pending a trial of a right of office between contestants? Surely not; public interests forbid. They require that the office should be filled, and that when filled by parties, under color of right, all other officers should recognize them as commissioners until their right to hold the office has been judicially determined adversely by proper quo warranto proceedings."

c. *Injunction*.—The right to a public office or franchise cannot be determined in equity upon an original bill for an injunction: *Cochran v. McCleary*, 22 Iowa, 75. Since possession of his office under color of title gives validity to the acts of a de facto officer so far as they affect the public and third persons, injunction does not lie to restrain such an officer from performing the duties of his office: *Chambers v. Adair*, 110 Ky. 942, 62 S. W. 1128.

In *Campbell v. Wolfenden*, 74 N. C. 103, which was a proceeding in the nature of a quo warranto calling on the defendants to show by what right they held their respective offices of mayor and aldermen, and asking for an injunction against their exercising the rights and powers of their offices until the final hearing of the case, the court, per Rodman, J., said: "To grant an injunction by which the

persons in possession of the offices of mayor and aldermen of a city, and actually performing the duties of those offices, are restrained from all official acts, is to leave the city without a government, and a prey to all the evils which a city government is designed to prevent. It cannot be considered a trivial or indifferent thing. In the present case no bond at all was required from the relators. But any bond which might have been given would have been only for the indemnity of the defendants, and not of the public. If a city government had not been deemed necessary to the public welfare, the legislature would not have established it. All courts are bound to assume that it is useful and necessary, and that the circumstances must be rare and peculiar which will justify a court in suspending it. It cannot be sufficient that it shall be alleged and be made to appear probable, or even clear, that the persons filling the offices were not regularly or rightfully elected; but it must also appear that they are abusing or about to abuse their possession of official power to the public injury, and that the public will sustain no damage by the suspension for an indefinite time of all city government."

d. *Prohibition*.—The writ of prohibition does not lie to test the title of a *de facto* judicial officer: *State v. McMartin*, 42 Minn. 30, 43 N. W. 572; *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478, 24 Pac. 367, 9 L. R. A. 59; *In re Radl*, 86 Wis. 645, 39 Am. St. Rep. 918, 57 N. W. 1105.

In *State v. McMartin*, 42 Minn. 30, 43 N. W. 572, there was an act of the legislature establishing a justice's court in one of the wards of the city of St. Paul, and providing for the election of such justice at the next general city election. There was a section of the act authorizing the mayor of the city to appoint the first justice to hold the office until the next election. Respondent, *McMartin*, was occupying the office and performing its duties, under appointment by the mayor, pursuant to the provisions of the act. A civil action was commenced in the court, and the defendant therein applied for a writ of prohibition to restrain *McMartin* from proceeding in the action on the ground that he was not a justice of the peace, and had no authority to act as such for the reason that the provision of the act assuming to confer the power on the mayor to fill the office by appointment is unconstitutional. The court, speaking by Justice Mitchell, said: "This part of the act is entirely separate and distinct from the provisions creating the court or office, and hence, even assuming that the former is invalid, the latter are valid. We have, then, a case where the court or office was legally created, and the illegality, if any, consists in an attempt to fill it by appointment, for the period indicated, in a way not authorized by the constitution. On these facts, according to all the authorities, the respondent is a justice *de facto*. That his title to the office cannot be tried on a writ of prohibition, but only on information in the nature of *quo warranto*, is too well settled to require discussion. The office of the writ of prohibition is to prevent inferior tribunals from usurping a jurisdiction with which they are not legally vested. It may also issue to a person or body of persons assuming to exercise the functions of a pretended court, when in fact no such court had ever been constitutionally established, for as said in *State v. Young*, 29 Minn. 474, 9 N. W. 737, the same reasons might exist for arresting their action as in the case of a court exceeding its jurisdiction. In both cases there is the exercise of unauthorized judicial power, which

is regarded as a contempt of the sovereign. But in the present case neither of these conditions exist, for it is conceded that the court was lawfully established, and it is not pretended that respondent has done or is threatening to do anything in excess of the jurisdiction of that court. Counsel argues that relator has no other available remedy for the wrong that is about to be done to him, and that, inasmuch as there must be a remedy for every wrong, therefore a writ of prohibition will lie. But the fallacy consists in the assumption that relator is threatened with any wrong. Respondent being a justice *de facto*, his acts are as valid as if he were a justice *de jure*. In fact, as to everybody except the state in proceedings by *quo warranto*, to test his right to the office, he is, in effect, a justice *de jure*."

e. **Habeas Corpus.**—The validity of the title of a *de facto* judge to his office or his right to exercise the judicial functions cannot be determined upon a writ of habeas corpus sued out by one who has been tried and convicted by him: *In re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382, 62 Pac. 661; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374; *State v. Bailey*, 106 Minn. 138, 130 Am. St. Rep. 592, 118 N. W. 676, 19 L. R. A., N. S., 775, 16 Ann. Cas. 338; *Patterson v. State*, 49 N. J. L. 326, 8 Atl. 305; *Ex parte Strang*, 21 Ohio St. 610; *Clark v. Commonwealth*, 29 Pa. 129; *In re Boyle*, 9 Wis. 264; *In re Burke*, 76 Wis. 357, 45 N. W. 24; *In re Manning*, 139 U. S. 504, 11 Sup. Ct. Rep. 624, 35 L. ed. 264; *Ex parte Ward*, 173 U. S. 452, 19 Sup. Ct. Rep. 459, 43 L. ed. 765.

"The office of the writ of habeas corpus," said Brown, J., in *State v. Bailey*, 106 Minn. 138, 130 Am. St. Rep. 592, 118 N. W. 676, 19 L. R. A., N. S., 775, 16 Ann. Cas. 338, "is to afford the citizen a speedy and effective method of securing his release when illegally restrained of his liberty. Its scope, when directed to an inquiry into the cause of imprisonment in judicial proceedings, extends to questions affecting the jurisdiction of the court, the sufficiency in point of law of the proceedings, and the validity of the judgment or commitment under which the prisoner was restrained. It cannot be employed as a writ of *quo warranto* to inquire into the title of the person to the office of judge of the court whose judgment or commitment is assailed."

It may, however, be shown on habeas corpus that the court under whose judgment or order the prisoner is deprived of his liberty had no legal existence or is not a court of competent jurisdiction: *In re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255, 68 Pac. 639. But in *Ex parte Keeling*, 54 Tex. Cr. 118, 130 Am. St. Rep. 884, 121 S. W. 605, it was held that a person in custody for violating a city ordinance cannot, on habeas corpus, inquire into the legality of the corporate existence of the city and the election and incumbency of its officers. Such attack can be made only by proceedings in the nature of a *quo warranto*.

f. **Certiorari.**—It was held in *Oliver v. Jersey City*, 63 N. J. L. 634, 76 Am. St. Rep. 228, 44 Atl. 709, 48 L. R. A. 412, reversing *Oliver v. Jersey City*, 63 N. J. L. 96, 42 Atl. 782, that where an officer enters upon the duties of an office to which he has been legally elected and for which he has properly qualified, and afterward is appointed to and accepts another and incompatible office, but continues in good faith to publicly discharge the duties of the first, his term not having expired and no successor having been appointed

or elected in his stead, nor any adjudication made against his title, he is, as to such first office, an officer *de facto*, and his acts as such officer cannot be impeached on certiorari to review the proceedings of a city board in which he participated.

A similar ruling was made in *Ross v. City of Long Branch*, 73 N. J. L. 292, 63 Atl. 609. In that case a mayor's commission became by statute null and void by his acceptance of the office of sheriff of the county. He continued, however, to act as mayor, and it was held that his acts as such were not open to question on certiorari to review a resolution passed by the mayor and city council; that his right to the office must be directly attacked in a proceeding to which he was a party.

Certiorari is, however, the proper remedy to review and quash void judgments of inferior courts. Where, therefore, under the law there could be no office of justice of the peace in and for a certain ward of a city, a person assuming to act as such was not even a *de facto* justice of the peace, and all judgments rendered by him were void, and could not support an appeal, and the proper remedy to review and quash the same was by common-law certiorari: *Schulte v. Wilke*, 167 Ala. 663, 52 South. 526. While the judgment in this case was simply one vacating the judgment of the justice, it was based upon an inquiry into his title to the office, and its necessary effect would be that of a judgment of ouster.

g. Replevin for Property Belonging to the Office.—Title to office cannot be tried in an action of replevin for property belonging to the office: *Desmond v. McCarthy*, 17 Iowa, 525; *Hallgren v. Campbell*, 82 Mich. 255, 21 Am. St. Rep. 557, 46 N. W. 381, 9 L. R. A. 408.

In *Desmond v. McCarthy*, 17 Iowa, 525, one who had been elected justice of the peace for a certain township, and who had properly qualified for the office, brought a replevin suit against the *de facto* incumbent of the office to recover the docket and other books and papers belonging to the office, which the defendant unlawfully withheld. The suit was evidently brought to test the right of the respective parties to the office. Said the court: "The action of replevin would determine nothing except as between the parties to it, leaving the public still unaffected by the judgment in the particular case, and free to adopt or repudiate it. And if a justice of the peace may thus test his right to that office by an action of replevin, it would, of course, be alike competent for any person claiming to be a clerk of a district court, a county judge, a mayor of a city or any other officer, by a replevin of the seal and books and papers pertaining to the office, to put themselves in full possession of the respective offices without any authority from the people, or any judgment of a court in an action wherein the state is a party directly or indirectly. It is clear, therefore, upon principle as well as authority, that the right or title to an office cannot be determined by a civil action between the respective claimants. Such an issue can only be tried in the proper action in the nature of a writ of *quo warranto*, or by an information, or possibly by *mandamus*. And until such issue is determined in the proper action, no suit in replevin can be maintained by one claimant against the other for the possession of the office or its appurtenances."

h. Statutory Proceedings for Delivery of Books and Papers of the Office.—In a number of the states a summary proceeding is pro-

vided by statute to compel the delivery of books and papers appertaining to a public office. To authorize an application under such a statute it is sufficient that the applicant has color of title to the office. The court will not, upon such an application, decide the question of title to the office. If there is a reasonable doubt as to who is entitled to it, it must be determined on a direct proceeding for the purpose, by action of quo warranto: *Conover v. Devlin*, 24 Barb. 587; *In re Sells*, 15 App. Div. 571, 44 N. Y. Supp. 570.

In *Re Bradley*, 141 N. Y. 527, 36 N. E. 598, the petitioner, Henry Bradley, had received a certificate of election as supervisor of the town of Minerva, in Essex county, and had duly qualified. He sought to compel his predecessor in office to deliver the moneys, books, and papers belonging thereto, and objection was made that the petitioner had not been elected by the greatest number of legal ballots. In affirming an order directing the delivery to be made as demanded, the court of appeals said: "This is not a proceeding to try the petitioner's title to the office. It is simply a summary proceeding, authorized by the statute (1 Rev. Stats., p. 124, sec. 50), by which he seeks to obtain the town moneys and the books and papers accompanying the office; and all the petitioner was required to establish was the fact of his election, as evidenced by the proper certificate, and that he had duly qualified. The incumbent of the office whose term had expired cannot go into questions underlying the petitioner's election, and which he may allege as invalidating it. For such purpose the proceeding must be direct."

But while in a statutory proceeding of this kind, to enforce the delivery of books and papers, the title to an office cannot be regularly tried or decided, yet, where the facts are undisputed, and the title of the applicant is void beyond a substantial doubt, the rights of the parties to the office may be passed on: *In re Brenner*, 170 N. Y. 185, 63 N. E. 133; *Guden v. Dike*, 75 N. Y. Supp. 794.

V. Status of De Facto Officer.

a. **As to the Public and Third Persons.**—In view of what has already been said, it should be unnecessary to cite further authority for the proposition that the acts of a de facto officer, so far as third persons and the public are concerned, are as valid and binding as those of a de jure officer, and are not open to collateral attack. This proposition is the very essence of the de facto doctrine. It has been either postulated or assumed in every case that has had the subject of de facto officers under consideration, and is inseparably interwoven with every phase of the subject that has been considered in this note. It may further illustrate the rule, however, to consider a few cases where a distinction between the two kinds of officers, touching their official acts, has been sought to be made, and where, perhaps, the gravity of the circumstances justified the point being raised.

"Public policy," said the court in *State v. Messervy*, 86 S. C. 503, 68 S. E. 766, "requires that the authority of one in fact holding a public office under color of legal title shall not be questioned collaterally"; and therefore held that one who resists a de facto officer and kills him while in the discharge of his apparent duty has only such defense as would exist were the person slain an officer de jure.

In *State v. Dierberger*, 90 Mo. 369, 2 S. W. 286, it was held that the failure to file a deputy constable's appointment in the office of the county clerk as required by the statute did not affect the officer's status as a constable. He was an officer *de facto*, and no one had a right to resist him in the performance of the duties of a constable; and when on trial under an indictment for murder for killing one who had resisted him while attempting to make an arrest, he was entitled to be treated as an officer, and an instruction to the jury was erroneous which proceeded on the theory that he was not one.

In *People v. Hopson*, 1 Denio, 574, where the defendants were indicted for resisting a constable in the execution of process, the defendants offered to prove that the constable had never taken the oath of office, nor given security as required by law, and so was not a constable. As to this offer the court said: "The evidence would be proper if Lascells [the constable], instead of the people, was the party complaining of an injury. If he were suing to recover damages for the assault, it would probably be a good answer to the action that he was not a legal officer, but a wrongdoer who might be resisted. And clearly, he cannot recover fees, or set up any right of property on the ground that he is an officer *de facto*, unless he be also an officer *de jure*. . . . But it is equally well settled that the acts of an officer *de facto*, though his title may be bad, are valid so far as they concern the public, or the rights of third persons who have an interest in the things done. Society could hardly exist without such a rule. . . . The people are prosecuting for a breach of the public peace; and it is enough that Lascells was an officer *de facto*, having color of lawful authority. The rights of the creditor, the due administration of justice, and the good order of society all concur in requiring that he should be respected as an officer until his title has been set aside by due process of law."

In *People v. McCann*, 247 Ill. 130, 93 N. E. 100, which was a prosecution of a police inspector for bribery, it was held to be immaterial whether or not the accused was an officer *de jure*, when at the time of committing the crime he assumed to be such officer and exercised the duties of the office. "If plaintiff in error," said the court, "was seeking to establish his title, or some right depending upon a valid title, to the office of police inspector, he would be required to show that he is a *de jure* officer. . . . But as between himself and third parties (the state in this case), if the office of inspector of police of the city of Chicago had a legal existence, and plaintiff in error assumed the duties and discharged the powers and functions of the office, he became a *de facto* officer, and cannot be permitted to deny his responsibility, while so acting, on the ground that he was not legally elected or appointed to said office."

In *Diggs v. State*, 49 Ala. 311, the defendant, by an order of the circuit court, was appointed county solicitor. He accepted the appointment and acted under it, although there was no vacancy in the office of county solicitor at the time the order was made. It was held that he was county solicitor *de facto*, and as such officer *de facto* he was indictable for malfeasance in office as if he had been an officer *de jure*.

In *State v. Frentress*, 37 Ind. App. 245, 76 N. E. 821, it was held that one who was appointed a deputy marshal by a town board of trustees, and was acting as an officer *de facto* at least, could not, in an action on his bond, deny that he was an officer *de jure*.

In *State v. Marsh*, 13 Kan. 596, it was held that a *de facto* grand jury may present a legal indictment; and in *State v. Williams*, 61 Kan. 739, 60 Pac. 1050, that perjury may be committed in taking oath before a *de facto* judge.

b. Suing or Defending in His Own Right.—While the acts of an officer *de facto* are valid in so far as the rights of the public are involved, or the rights of third persons having an interest in them are concerned, yet if a party sues or defends in his own right as a public officer, it is not sufficient that he be merely an officer *de facto*, but he must be an officer *de jure*: *Miller v. Callaway*, 32 Ark. 666; *People v. Weber*, 89 Ill. 347; *Moon v. City of Champaign*, 214 Ill. 40, 73 N. E. 408; *Patterson v. Miller*, 2 Met. (Ky.) 493; *Kimball v. Alcorn*, 45 Miss. 151; *Fylpaa v. Brown County*, 6 S. D. 634, 62 N. W. 962.

The case of *Patterson v. Miller*, 2 Met. (Ky.) 493, was that of a sheriff, sued in trespass for the seizure and sale of property. He was duly elected, had given bond and taken the oath, but the law required that he should, when elected, be a resident of the county. Not being such resident, he was not competent to take the office, and his mere color of title to the office, it was held, could not avail him as a defense to the action. Said the court: "As he holds his office by color of right, and acts as sheriff, all his acts as such are regarded as lawful, so far as third parties are concerned. Public policy requires that they should be so regarded, and that his official authority should not be questioned collaterally. He acts as the sheriff of the county, and it is to the interest of its citizens that his acts should be declared to be valid, so long as he continues thus to act. . . . He remains an officer *de facto*, until his office shall be declared to be vacant or forfeited, by a direct proceeding against him, instituted and carried on for that purpose. . . . Can he, however, in an action against himself, for acting as sheriff and seizing and selling the property of the plaintiff without lawful authority, defeat the right of recovery, by showing that he acted as an officer *de facto*, or by relying on his certificate of election and qualification in the county court, as conclusive evidence that he was the lawful sheriff of the county?" The court said he could not, holding the principle to be well established that although the acts of an officer *de facto* are valid as to third persons, nevertheless they are invalid so far as he himself is concerned; and his mere color of title to the office will not avail him as a protection in actions against him for trespasses on person or property.

At first blush this case seems to conflict with that of *State v. Dierberger*, 90 Mo. 369, 2 S. W. 286, *supra*, where, it will be remembered, it was held that a *de facto* constable on trial under an indictment for murder for killing one who had resisted him while attempting to make an arrest, was entitled to be treated as a *de jure* officer, with all the immunities of such an official. But it should be noted that in that case the state was the prosecutor, and fell into the category of third persons, as to whom the official acts of a *de facto* officer are valid. If we suppose that instead of killing, the officer had simply maimed his victim, and the latter had then sued the officer to recover damages for the assault, the officer could not, under the decision in *Patterson v. Miller*, 2 Met. (Ky.) 493, have set up his *de facto* title as a defense to the action.

MOORE v. BRANDENBURG.

[248 Ill. 232, 93 N. E. 733.]

EQUITY—Distribution of Estates of Decedents.—Jurisdiction of the distribution of an estate among the heirs of an intestate will not ordinarily be assumed by a court of equity. It will be done only under circumstances extraordinary or unusual in character. (p. 207.)

DESCENT AND DISTRIBUTION—Title of Heirs to Personalty.—The naked legal title to the personal property of an intestate vests in the administrator, but the equitable title vests in the heirs, and the administrator holds the property in trust for the payment of debts. (p. 207.)

ESTATES OF DECEDENTS—When Heirs may Recover Property.—Where there is an administrator the heirs are not entitled to sue for and recover property belonging to or demands due the estate; but where there are no debts or claims of any kind against the estate, and nothing for an administrator to do, if one should be appointed, except to distribute the personal estate to those entitled to it by law, the heirs may maintain necessary actions for the purpose of reducing the property to possession in order that it may be distributed. (pp. 207, 208.)

ESTATES OF DECEDENTS—Action by Heirs to Recover Property.—Where the statute fixes the shares of the heirs of an intestate, and there are no debts or claims of any kind against the estate, and no administrator has been appointed, the heirs may maintain an action in equity to recover property procured from the deceased by fraud and undue influence. (pp. 208, 209.)

EQUITY—Administration of Estates—Full Relief.—In an action to recover certain property procured from a decedent in his lifetime by fraud and undue influence, a court of equity will not stop with a decree for the recovery of the property, but will retain jurisdiction for the purpose of adjusting all the rights of the parties, even though in doing this it may be, in part, administering purely legal remedies. (p. 209.)

ADMINISTRATION—Disputed Title.—In Summary Proceedings provided by statute for the discovery of concealed assets of an estate of a decedent, contested rights and title of property between the executors and others cannot be tried. (p. 211.)

Bill in equity by certain of the children and heirs of Peter Brandenburg, deceased, against his widow and certain other children, brought in the circuit court of La Salle county, to set aside certain transfers and gifts made by the deceased to the defendants, and for an accounting.

The bill alleges the death of Peter Brandenburg; that he left certain personal properties; that no administrator had been appointed and no settlement of the estate had; that there were no debts of or claims against the estate; that he was old and infirm and of unsound mind; and that by reason thereof and by undue influence the defendants had procured him to transfer to them certain property, the subject matter of the action. The plaintiffs and defendants were all of the heirs of the deceased.

An answer was filed on behalf of the minor defendants and a demurrer by the others. The demurrer was sustained and

the bill dismissed. On appeal to the appellate court the decree of the circuit court was affirmed and the case came to the supreme court by writ of certiorari.

C. A. Darnell and L. B. Olmstead, for the plaintiffs in error.

Butters & Armstrong, for the defendants in error.

²³⁵ FARMER, J. Two questions are involved in this litigation: First, do the heirs of an intestate, where there is no administration and no debts, take such title to the personal estate as will enable them to maintain a bill to procure their distributive share of the estate? Second, have the plaintiffs in error an adequate remedy at law for the relief asked? As an incident to the first contention it is also insisted that a court of equity will not, unless the circumstances be unusual, assume jurisdiction to administer an estate. It is undoubtedly true that a court of equity will not ordinarily take jurisdiction of the distribution of an estate among the heirs of an intestate. This will only be done under circumstances extraordinary or unusual in character, and in ²³⁶ the decision of this case we are called upon to determine whether the case made by the bill is one justifying the exercise of equitable jurisdiction.

The contention of defendants in error that no title to personal property of an intestate vests in the heirs without administration, and they cannot therefore maintain a bill in equity to procure their distributive share of the estate, is true only in a modified degree. While the naked legal title to the personal property of an intestate vests in the administrator, the equitable interest vests in the heirs and the administrator holds the property in trust for the payment of debts. The residue after the payment of debts belongs to the distributees: *People v. Brooks*, 123 Ill. 246, 14 N. E. 39. The general rule is that the administrator represents the deceased as to the personal estate and is entitled to take possession of it, and when the liabilities are discharged distribute the residue to the heirs according to the laws of descent, and where there is an administrator the heirs are not entitled to sue for and recover property belonging to or demands due the intestate. There is, however, an exception to the general rule where there are no debts or claims of any kind against the estate, and nothing for an administrator to do, if one should be appointed, except to distribute the personal estate to those entitled to it by law. In such cases, although the authorities are not in entire harmony, the weight of them is that it is unnecessary to go through the legal form of having an administrator appointed for the sole purpose of distributing the personal estate, but the heirs may maintain necessary actions

for the purpose of reducing property to possession in order that it may be distributed. In *McCleary v. Menke*, 109 Ill. 294, and *Lynch v. Rotan*, 39 Ill. 14, it was held that where there are no debts of the intestate and no administration upon the estate, the heirs are entitled to the property and may maintain an action therefor in their own names.

²³⁷ In *People v. Abbott*, 105 Ill. 588, the sole heir of an intestate took possession of the personal property, and after the payment of all debts and liabilities appropriated and disposed of the personal estate. Part of the property thus disposed of consisted of notes due the intestate, which the sole heir indorsed, transferred and delivered to another. The transferee died testate, and her executor took possession of and inventoried the notes as assets of her estate. Afterward an administrator of the sole heir's intestate was appointed and endeavored to cause the notes, or the proceeds thereof, to be delivered to him by a citation under sections 81 and 82 of the administration act. The title of the assignee of the notes was sustained. This court said (page 595): "If the notes be delivered to the administrator he has only the duty of paying the proceeds to Lee (the heir), but Lee not being entitled to them equitably, he could be made, by the decree of a court of chancery, to pay them over to appellees." Here the bill alleges that no administrator has been appointed; that the deceased left no debts; that his funeral and other burial expenses have been fully paid, and that there is no property or effects belonging to the estate other than as mentioned in the bill. These allegations are admitted by the demurrer to be true. There is no dispute as to who are the heirs of Peter Brandenburg and as to their distributive shares in his personal estate, if he left any such estate. No one but the widow and heirs has any interest in the personal property or is entitled to share in its distribution. The equitable title is in them. The disagreement is not as to the right of any of the parties to share in the distribution of the personal property of the intestate, but is as to the title of the intestate to the property at the time of his death, and that must be determined before there can be any distribution. If the allegations of the bill are true—and they are admitted to be true by the demurrer—then the defendants in error are not the owners of the property, but it belongs to the heirs ²³⁸ of Peter Brandenburg, and, there being no creditors, the heirs may sue for and recover the property. There can be no doubt that under the allegations of the bill a court of equity has jurisdiction to hear and determine the validity of the title to the property claimed by the defendants in error, and we see no reason why a court of equity cannot distribute the property, if it is determined there is any to distribute, as fairly and justly as the probate court. The respective shares

of all the parties are fixed by statute, except the amount of the widow's award, and there is no insurmountable difficulty in the way of a court of equity fairly and justly fixing that.

In *Spencer v. Spruell*, 196 Ill. 119, 63 N. E. 621, an heir of an intestate filed a bill in chancery to set aside conveyances of real and personal property made by him during his lifetime. The bill alleged he was not possessed of sufficient mental capacity to make disposition of his property, and that he was unduly influenced by those to whom the property was given. It was held the allegations of the bill were sustained by the proofs, and a decree was entered setting aside the conveyances and transfers of the property. It does not appear that the right of the heir to maintain the bill in her own name was questioned in that case, but this court affirmed the decree of the circuit court, and held that that court had full power to render the decree it did.

That cases where there are no debts of the intestate and no administration of the estate form an exception to the rule that heirs cannot sue for and recover property of the estate in their own right has been held, we believe, by a majority of the courts of last resort in other states where the question has been presented and passed upon. Some of the decisions so holding are: *Ferguson v. Barnes*, 58 Ind. 169; *Giddings v. Steele*, 28 Tex. 732, 91 Am. Dec. 336; *Magel v. Milligan*, 150 Ind. 582, 65 Am. St. Rep. 382, 50 N. E. 564, and cases cited in note; *Teal v. Chancellor*, 117 Ala. 612, 23 South. 651. The author of the chapter on Descent and Distribution ²³⁹ in 14 Cyc. in discussing this subject says (page 109): "According to the weight of authority, however, where there are no debts and no letters of administration have been granted, the heirs or distributees may take or divide and enforce choses in action of the intestate or receive payment of and discharge the same." And on page 157: "An heir or distributee may maintain a bill in equity against his coheirs or codistributees for an accounting or for the purpose of obtaining his distributive share of an estate where the administration has been closed, or where there has been no administration and there are no creditors, or where there has been a mistake as to the value of the property of decedent or fraud in settling the estate."

In our opinion, if there were an administrator appointed under the facts alleged in the bill in this case, he would be required to resort to a court of equity to have the title to the property in dispute determined. The only parties having any interest in the property in dispute are parties to this litigation, and the bill makes a case for the exercise of equitable jurisdiction. A court of equity, having been properly appealed to for relief, will not, if the bill is sustained by the proof, stop with merely declaring the title of defendants in error to be invalid, but will retain jurisdiction for

the purpose of adjusting all the rights of the parties, even though in doing this it may be, in part, administering purely legal remedies. In discussing the right of an heir to the personal property of an intestate without administration, where there were no debts, this court, in *Lewis v. Lyons*, 13 Ill. 117, used language that seems pertinent to this case. The court said (page 121): "It would be a mockery of justice for a court of chancery to require the heir to pay over the money to the administrator when he has no debts to pay and no legitimate use for it, merely for the purpose of allowing him to retain and use it for perhaps two years and then to pay it back to the heir, retaining his costs and commissions—costs uselessly made and commissions ²⁴⁰ earned by no beneficial services, but in a business which he seeks through an expensive suit in chancery and which can benefit himself alone."

We conclude that under the allegations of the bill in this case neither reason nor justice requires a dismissal of this proceeding and the appointment of an administrator to do the same thing that may be as fully and completely done by a court of chancery in this case, and while this conclusion is not sustained by all the authorities, it is by a very large number, and, we believe, by a much greater weight of them.

Defendants in error contend that the demurrer was properly sustained because plaintiffs in error have a complete and adequate remedy at law. The remedy pointed out is the appointment of an administrator, and a proceeding, under sections 81 and 82 of the administration act, by citation against defendants in error. Those sections have been frequently before this court and as understood and construed were not designed to apply to a case like this. In the case of *Dinsmoor v. Bressler*, 164 Ill. 211, 45 N. E. 1086, the court said, on page 221: "The summary proceeding in the probate court to compel the production and delivery of property 'is not the proper remedy . . . to try contested rights and title to property between the executor and others': 2 Woerner's American Law of Administration, sec. 325, p. 681. 'Nor does the power conferred upon probate courts to subpoena and examine parties alleged to conceal or withhold property of the estate authorize such courts to try the title to the property in dispute': 1 Woerner's American Law of Administration, sec. 151, p. 347; Schouler on Executors and Administrators, sec. 270. If sections 81 and 82 could be used to settle contested rights to property as between executors and administrators on the one side and third persons on the other, they would operate as an infringement upon the constitutional right to trial by jury, as they contain no provision for a jury trial." This case was cited with approval ²⁴¹ in *Martin v. Martin*, 170 Ill. 18, 48 N. E. 694, where the court said (page 28): "The statute is not designed to afford the means of col-

lecting debts due to estates (Williams v. Conley, 20 Ill. 643), nor to try contested rights and title to property between the executors and others: Dinsmoor v. Bressler, 164 Ill. 211, 45 N. E. 1086. The mere fact that one party to the controversy is an executor will not justify depriving the other party of a trial by jury or authorize his imprisonment, but in a proper case the court may order the property or effects to be delivered up, or the proceeds or value thereof in case the same has been converted."

Statutes authorizing a summary proceeding in the probate court for the discovery of concealed assets of an estate exist in many states of the Union. Some of them are similar to ours and some do not confer as much power on the probate court as our statute. The construction we have given our statute is in harmony with that given similar statutes in other states: Humbarger v. Humbarger, 72 Kan. 412, 83 Pac. 1095, 115 Am. St. Rep. 204, where an exhaustive note will be found. Furthermore, the bill in this case prays for an accounting by defendants in error for portions of the property converted and disposed of by them, and it certainly could not be contended that such relief could be granted by the probate court in a proceeding by citation under sections 81 and 82. In our opinion, whether the case made by the bill is one for the exclusive jurisdiction of a court of equity or not, it is a proper case for equitable jurisdiction, and the demurrer to the bill should have been overruled.

The judgment of the appellate court and the decree of the circuit court are reversed and the cause remanded to the circuit court, with directions to overrule the demurrer.

Summary Proceedings to Discover or Recover the Property of Estates of decedents is the subject of a note to Humbarger v. Humbarger, 115 Am. St. Rep. 208.

As to Equitable Jurisdiction in the Matter of the Discovery of Property of the Estates of Decedents, see Eisentraut v. Cornelius, 134 Wis. 532, 126 Am. St. Rep. 1027, and cases cited in the cross-reference notes thereto.

The Rights of Heirs in the Personal Property of their ancestor are discussed in the note to McBride v. Vance, 112 Am. St. Rep. 727.

WILCE v. VAN ANDEN.

[248 Ill. 358, 94 N. E. 42.]

ANNUITIES.—The Payment of Annuities from the Corpus of a Trust Fund is authorized and directed by a provision of a will: "And out of the fund so created they shall set apart a sum of not less than seventy-five thousand dollars (\$75,000), (if it shall produce so much) from which, together with the income thereof, they shall pay said annuities." (p. 214.)

ANNUITIES—Payment from Corpus of Fund.—It is often difficult to determine whether an annuity is to be paid out of the capital of an estate or only out of the income of the estate. The question must be determined by ascertaining the intention of the testator. Each case will depend largely upon the meaning of the words used by the testator. (p. 214.)

WILLS—Trust for Charitable Use—Certainty.—A provision of a will creating a fund for the payment of annuities to the widow and daughter of the testator, and upon their death authorizing the trustees to give such portion thereof as they may think best and proper to any one or more of the testator's brothers or sisters that may stand in need of the same, "and the remainder shall be devoted by said trustees, in their discretion, to the advancement of the cause of temperance or in aid of one or more manual training schools in said city of Chicago," attempts to create a trust which by reason of its indefiniteness is incapable of being enforced in equity, and therefore is void. (p. 216.)

WILLS—Trusts.—Certainty is Necessary to the Creation of a valid testamentary trust, and any words by which it is expressed, or from which it may be implied, that the first taker has the power of withdrawing any part of the subject from the object of the request or wish of the testator, applying it to his own use, will prevent the subject of the gift or trust from being considered certain. (pp. 216, 217.)

WILLS—Charities—Power of Trustees to Choose.—Where trustees in a will are given the power to choose between charities, a bequest may be upheld, but where they have a discretion to give what remains of a fund to private parties or donate it to charitable uses, the bequest must be held void for uncertainty. (p. 217.)

WILLS.—The Law Favors the Vesting of Estates, and, in the absence of any intention of the testator appearing to the contrary, the estate will vest at the time of his death. (p. 218.)

TRUSTS—Termination by Equity.—Where an attempted trust in the residue of a fund, if any, remaining at the death or remarriage of the testator's widow and the death of his daughter is void, and the corpus of the property is being consumed by annuities in favor of the widow and daughter, charged thereon, the daughter being the sole heir of the testator, and all parties interested being sui juris and requesting and consenting to a termination of the trust, the same may be decreed by a court of equity and the corpus of the estate vested in the daughter, subject to the rights of the widow. (p. 218.)

TRUSTS—Termination in Equity.—Where all the parties are capable of acting and desire to terminate a trust, courts can decree its termination, and when all those who have the entire legal and beneficial interest in the property agree to dispose of it in a particular manner, courts will give effect to their agreements. (p. 219.)

Bulkley, Gray & More, for the appellants.

Adams, Bobb & Adams, for the appellees.

³⁵⁹ HAND, J. This was a bill in chancery filed by E. Harvey Wilce and George C. Wilce, as trustees under the last will and testament of Edwin P. Wilce, deceased, against the appellees, for the construction of the will of Edwin P. Wilce. An answer and replication were filed, and Eva R. Wilce and Edwina May Van Anden filed a cross-bill. A decree was entered construing the will and terminating the trust therein created, and the complainants have prosecuted this appeal.

Edwin P. Wilce died the twentieth day of September, 1889, testate, leaving Eva R. Wilce, his widow, and Edwina May Wilce (now Edwina May Van Anden), an adopted daughter, him surviving as his only heir at law. His will was admitted to probate, and Thomas Wilce and Alexander H. Lowden, who were named as executors and trustees under the will, duly qualified as executors. The will provided (1) for the payment of debts and funeral expenses; (2) that an annuity of \$2,500 per year should be paid his widow, Eva R. Wilce, during her life and until she should again marry; (3) that an annuity should be paid his adopted daughter, Edwina May Wilce, of \$500 per year until she should arrive at the age of fifteen years, afterward \$1,000 per year until the death or remarriage of his widow, and after the death or remarriage of his widow \$2,500 per year during her life; (4) he devised his residence, household ⁸⁰⁰ furniture, etc., to his widow during her life and at her death to his adopted daughter in fee simple; (5) all the balance of his estate he gave to Thomas Wilce and Alexander H. Lowden in trust, first, to pay annuities to his widow and adopted daughter; second, to dispose of enough of his estate to raise a fund of \$75,000, if it should produce so much, "from which, together with the income thereof, they shall pay said annuities"; and third, that the business then being carried on by him as a sash, door and blind factory be incorporated and certain stock sold to certain employees and the balance sold by the trustees, the proceeds to be used, in connection with the proceeds from the sale of other property, to constitute the \$75,000 fund with which to pay annuities. The fourth clause of the fifth paragraph of the will, upon which the main contention rests in this case, reads as follows:

"(4th) The surplus, if any, remaining after setting apart said sum of seventy-five thousand dollars, (\$75,000,) and also the entire part or portion of my estate remaining after the death or re-marriage of my said wife and after the death of my said daughter, shall be disposed of by my said trustees as follows, to-wit: They may give such part or portion thereof as they may think best and proper to any one or more of my brothers or sisters that may stand in need of the same, in the judgment of my said trustees, and the remainder thereof shall be devoted by said trustees, in their discretion, to the advance-

ment of the cause of temperance or in aid of one or more manual training schools in said city of Chicago."

The executors in 1894 settled their accounts in the probate court and turned over to themselves, as trustees, \$3,264.88 in cash and real estate estimated to be worth \$80,000. Thereafter Thomas Wilce died and Alexander H. Lowden resigned as trustee, and E. Harvey Wilce and George C. Wilce, brothers of the testator, who were named as successors in trust in the will, were duly appointed by ³⁶¹ the circuit court of Cook county trustees of said estate. In 1902 Edwina May Wilce intermarried with one Frank Van Anden, and the infant defendants, Evelyn, Itilia and William Manning Van Anden, who are represented by guardian ad litem in this litigation, are the fruits of that marriage. The brothers and sisters of Edwin P. Wilce, deceased, are also made parties defendant in this suit.

Three questions were raised in the court below and are discussed in the briefs filed in this court: (1) May the corpus of the estate be drawn upon to pay the annuities of Eva R. Wilce and Edwina May Van Anden, provided the income is insufficient for that purpose? (2) Is the fourth clause of the fifth paragraph of the will void? and (3) if the aforesaid clause is void, may the trust at this time be terminated at the suit of Edwina May Van Anden and Eva R. Wilce, with the consent of the trustees? The trial court by its findings determined all of said propositions in the affirmative, and directed the trustees, by its decree, to turn over the corpus of the estate to Eva R. Wilce and Edwina May Van Anden upon the execution by them, to the trustees, of proper releases.

In the second clause of the fifth paragraph of the will it is provided: "And out of the fund so created they shall set apart a sum of not less than seventy-five thousand dollars, (\$75,000,) (if it shall produce so much,) from which, together with the income thereof, they shall pay said annuities." This clause of the will clearly directs the trustees to pay the said annuities out of the corpus of the fund if the income is insufficient. In *Einbecker v. Einbecker*, 162 Ill. 267, it was said (page 273): "It is often difficult to determine whether an annuity is to be paid out of the capital of an estate or only out of the income of the estate. But the question must be decided, as a general thing, by so construing the language of the testator's will as to ascertain his intention, and when the intention is ascertained it must be carried into effect. Each case will depend largely upon ³⁶² the meaning of the words used by the testator in his will." The trial court did not err in holding that the annuities of Eva R. Wilce and Edwina May Van Anden were payable out of the corpus of the trust if the income from the fund was insufficient to pay said annuities.

The fourth clause of the fifth paragraph of the will provides that the trustees, after the death or remarriage of the widow and after the death of the daughter, "may give such part or portion thereof as they may think best and proper to any one or more of my brothers or sisters that may stand in need of the same, in the judgment of my said trustees, and the remainder thereof shall be devoted by said trustees, in their discretion, to the advancement of the cause of temperance or in aid of one or more manual training schools in said city of Chicago." This clause of the will we think is void for two reasons:

First—Because it is uncertain that there will be any part of the fund remaining at the death of the annuitants in the hands of the trustees, as at that time it may be entirely exhausted in the payment of the annuities. The case of *Mills v. Newberry*, 112 Ill. 123, 54 Am. Rep. 213, 1 N. E. 156, is a case in point. The court, in that case, had the will of Julia Newberry under consideration. The clause in question was: "In event I die unmarried, leaving my mother surviving, I devise and bequeath to her all my property, both real and personal, of every kind and nature, upon the express condition, however, that she devise, by will to be executed before receiving this bequest, so much thereof as shall remain undisposed of or unspent at the time of her decease, to such charitable institution for women in said city of Chicago as she may select." Julia Newberry died unmarried and her mother declined to execute the will upon which the bequest was conditioned. She therefore took nothing under the will, and the question was, Where would the property bequeathed by the will go—to the mother, as heir at law, or to the charitable uses mentioned in the will? This court held the ³⁶³ language used was amply sufficient to create a trust for a charitable use, but that the subject of the trust was too indefinite to be executed. Among other things, the court said: "But an insuperable difficulty which we find to be in the way of the present proceeding is the uncertainty as to the subject matter of the trust attempted to be asserted. The subject is, so much of the property as shall remain undisposed of or unspent at the time of the decease of Mrs. Newberry. The property having been previously given to her absolutely, we construe the above as giving her the full power of expenditure and disposition of the property during her lifetime. What, then, is there to which a trust can now attach—which a court of equity can now take hold of and administer as trust estate? Evidently nothing. It is not the whole property nor is it any particular part of it, for it all must remain with Mrs. Newberry so long as she lives, for her to spend and dispose of. There may or there may not be something remaining undisposed of or unspent by her at the time of her

decease. Whether anything at all will be so left is now entirely uncertain. The authorities fully establish that the subject matter of the supposed trust must be certain." The will of Edwin P. Wilce conferred power upon his trustees to use the corpus of the trust fund to pay annuities, and the entire trust fund may be exhausted in the payment of said annuities prior to the death of Eva R. Wilce and Edwina May Van Anden. There is therefore no fund in existence, at least during the life of either of the annuitants, to which a trust in said clause 4 can attach, and there may be nothing remaining of the fund at the death of the survivor to which the trust can attach. The trust, therefore, attempted to be created by that clause of the will is by reason of its indefiniteness incapable, we think, of being enforced in a court of equity and void.

Second—The power is conferred upon the trustees to give such portion of the trust fund, upon the death of the survivor of the annuitants, to any one or more of the ³⁶⁴ brothers or sisters of the testator that may stand in need of the same, in the judgment of said trustees. This feature of the trust is a private trust as contradistinct from a charitable trust, and under this clause of the will the entire fund could be turned over by the trustees to an indigent brother or sister of the testator upon the death of the annuitants and nothing be left for the charitable bequest to operate upon. The result would be to make uncertain the amount set aside by the will for a charitable use and to make the entire clause of the will void. In *Mills v. Newberry*, 112 Ill. 123 (54 Am. Rep. 213, 1 N. E. 156), on page 135, it is said: " 'To constitute a valid trust, undoubtedly three circumstances must concur: Sufficient words to raise it, a definite subject, and a certain or ascertained object': Sir William Grant in *Cruwys v. Colman*, 9 Ves. 323. 'I do not lay it down that in a will a request may not amount to a legacy, but it should be limited to some certain thing or for some certain part of a thing, and not left absolutely to the pleasure of the person to whom the request is made': Lord Hardwicke in *Bland v. Bland*, 2 Cox, 355. In the language of Story: 'Wherever, therefore, the objects of the supposed recommendatory trusts are not certain or definite; wherever the property to which it is to attach is not certain or definite; wherever a clear discretion or choice to act, or not to act, is given; wherever the prior dispositions of the property import absolute and uncontrollable ownership—in all such cases courts of equity will not create a trust from words of this character': 2 Story's Equity Jurisprudence, sec. 1070. The rule, which we believe to be amply supported by the authorities, is thus laid down in *Hill on Trustees* (119): 'But any words by which it is expressed, or from which it may be implied, that the first taker has the

power of withdrawing any part of the subject from the object of the wish or request or of applying it to his own use will prevent the subject of the gift from being considered certain': See, also, *Knight v. Knight*, 3 Beav. 173; *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. Rep. 575, 27 L. ed. 1089; ³⁸⁵ 2 *Pomeroy's Equity Jurisprudence*, secs. 1014-1017; *Williams v. Worthington*, 49 Md. 572, 33 Am. Rep. 286."

In *Kendall v. Granger*, 5 Beav. 300, there was a bequest of personalty to trustees, to be applied for the relief of domestic distress, assisting indigent but deserving individuals or encouraging undertakings of general utility. It was held void as a charitable bequest on the ground that "the trustees have an option to apply them to purposes which are not charitable, and consequently to divert the trust fund from those purposes which this court is in the habit of considering charitable." Likewise, in the case of *Nash v. Morley*, 5 Beav. 177, the court says: "If there be any option in the trustees to apply the funds to purposes which, though liberal or benevolent, are not such as are in this court understood to be charitable, the trust cannot be executed here. Moreover, if it be expressly declared that the fund is to be distributed in private charity, it has been held that the court cannot execute such a trust": See, also, *Vezey v. Jamson*, 1 Sim. & S. 69; *Ellis v. Selby*, 7 Sim. 351; *Hunter v. Attorney General*, 68 L. J. Ch., N. S., 449; *Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906; *Randall v. Randall*, 135 Ill. 398, 25 N. E. 373; *Coulson v. Alpaugh*, 163 Ill. 298, 45 N. E. 216; *Minot v. Attorney General*, 189 Mass. 176, 75 N. E. 149; *Mills v. Newberry*, 112 Ill. 123, 54 Am. Rep. 213, 1 N. E. 156; *Welch v. Caldwell*, 226 Ill. 488, 80 N. E. 1014.

It is doubtless true that where trustees are given the power to choose between charities the bequest may be upheld, and this would be true if a definite part of the fund was set aside for charity and a definite sum for some private trust. But that is not the case here. By the fourth clause of the fifth paragraph of the will the trustees are given power to apply so much of the trust fund as they may see fit for the benefit of the needy brothers and sisters of the testator, and then to apply the remainder thereof, in their discretion, to the advancement of the cause of temperance or in aid of one or more manual training schools of the city of Chicago. As has been suggested, there are two considerations ³⁸⁶ which render the gift to charity void for uncertainty. In the first place, it is uncertain what, if any, amount will remain upon the death of the annuitants; and secondly, the trustees have a discretion as to whether they will give what remains, if any, after the death of the annuitants, to a needy brother or sister or donate it to charity. We think it clear, therefore, that clause 4 of paragraph 5 of the will is void.

It is a well-established principle that the law favors the vesting of estates, and that, in the absence of any intention of the testator appearing to the contrary, the estate will vest at the time of his death. In the cross-bill filed by Eva R. Wilce and Edwina May Van Anden they have set forth that the trust property in the form in which it now exists is unproductive and that the corpus of the estate is being consumed in order to pay the annuities therein provided, and they ask to have the trust terminated and the trust property conveyed to them in such proportion as they are entitled, and the trustees to account for all funds received by them and which but for their neglect and willful default might have been received by them. Furthermore, the trustees are interposing no objection to the termination of the trust. The manifest intention of the testator in placing his property in the hands of trustees was to permit his widow and daughter to enjoy the income of his property for their lives, and then to preserve the corpus of the estate, or what was left of it, if the income was not sufficient to pay the annuities therein provided, for the benefit of his brothers and sisters who might be in need of assistance or for the purpose of charity. There is nowhere any provision to indicate an intention of the testator that his estate should be allowed to accumulate for any given length of time or that he desired to keep it out of the control of the annuitants. The unexpected has here happened. The residuary clause in the will is void, and there is nothing to indicate that if the testator had known this he would not have³⁶⁷ been perfectly willing for his widow and daughter to have had absolute dominion of the property. In the absence of any such intention appearing in the will, when all the parties are sui juris and requesting and consenting to a termination of the trust, and when the trust cannot be carried out according to the expressed intention of the testator, there is no reason why the trust should not be immediately terminated. Upon the death of the testator, clause 4 of paragraph 5 being void, the corpus of the estate vested in Edwina May Van Anden as his sole heir at law, subject to the rights of the widow therein, and as the widow and adopted daughter are the only persons who have any interest in the estate at the present time, and they are willing to accept the estate in the condition it is in at the present time and release the trustees, there is no reason why the estate should not be surrendered to them by the trustees. In Perry on Trusts (vol. 2, 2d ed., sec. 920) it is said: "Although a trust may not have ceased by expiration of time, and although all its purposes may not have been accomplished, yet if all the parties who are or may be interested in the trust property are in existence and sui juris, and if they all consent and agree thereto, courts of equity may decree the determination of a trust and

the distribution of the trust fund among those entitled. The same rule applies if it become impossible to carry out the trust. It was for some time doubtful whether a trust could be thus determined prior to the time contemplated by a testator, but it is now well settled that where all the parties are capable of acting and desire to terminate the trust, courts can decree its determination. There can be no doubt, upon principle, that when all those who have the entire legal and beneficial interest in the property agree to dispose of it in a particular manner, courts will give effect to their agreements." The doctrine as thus announced by Mr. Perry in his work on Trusts is sustained by *Eakle v. Ingram*, 142 Cal. 15, 100 Am. St. Rep. 99, 75 Pac. 566; *Armistead's Exrs. v. Hartt*, 97 Va. 316, 33 S. E. 616; *Conley's Estate*, 368 197 Pa. 291, 47 Atl. 238; *Sears v. Choate*, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786; *Taylor v. Huber's Exrs.*, 13 Ohio St. 288; *Hyde's Exrs. v. Hyde*, 64 N. J. Eq. 6, 53 Atl. 593; *Welch v. Episcopal Theological School*, 189 Mass. 108, 75 N. E. 139.

Finding no reversible error in this record the decree of the circuit court will be affirmed.

The Certainty and Unity Required in Charitable Trusts are discussed in the note to *Fifield v. Van Wyck*, 64 Am. St. Rep. 756; when a charitable trust is not void for uncertainty is discussed in the note to *Owens v. Missionary Society*, 67 Am. Dec. 184; and when such a trust is void for uncertainty is discussed in the note to *Bridges v. Plessants*, 44 Am. Dec. 98. How the objects of a charitable trust must be designated is considered in the note to *Green v. Tilden*, 27 Am. St. Rep. 512.

A Charitable Trust will not be Held to Fail on Account of Any Uncertainty as to the persons as to whom it is to be applied, if there is someone appointed to make a selection and thereby render certain the beneficiaries who are to enjoy the testator's bounty: *Kemmerer v. Kemmerer*, 233 Ill. 327, 122 Am. St. Rep. 169, and see cases cited in the cross-reference note thereto. As to a degree of vagueness being allowable in charitable trusts, see *Snider v. Snider*, 70 S. C. 555, 106 Am. St. Rep. 754, and cases cited in the cross-reference note thereto. A devise to executors or trustees to be distributed to the poor in their discretion creates a gift sufficiently definite to be enforceable under a statute requiring charitable gifts to point out with reasonable certainty the purpose of the charity and the beneficiaries thereof: *Thompson v. Brown*, 116 Ky. 102, 105 Am. St. Rep. 194; and see *Grant v. Saunders*, 121 Iowa, 80, 100 Am. St. Rep. 310, and cases cited in the cross-reference note thereto, and *Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117. While courts sometimes relieve against defects in conveyances to charitable purposes where there is simply uncertainty as to who are meant to be the trustees or the cestuis que trustent, they do not supply conveyances where none are made: *Organized Charities Assn. v. Mansfield*, 82 Conn. 504, 135 Am. St. Rep. 285.

What are Charitable Uses or Trusts is the subject of a monographic note to *Hoeffler v. Cloghan*, 63 Am. St. Rep. 248-267.

LUKEN v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

[248 Ill. 377, 94 N. E. 175.]

STATUTES—Construction by Federal Courts—How Affects State Courts.—In construing a federal statute a state court is bound by the construction placed upon the act by the federal courts. In construing a similar state statute a state court is not bound to follow the construction of the federal courts in construing the federal statute, but where the two acts are nearly identical and the state act was passed after the federal statute had been construed, and both acts were intended to accomplish the same object, the state court will be naturally inclined to follow the construction that the federal courts have given the federal statute. (p. 224.)

RAILROADS—Automatic Couplers—Statutory Duty to Provide. Under both the federal statute and the statute of Illinois, requiring all cars to be equipped with automatic couplers, it is the absolute duty of common carriers to equip and maintain such safety appliances in such condition and state of repair that they will operate in the manner and for the purposes intended; and the carrier cannot be heard to say in defense of an action brought by one injured in consequence of its failure to perform its duty, that the plaintiff is bound to prove that the carrier did not use reasonable care to maintain the safety appliances in good condition and repair. (p. 224.)

RAILROADS—Defective Automatic Coupler—Knowledge.—In an action by a switchman, injured by reason of a defective condition of an automatic car-coupler, it is not incumbent upon the plaintiff to show that the defendant knew, or by the exercise of reasonable care might have known, of the defective condition of the coupler. (p. 224.)

RAILROADS—Defective Coupler—Action—Election Between Counts.—In an action for damages suffered by reason of a defective automatic car-coupler, it is error for the court, at the trial, to compel the plaintiff to elect between the first count of his complaint, based upon the state statute, and the second count, based upon the federal statute, when the evidence justifies the submission of the case to the jury. (p. 224.)

APPEAL—Affirmance by Appellate Court, When Conclusive.—In an action by a switchman for injuries suffered by reason of a defective automatic car-coupler, if the evidence fairly tends to sustain a count of the declaration, the court is justified in submitting it to the jury under that count, and in such case affirmance of the judgment by the appellate court is conclusive upon the supreme court. (pp. 224, 225.)

RAILROADS—Safety Appliances.—Empty Cars, as well as loaded ones, are affected by the law requiring the equipment of cars with safety appliances. (p. 225.)

APPEAL—Invalidity of Statute—Waiver.—A defendant waives the right to question the validity of a statute by prosecuting an appeal to the appellate court. (p. 225.)

COMMERCE.—The States have Full Power over commerce which does not assume an interstate character, and may pass such laws regulating commerce within the states as they may deem expedient. (p. 225.)

COMMERCE—When Interstate and When Intrastate.—If the places from which and to which passengers and property are carried, and the line over which they are carried, are within the state, the

commerce is domestic and is subject to state control. The transportation between points within a state by a railroad engaged in interstate traffic does not, of itself, determine the character of the traffic and make it interstate commerce. (pp. 225, 226.)

COMMERCE—Regulation by Both Federal and State Government.—The fact that some railroads may be engaged in both interstate and intrastate commerce does not prevent the state from adopting such regulations as it may deem proper to provide for the safety of men engaged in the intrastate commerce, if such regulations are not inconsistent with or repugnant to the acts of Congress adopted for the regulation of railroads engaged in interstate commerce. (p. 226.)

RAILROADS—Safety Appliances—Federal and Illinois Statutes.—The federal statute requiring railroads to equip cars with automatic couplers and the Illinois statute on the same subject are substantially the same, and there is no repugnancy between their provisions. The act of Congress applies to all interstate carriers in moving interstate commerce, but it does not deprive the state of power to regulate intrastate commerce, although it is carried by a railroad doing an interstate business. (pp. 226, 227.)

RAILROADS—Automatic Coupler Statutes—Assumption of Risk.—Both the federal and the Illinois statute, requiring railroad cars to be equipped with automatic couplers, abolish the doctrine of assumed risk in all cases to which the statute is applicable. (p. 227.)

APPEAL—Verdict Contrary to Erroneous Instructions.—A verdict will not be disturbed which is in accordance with the law and the evidence, even if it is contrary to erroneous instructions given at the request of the party against whom it is rendered. (p. 228.)

Glennon, Cary, Walker & Howe, for the plaintiff in error.

James C. McShane, for the defendant in error.

379 FARMER, J. This action was brought by defendant in error (hereafter referred to as plaintiff) against the plaintiff in error (hereafter referred to as defendant), to recover damages for personal injuries.

Defendant is operating a line of railroad running from Chicago, Illinois, to Buffalo, New York, and is a common carrier of passengers and freight. Plaintiff was at the time of his injury a switchman employed by defendant at its yards in Chicago. At about 1:30 o'clock A. M., July 15, 1905, he was assisting in making up a transfer train composed of forty-five cars located on one of the tracks of defendant in its yards. Plaintiff's duty was to couple the cars, and while thus engaged he received the injury complained of. The cars were equipped with automatic couplers, but the coupler on one car was not in working order and would not couple by impact. Plaintiff went between ³⁸⁰ the cars for the purpose of endeavoring to effect the coupling, and while endeavoring to put the coupler in such condition that it would work, the cars were moved and brought together, severely injuring him.

The declaration contains two counts. The first count is based upon the statute of this state requiring the use of safety

appliances on railroads engaged in moving traffic between points in the state of Illinois. Section 2 makes it unlawful for any such common carrier to haul any car used in moving such traffic which is not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars: Laws 1905, p. 350. Said first count charges the violation of this statute by defendant by hauling and using upon its line of railroad in moving traffic between points in the state of Illinois a certain car equipped with a certain automatic coupler, which, by reason and in consequence of its then improper and defective condition of repair, could not be coupled automatically by impact without the necessity of switchmen going between the ends of the cars. The second count is based on the federal statute requiring common carriers engaged in interstate traffic to equip their cars with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. Said second count charges the violation of this statute by defendant by hauling and moving upon its line of railroad a certain car used in moving interstate traffic, equipped with an automatic coupler which was in such defective and improper condition that the car could not be coupled automatically by impact without the necessity of switchmen going between the ends of the cars.

Defendant pleaded the general issue, and a trial was had by a jury. At the conclusion of all the evidence defendant moved the court to require plaintiff to elect under which count the case should be submitted to the jury, and, over ³⁸¹ the objections and exceptions of plaintiff, the court required an election. Thereupon plaintiff elected to go to the jury on the first count of the declaration. The jury returned a verdict in favor of the plaintiff, assessing his damages at ten thousand dollars. After the return of the verdict, on motion of the plaintiff the court vacated the order requiring an election, and, after overruling motions for a new trial and in arrest of judgment, rendered judgment on the verdict. Defendant prosecuted an appeal to the appellate court for the first district, and that court affirmed the judgment of the trial court. The case is brought to this court by writ of certiorari.

Plaintiff testified that before the cars were brought together to couple them by impact he examined the couplers to see if they were in order and found the knuckle of the car in question would not open. He made some effort to open it and get it in condition to couple, but failing to do so went to another car north of it and examined the coupling on it. He then returned to the car in question and again endeavored to open the knuckle and get the coupler in condition, but

found it would not open so the coupling could be made. In attempting to get the coupler in condition he had to go between the cars and use his hands. While thus engaged the cars were brought together and plaintiff was injured. There is no proof as to the length of time the coupler had been defective or out of order, and defendant contends that the evidence failed to show it violated any duty it owed to plaintiff. Defendant's position is, that the car having been equipped with an automatic coupler it was incumbent on plaintiff to show that its defective condition was known, or by the exercise of reasonable care might have been known, by it before the injury. In addition to the testimony of plaintiff, the conductor in charge of the train that was being made up testified that he tried to effect the coupling twice by impact—once before plaintiff was injured and once afterward—and failed each time. ³⁸² After the second failure the car was placed on the repair track. There was no proof of the coupler being out of order or defective previous to the time mentioned by the plaintiff and the conductor.

While both the Illinois statute and the federal statute require cars to be equipped with couplers coupling automatically by impact, so that they can be uncoupled without requiring men to go between the ends of the cars, in considering the federal statute the supreme court of the United States, in *Johnson v. Southern Pacific Ry. Co.*, 196 U. S. 1, 25 Sup. Ct. Rep. 158, 49 L. ed. 363, held the statute should be so construed as to promote in the fullest manner the apparent policy and object of its adoption, and that it was intended to, and did, cover both coupling and uncoupling cars. Both the state and federal acts were passed to protect men engaged in these duties, and it cannot be denied that it is the duty of the carrier to equip its cars with automatic couplers and maintain them in such condition that the cars can be coupled and uncoupled without employees being required to go between them in performing their duties, and the federal courts, in cases arising under the federal statute, have by an almost uniform line of decisions held that the duty of the carrier is not merely that of exercising reasonable care in maintaining the prescribed safety appliances in an operative condition, but is absolute: *Norfolk etc. R. R. Co. v. United States*, 177 Fed. 623; *St. Louis etc. R. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. Rep. 616, 52 L. ed. 1061; *United States v. Atchison etc. Ry. Co.*, 163 Fed. 517, 90 C. C. A. 327; *Chicago etc. R. R. Co. v. United States*, 170 Fed. 556, 95 C. C. A. 642.

In *Norfolk etc. R. R. Co. v. United States*, 177 Fed. 623, will be found a very large collection of cases decided by the federal courts holding that it is the absolute duty of common carriers not to haul cars which are not equipped with safety appliances that will operate for the purpose for ³⁸³ which

they are required to be provided, and relief from the liability provided for noncompliance with the act cannot be obtained by showing reasonable care and want of intentional violation of the statute. The court refers to *St. Louis etc. R. R. Co. v. Delk*, 158 Fed. 931, 86 C. C. A. 95, 14 Ann. Cas. 233, and *United States v. Illinois Central R. R. Co.*, 170 Fed. 542, 95 C. C. A. 628, both decided by the circuit court of appeals for the sixth circuit, holding a contrary rule, but says those cases are contrary to the great weight of authority.

In construing a federal statute this court is bound by the construction placed upon the act by federal courts. In construing a similar state statute we are not necessarily bound to follow the construction of the federal courts in construing a federal statute, but where, as here, the two acts are so nearly identical, and the state act was passed after the federal statute had been construed, and both acts were intended to accomplish the same object, we would naturally incline to follow the construction given the federal statute by federal courts. But in our opinion the construction placed upon the federal statute by the federal courts is the sound and proper construction, and in the absence of federal authority we would give the state statute the same construction that the federal courts have given the federal statute, by holding that the duty imposed upon the carrier to equip and maintain safety appliances in such condition and state of repair that they will operate in the manner and for the purposes intended is absolute, and the carrier cannot be heard to say, in defense of an action brought by one injured in consequence of its failure to perform its duty, that the plaintiff is bound to prove that the carrier did not exercise reasonable care to maintain the safety appliances in good condition and repair. The court properly refused three instructions offered by defendant that it was incumbent upon the plaintiff to prove that the defendant knew, or ³⁸⁴ by the exercise of reasonable care might have known, of the defective condition of the coupler.

We think the trial court erred in requiring plaintiff to elect under which count the case should be submitted to the jury. Plaintiff's evidence made a case against the defendant that justified its submission to the jury and it should have been submitted under both counts. Defendant now insists that if there was any liability shown by the testimony it was under the second count, and that count having been taken from the jury by election under the ruling of the court, and by the instructions given, no recovery could be had, under the evidence, under the first count. In the view we take of the case we do not find it necessary to determine whether the action of the court in vacating the order of election after the verdict was returned was erroneous or not. If the evidence of the plain-

tiff fairly tended to sustain the first count of the declaration, the court was justified in submitting the issues to the jury under that count, and the affirmance of the judgment of the trial court by the appellate court in that event would be conclusive upon us. In our opinion the evidence of the plaintiff, which was uncontradicted, fairly tended to make a case under the first count. The proof shows the car was being moved from defendant's yards at Park Manor to the Union Stock Yards, both of said points being within the state of Illinois. While it is true defendant's railroad is an interstate road and defendant is engaged in interstate traffic, it is also engaged in intrastate traffic. What point the car in question came from (which was a Chicago, Milwaukee and St. Paul car) and to what point it may have been finally destined to be hauled does not appear from the proof, but at the time the injury occurred the car was being hauled from one point in Illinois to another point in the same state. It was an empty car, but the law applies as well to empty cars as to loaded cars. The character of the traffic the car was being used for at the time of the injury is to be determined from ^{the} proof as to the points between which the car was being moved at the time, whether the road over which the car was being moved was an interstate road and whether the car was sometimes used in interstate traffic or not.

The defendant contends that the state has no power to regulate intrastate traffic being carried over an interstate road, and that the statute of the state of Illinois, in so far as it attempts to do so, is invalid, because the power to regulate such traffic is conferred by the constitution of the United States upon Congress and is prohibited to the states. Under repeated decisions of this court, defendant waived the right to question the validity of the statute by prosecuting its appeal to the appellate court: *Case v. City of Sullivan*, 222 Ill. 56, 78 N. E. 37; *Barnes v. Drainage Commrs.*, 221 Ill. 627, 77 N. E. 1124; *Pittsburg etc. Ry. Co. v. City of Chicago*, 242 Ill. 178, 134 Am. St. Rep. 316, 89 N. E. 1022. The validity of the Illinois statute is therefore not properly before us, but we deem it not improper to say that if it were we could not agree to the position of defendant. The constitution of the United States confers power on Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Under this provision Congress derives its power to regulate interstate commerce. All powers not delegated to the federal government by the constitution are reserved to the states, and the states have full power over commerce which does not assume the character of interstate commerce, and may pass such laws regulating commerce within the states as they may deem expedient or politic. If the places from which and to which passengers and property

are carried, and the line over which they are carried, are within the state, then the commerce is domestic and is subject to state control. The transportation of property between points within a state by a railroad engaged in interstate traffic does not, of itself, determine the character of the traffic and make it interstate commerce. It is not the character of the road by which property is ³⁸⁶ transported, but the character of the traffic, that determines whether or not it is interstate or intrastate commerce. Congress may enact laws requiring all railroads engaged in interstate commerce to equip their cars with safety appliances, but the exercise of that power does not preclude a state from enacting laws requiring all roads engaged in intrastate commerce to equip their cars with safety appliances. The fact that some roads may be engaged in both interstate and intrastate commerce does not prevent the state from adopting such regulations as it may deem proper to provide for the safety of men engaged in carrying on intrastate commerce, if such regulations are not inconsistent with or repugnant to the acts of Congress adopted for the regulation of railroads engaged in interstate commerce: *People v. Chicago etc. Ry. Co.*, 223 Ill. 581, 79 N. E. 144, 7 Ann. Cas. 1; *People v. Erie R. R. Co.*, 198 N. Y. 369, 139 Am. St. Rep. 828, 91 N. E. 849, 29 L. R. A., N. S., 240, 19 Ann. Cas. 811; *Detroit etc. Ry. Co. v. State*, 82 Ohio St. 60, 137 Am. St. Rep. 758, 91 N. E. 869; *Missouri Pac. Ry. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. Rep. 330, 54 L. ed. 472; *Missouri etc. Ry. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. Rep. 488, 42 L. ed. 878; *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. Rep. 92, 47 L. ed. 108; 2 *Elliott on Railroads*, 690; 4 *Elliott on Railroads*, 1671.

Section 1 of the federal act provides that it shall apply "to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith." Section 7 of the Illinois statute provides that it shall "be held to apply to common carriers engaged in moving traffic by railroad between points in this state, . . . excepting those trains, cars and locomotives exempted by the provisions of section 6 of this act, and all those trains, locomotives, tenders, cars and similar vehicles used in interstate commerce." There is no repugnancy between these provisions of the federal and state acts. The act of Congress applies to all interstate carriers in moving interstate commerce, but it does not deprive the ³⁸⁷ state of power to regulate intrastate commerce although it is carried by a railroad doing an interstate business. Section 2 of the federal statute and section 2 of the Illinois statute are substantially identical, except that the federal act applies to interstate traffic and the

Illinois act applies to traffic within the state. Said section of the federal statute makes it unlawful for common carriers governed by the provisions of the act to haul or permit to be hauled over their lines cars used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be coupled without the necessity of men going between the ends of the cars. Section 2 of the Illinois statute imposes the same requirement upon common carriers moving state traffic. Section 8 of the federal statute is as follows: "Any employee of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge." Section 9 of the Illinois act reads as follows: "Any employee of any such common carrier who may be injured by any train, locomotive, tender, car or similar vehicle in use contrary to the provisions of this act, shall not be deemed to have assumed the risk thereby occasioned, nor to have been guilty of contributory negligence, because of continuing in the employment of such common carrier or in the performance of his duties as such employee after the unlawful use of such train, locomotive, tender, car or similar vehicle had been brought to his knowledge." There is no repugnancy between any of these provisions. Section 8 of the federal act exempts the employee from the assumption of the risk by continuing in the employment of the carrier after the unlawful use of a locomotive, car or train has been brought to his knowledge. Section 9 of the Illinois statute contains the same provision, ³⁸⁸ with the additional clause that the employee shall not be deemed to be guilty of contributory negligence because of continuing in the employment of the carrier, in the performance of his duty, after knowledge of the unlawful use of the locomotive, tender or car. The federal statute has been construed as abolishing the doctrine of assumed risk in all cases to which the statute is applicable: *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. Rep. 407, 51 L. ed. 681; *Johnson v. Southern Pacific Ry. Co.*, 196 U. S. 1, 25 Sup. Ct. Rep. 158, 49 L. ed. 363; *St. Louis etc. R. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. Rep. 616, 52 L. ed. 1061. In the *Schlemmer* case the court said: "We are clearly of opinion that *Schlemmer's* rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk." Under the Illinois statute plaintiff cannot be held to have assumed the risk of injury by going between the cars in the performance of his duties, and it does not appear that he was negligent in any other respect.

It is also contended that the verdict was contrary to certain instructions given by the court on behalf of defendant. The instructions referred to, we think, did not correctly state the law, but they were altogether favorable to defendant and could not possibly have prejudiced it before the jury. A verdict will not be disturbed which is in accordance with the law and the evidence, even if it is contrary to erroneous instructions given at the request of the party against whom the verdict is rendered: *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. 631; *West Chicago Street R. R. Co. v. Manning*, 170 Ill. 417, 48 N. E. 958; *Dickson v. Swift Co.*, 238 Ill. 62, 87 N. E. 59.

The judgment of the appellate court is affirmed.

A State Statute Requiring the Use of Automatic Couplers on all railway cars, locomotives, etc., is a valid and reasonable exercise of the police power of the state, and does not directly regulate interstate commerce or conflict with regulations thereof enacted by Congress: *Detroit etc. Ry. v. State*, 82 Ohio St. 60, 137 Am. St. Rep. 758, and see the cases cited in the cross-reference note thereto.

DALLENBACH v. BURNHAM.

[248 Ill. 468, 94 N. E. 41.]

STREETS—Easement Acquired by City by Prescription.—The occupation of a strip of land lying between the street line and a building by foundations beneath the surface and the extension of cornices over it by the owner of the fee, which in no way interferes with the use for street purposes, will not prevent the city from acquiring an easement in the strip by prescription. (p. 229.)

EASEMENTS—Use of Land by Owner of Fee.—The owner of land subject to a public easement has the right to use his property for any purpose which he may deem proper, so long as the use does not interfere with the proper enjoyment of the easement which is held by the public therein. (p. 229.)

STREETS—May be Acquired by Prescription.—Where lands have been thrown open for public use and have been used by the public for a street for the statutory period, the public right in the premises for street purposes is established by prescription. (p. 230.)

Walter B. Riley, H. Leonard Jones and Oliver B. Dobbins, for the appellants.

Thomas J. Smith and Charles R. Iungerich, for the appellee.

⁴⁶⁹ **HAND, J.** This was a bill in chancery filed in the circuit court of Champaign county by Rosanna Dallenbach, the appellee, against R. D. Burnham and others, the appellants, for an injunction to restrain the appellants, as the

executors of the last will and testament of Albert C. Burnham, deceased, from encroaching with a building upon one of the streets of Champaign. A temporary injunction was issued. An answer was filed, to which exceptions were sustained, and the defendants having refused to amend their answer, a decree was entered making the injunction theretofore issued perpetual, and an appeal has been prosecuted to this court by the defendants.

It appears from the averments of the bill and answer that Main street, the principal business street in the city of Champaign, and which runs east and west, was originally laid out seventy feet in width between Walnut and Neil streets; that when the south frontage of said street was built upon, the business houses were uniformly set in about twenty inches from the street line, and that said twenty-inch strip had been in use as a part of Main street for twenty-five years. When Albert C. Burnham, the appellants' testator, built upon his lots, he used a part of said strip in which to place the footing stones for the front wall of his building, and the cornice on the building projected over the twenty-inch strip, and that use was all the use he made of said strip after his building was constructed. Appellee's property adjoins appellants' property on the west. Appellants were about to extend the front wall of the Burnham building out to the north line of said strip, and the injunction was made perpetual on the theory that the twenty-inch strip had become a part of Main street by prescription.

The main contention of the appellants is that the use of said strip was not exclusively in the city, as their testator was in possession of the part of said strip which was occupied ⁴⁷⁰ by the footing stones and cornice of his building; hence they argue the city could not acquire title thereto by prescription. The fee in said strip is not in the city. It only has an easement for street purposes therein. There was no joint use of the surface of the strip, and the fact that the testator of appellants was using a portion of the premises beneath the surface and above the surface of the ground for the footing stones and cornice of his building, which in no way interfered with the enjoyment of said strip by the city for street purposes, would not prevent the city from acquiring an easement for street purposes in said strip. In *Tacoma Safety Deposit Co. v. City of Chicago*, 247 Ill. 192, 93 N. E. 153, it was held the law is well settled that the owner of real estate, subject only to the public easement, has the right to use his property for any purpose which he may deem proper, so long as the use to which it is put does not interfere with the proper enjoyment of the easement which is held by the public therein. When the owners of lots on the south side of Main street between Walnut and Neil streets

built upon their lots they placed their buildings back from the street line, and the city for more than the statutory period has used the strip adjoining the street line for street purposes. The use of his lots by appellants' testator, therefore, was in no way antagonistic to the rights of the city or in no way limited the use of the city in said strip for the purposes of a street. Clearly, therefore, after the lapse of twenty-five years, Albert C. Burnham or his executors had no right to build upon said strip. In *City of Chicago v. Wright*, 69 Ill. 318, it was held that where lands have been thrown open for public use and have been used by the public for a street for the statutory period, the public right in the premises for street purposes is established by prescription.

Finding no reversible error in this record the decree of the circuit court will be affirmed.

The Rights, Obligations and Remedies of Persons Over Whose Land a Public Highway Runs is the subject of a monographic note to *Wright v. Austin*, 101 Am. St. Rep. 102, the use of the road for private purposes being particularly considered at page 107; and the ownership of lands beneath streets is considered in the note to *Heinrich v. St. Louis*, 46 Am. St. Rep. 495. The owner of land subject to a right of way may use the land for any purpose not inconsistent with that right: *Gibbons v. Ebding*, 70 Ohio St. 298, 101 Am. St. Rep. 900, and see cases cited in the cross-reference note thereto.

Highways by Prescription and User are considered in the note to *Whitesides v. Green*, 57 Am. St. Rep. 744. Such a highway is not necessarily limited in width to the track made by passing vehicles. Its width is to be determined as a question of fact by the character and extent of the user: *Arndt v. Thomas*, 93 Minn. 1, 106 Am. St. Rep. 418.

CROSBY v. DORWARD.

[248 Ill. 471, 94 N. E. 78.]

DEEDS—Mental Condition of Grantor.—Old age, eccentricity, or even partial impairment of mental faculties of a grantor is not necessarily sufficient to warrant setting aside his deed. If he had sufficient mental capacity to comprehend the nature of the transaction and protect his own interests, the deed will not be set aside for want of mental capacity. (p. 234.)

DEEDS—Mental Capacity—Delusions.—That the grantor may have been affected with certain delusions or lapses of memory, if they did not affect or have anything to do with the transaction in question, will not require the setting aside of his deed for want of mental capacity. (p. 234.)

EVIDENCE—Weight—Opinion of Mental Condition.—The evidence of a witness that in his opinion the grantor in a certain deed was not competent to transact ordinary business, is weakened by the

fact that the witness transacted business with him and admitted that he seemed to understand what he was about. (p. 234.)

PRINCIPAL AND AGENT—Validity of Transactions Between. A sale of property by a principal to his agent is not necessarily voidable; it will be sustained where the transaction is open, honest and fair. (p. 234.)

EVIDENCE—Value of Real Estate.—Sales of Similar Property in the same neighborhood and at about the time of the transaction in question is one of the most important factors in determining the value of real estate. (p. 235.)

EVIDENCE.—In Order to Show the Value of Property it is not competent to prove offers for the property itself or other property similarly situated in the vicinity. (pp. 235, 236.)

Jesse Black, Jr., and Winslow Evans, for plaintiffs in error.

Thomas Kennedy, and W. H. Foster, for defendants in error.

472 CARTER, J. This is a bill brought in the circuit court of Woodford county by plaintiffs in error, Horatio N. Crosby and his conservator, against defendants in error, George A. Dorward and wife, asking that a certain deed to an eighty-acre farm in that county be set aside on the ground that it was obtained by reason of fiduciary relationship from one lacking in mental capacity and for an inadequate consideration. The master in chancery to whom the case was referred reported in favor of granting the relief prayed. The trial court sustained exceptions to this report and dismissed the bill for want of equity. From that order and decree this writ of error has been sued out.

Plaintiff in error Horatio N. Crosby was, at the time the deed in question was given, about sixty-five years of age. He was a bachelor and had been raised in Tazewell and Woodford counties, Illinois. In the year 1866 he was committed to an insane asylum and discharged in a little over six months as recovered. He was again committed in 1869 and remained about eight months, when he was discharged as recovered. He had inherited the farm in question from his father, who died about 1885. The evidence tends to show that he did not carry on this farm himself but usually leased it to others. In 1904 he visited a brother, John E. Crosby, in Wayne county, Iowa. While there he wrote to the defendant in error George A. Dorward, asking him to take charge of his business and collect certain notes and rents that were due and owing to him. About the same time he signed a power of attorney, dated **473** August 22, 1904, authorizing Dorward to take charge of his personal property, which was then in the hands of Crosby's sister, Mary Humphrey. This power of attorney was made out in Iowa and sent to Dorward with a letter from

Crosby's Iowa attorneys. Dorward, under this power of attorney, leased the farm in question to Uriah H. Humphrey, a nephew of Crosby, for one year at a rental of \$4.50 per acre, a written lease being signed by Humphrey and Dorward. This was fifty cents per acre more than Humphrey had been paying for several years for the farm under an agreement with Crosby. A number of letters from Crosby to Dorward are found in the record. Some of these letters, without question, were written by some other person for Crosby and signed by him, although a large number were written as well as signed by him. The letters which he himself wrote, while lacking as to spelling, grammar and punctuation, are easily understood, and instruct Dorward, in positive terms, as to what he (Crosby) wanted done in regard to the various business matters, and while in these letters there were matters foreign to the business in hand interjected, these outside matters did not in any way render obscure his letters on the business in question. These letters do not indicate that the writer did not know his own mind or was incapable of transacting ordinary business.

The first evidence in the record as to the sale of the farm by Crosby to Dorward is a letter written at Corydon, Iowa, March 1, 1905, stating that Crosby would sell the farm for \$135 an acre, one-half down and the balance to suit the buyer, at six per cent, possession given at once if Uriah Humphrey could be gotten off. On March 21, 1905, Crosby and Dorward entered into an agreement for the sale of this farm to the latter for \$135 an acre, or \$10,800, to be paid, \$3,141.66 on the execution of the contract, \$2,400 on March 1, 1906, and the balance (\$5,258.34) on March 1, 1907. This latter amount drew interest at six per cent after March 1, 1906. This business, as shown by the record, ⁴⁷⁴ was all conducted by correspondence. Dorward paid the consideration as agreed, partly by drafts and partly by note. The deed was dated March 21, 1905, and was signed and acknowledged in Iowa. The notary public who took the acknowledgment was an attorney with years of experience, having held several important public positions, including that of United States district attorney. He testified that in his judgment Crosby was of sound mind and memory and understood the nature of the business; that Crosby and his brother, John, came to his office with the deed and Crosby acknowledged it. A little over a year after the making of this sale, April 19, 1906, Crosby was adjudged a distracted person and T. W. Gish was appointed as his conservator. Upon Gish's removal from the state, the plaintiff in error Mary Humphrey was appointed conservator in his stead, April 4, 1907. This suit was instituted August 24, 1906, by Gish.

A number of witnesses testified, in general terms, as to Crosby's lack of mental capacity, but did not state the particular facts upon which they based their opinions. The chief circumstances found in the record testified to as tending to indicate unsoundness of mind are the following: One witness stated that Crosby wished to make him a present of a vacant lot in Eureka, Illinois, which the witness refused to accept. This witness was an old army friend of Crosby, and the latter had been in the habit of stopping at his house. The witness was a laboring man and not well off. He also stated that Crosby had placed two claims in his hands as a constable, and that when he (the witness) thought the persons were about ready to pay, Crosby forgave them the debts. These debtors appear to have been judgment-proof. Two witnesses gave as particular instances upon which they based their opinions of his mental unsoundness, that Crosby would walk along the road talking to himself and pay no attention to passers-by. A niece testified that some time before this trade she had gone to ⁴⁷⁸ Iowa with him for a visit; that he purchased through tickets before they started, and that when they changed cars at Bushnell, Crosby bought another set of tickets; that she afterward, through the conductor, had the money refunded. A brother in law testified that Crosby had gone visiting and lost his overcoat, false teeth and pocket-book. Certain other witnesses testified that Crosby, although an illiterate man, tried to write poetry, which he attempted to have printed, and that he stated he was proud of the fact that he could play a Jew's harp and sing at the same time, and that he purchased a number of these instruments. Another witness testified that when he was driving in a cutter one winter he came to where Crosby was standing and asked him to get in and ride, and that, although he had met Crosby frequently, the latter did not recognize him or remember any of the subjects which they had discussed together. Another said that Crosby had broken out in church whistling a part of some air, which made the congregation look toward him and laugh. Three doctors also testified as experts, to the effect that Crosby was lacking in mental capacity, and, though possibly not insane, was peculiar and simple. About fifteen witnesses in Illinois and three in Iowa testified that they did not think he had sufficient mental capacity to do ordinary business or sell the farm in question.

Some twenty-one witnesses in Illinois testified they thought Crosby capable of transacting business. Among them were a banker, two lawyers, several farmers, two men who, while acting as assessor, had assessed his land, an ex-county clerk, who was then a bank cashier, and also a doctor who had known Crosby thirty-nine years. In addition to this testi-

mony the depositions of some twenty-two witnesses for defendants in error were taken in Iowa and introduced on the hearing. All of these latter testified they considered him of sound mind and capable of conducting the business of selling this farm. Among these latter witnesses were an attorney, pension agent, a storekeeper, a man with whom ⁴⁷⁶ he had boarded in Iowa, a man with whom he had talked about buying a monument, a dentist who did some work for him, and the cashier of a bank where he deposited money.

The law is that old age, eccentricity, or even partial impairment of mental faculties, is not necessarily sufficient to set aside a deed. If the grantor had sufficient mental capacity to comprehend the nature of the transaction and protect his own interests the deed will not be set aside for want of mental capacity: *McLaughlin v. McLaughlin*, 241 Ill. 366, 89 N. E. 645; *Sears v. Vaughan*, 230 Ill. 572, 82 N. E. 881; *Baker v. Baker*, 239 Ill. 82, 87 N. E. 868. And this is true even though he may have been affected with certain delusions or lapses of memory, if they did not affect or have anything to do with the transaction in question: *Kelly v. Nusbaum*, 244 Ill. 158, 91 N. E. 72. The evidence of some of the witnesses who testified that Crosby was not competent to transact ordinary business is weakened by the fact that they transacted business with him and admitted that he seemed to understand what he was about: *Fitzgerald v. Allen*, 240 Ill. 80, 88 N. E. 240. There can be no question that Crosby was eccentric and acted at times in an odd manner, but, so far as shown by this record, all the business that was carried on by him was done in a reasonably business-like manner. We think not only the number of witnesses but the weight of the evidence upholds the finding of the trial court that he understood and comprehended the business he was engaged in at the time he sold his farm.

Conceding that a fiduciary relation existed between George A. Dorward and Crosby at the time of this transaction, it does not necessarily follow that the deed is void or voidable. The sale of property under such circumstances will be sustained where the transaction is open, honest and fair: *Laclede Bank v. Keeler*, 109 Ill. 385. It does not appear that any misrepresentations were made by Dorward, or that he attempted to conceal or mislead Crosby in any way in the purchase of this farm. The record shows that Crosby offered, by letter, to sell the farm, the wording of ⁴⁷⁷ the letter indicating that it was a general offer for anyone who wanted to buy, and that the purchase price agreed on was the one fixed by Crosby.

On the question of value plaintiffs in error introduced some fifteen witnesses, who testified that they owned land in the vicinity and that they considered this eighty-acre

farm worth \$150 to \$180 per acre. While several of these witnesses testified that they knew of actual sales ranging between those figures, it does not appear from the abstract that they stated, at all definitely, the location or owners of the farms referred to or the date of the sales, or that they had any means of knowing the circumstances of the transactions, other than mere rumor and hearsay. On this question about the same number of witnesses were introduced by defendants in error, and their estimates ran from \$120 to \$140, or an average of about \$131 an acre. The Crosby farm sold for \$135, subject to the lease. Considerable controversy exists in the briefs as to the character of other farms referred to by various witnesses as compared with the eighty-acre farm in question. The testimony shows that there are two kinds of land in that vicinity—that which is rolling and more or less wooded, and the flat prairie land—which vary considerably in value. The evidence tended to show that land had advanced quite steadily for a number of years in Woodford county, and that the price at a given time might not serve as a fair index at another time several years later. Various witnesses for defendants in error testified as to some ten or more different sales of land located within a radius of a few miles from the Crosby farm, at about the time of the sale of that farm to Dorward, many of the witnesses being those who had either bought or sold in those transactions. From their testimony it appears that actual sales were being made in that vicinity at about that time for from \$115 to \$133.50. There is evidence tending to show that some of the farms so sold were partly wooded and broken and not as valuable, per acre, as ⁴⁷⁸ the Crosby farm, but it seems to be admitted other farms mentioned were as valuable and as favorably or more favorably situated with reference to markets and with as good or better improvements than the Crosby farm. One of the most important factors in determining the value of property is the sale of similar property in the same neighborhood about the time of the transaction in question: *Lewis on Eminent Domain*, sec. 443; *Watson v. Milwaukee etc. Ry. Co.*, 57 Wis. 332, 15 N. W. 468.

It is insisted in this connection that the testimony of one Rich that he offered Crosby, in 1904, \$165 an acre for this farm, and that he thought it was worth that, tends strongly to support the contention of plaintiffs in error that the farm was worth more than \$135 per acre. This evidence, we think, was incompetent. In order to show the value of property it is not competent to prove offers for the property itself or other property similarly situated in the vicinity. Private offers could be multiplied to any extent, and the bad faith in which they were made, if so made,

would be difficult to prove: Chicago etc. Ry. Co. v. Kelly, 221 Ill. 498, 77 N. E. 916; Hine v. Manhattan Ry. Co., 132 N. Y. 477, 30 N. E. 985, 15 L. R. A. 591; Davis v. Charles River Branch R. R. Co., 11 Cush. (65 Mass.) 506; Watson v. Milwaukee etc. Ry. Co., 57 Wis. 332, 15 N. W. 468; Lewis on Eminent Domain, sec. 446.

We think the evidence satisfactorily shows defendant in error Dorward paid what the land was reasonably worth at the time the purchase was made. In our judgment a clear preponderance of the evidence sustains the findings of the chancellor.

The decree of the circuit court will be affirmed.

The Purchase by an Agent of the Property of His Principal is the subject of a note to Kimball v. Raemey, 80 Am. St. Rep. 555; and who may not purchase at judicial, execution and other compulsory sales because so doing may conflict with their duties, is the subject of a note to Credle v. Baugham, 136 Am. St. Rep. 789. The doctrine which forbids an agent to buy from or sell to himself is not based on the idea that the transaction is necessarily an injury to or fraud upon the principal, but upon the idea of closing the door to temptation to fraud and keeping the agent's eye single to the rights and welfare of his principal. And the interdiction is enforced with a strong hand in courts of justice: Meek v. Hurst, 223 Mo. 688, 135 Am. St. Rep. 531; and see Egger v. Egger, 225 Mo. 116, 135 Am. St. Rep. 566. A presumption of influence and unfairness is created by the dealing between those standing in a confidential or fiduciary relation to each other: Hensaw v. Cooksey, 237 Ill. 620, 127 Am. St. Rep. 345; Post v. Hagan, 71 N. J. Eq. 234, 124 Am. St. Rep. 997; and to sustain a sale between persons standing in a fiduciary relation to each other, the buyer must show affirmatively that the transaction was conducted in perfect good faith, without pressure or influence on his part, and with express knowledge of the circumstances and entire freedom of action on the part of the seller: Stewart v. Harris, 69 Kan. 498, 105 Am. St. Rep. 178.

The Mere Fact That the Mind of a Grantor may have been somewhat impaired by age or disease does not justify a court in setting aside his deed. The instrument is valid if he has sufficient mental capacity properly to understand and comprehend its nature and scope: Shea v. Murphy, 164 Ill. 614, 56 Am. St. Rep. 215; Delaplain v. Grubb, 44 W. Va. 612, 67 Am. St. Rep. 788; Sneathen v. Sneathen, 104 Mo. 201, 24 Am. St. Rep. 326. But see Ashmead v. Reynolds, 134 Ind. 139, 39 Am. St. Rep. 238. Average mental capacity on the part of the grantor is not required for the execution of a valid deed: Coburn v. Raymond, 76 Conn. 488, 100 Am. St. Rep. 1000.

PEOPLE v. BENNETT MEDICAL COLLEGE.

[248 Ill. 608, 94 N. E. 110.]

TAXATION.—The Power to Exempt Property from taxation, as well as the power to levy taxes, is an essential element of sovereignty and can be surrendered or diminished only by plain and explicit terms of a statute. (p. 238.)

TAXATION—Exemption, Construction of Statutes Granting.—When words exempting property from taxation are susceptible of two constructions, courts will resolve any doubt as to the meaning of the language in favor of the state and hold the property not exempt. (p. 238.)

TAXATION—Exemption.—The Words "Belonging to," as used in a statute exempting from taxation property "belonging to" a medical college, mean "to be the property of," and denotes title or ownership. (p. 238.)

TAXATION — Exemption — Property Leased by Medical College.—Under a statute exempting from taxation the property belonging to a medical college, property held by it under a lease for a period of ninety-nine years is not exempt. (p. 239.)

W. H. Stead, attorney general, and Charles E. Woodward, for the appellant.

608 VICKERS, C. J. The Bennett Medical College filed a petition with the board of review of Cook county alleging that it was seised and possessed of certain real estate for a term of years and praying that said board hold said real estate to be exempt from taxation. It appears from the petition that the Bennett Medical College holds said real estate under a lease for a period of ninety-nine years and that said property is used by the petitioner in connection with its college. The board of review sustained the petition and entered an order exempting from taxation the real estate therein described. The auditor of state refused to approve said order of exemption, and under the statute has certified the cause to this court and asks that the order of the board of review be annulled and set aside.

No brief has been filed on behalf of the medical college, although it appears that due notice of the pendency of this cause has been served upon the president of the institution.

The Bennett Medical College was incorporated by a special act of the legislature passed and in force March 25, 1869. Section 8 of the charter provides that "all property, real, personal and mixed, belonging to said corporation shall be exempt from all taxes for any and all purposes." The only question arising on this record is whether property held under a leasehold belongs to or is owned by the college, within the meaning of the language above quoted from the eighth section of the charter.

The rule is well established by the decisions of this court and the great weight of authority elsewhere, that the power

to exempt property from as well as the power to levy taxes upon property is an essential element of sovereignty and can only be surrendered or diminished by plain and explicit terms of a statute: *Presbyterian Theological Seminary v. People*, 101 Ill. 578; *In re Swigert*, 123 Ill. 267, 14 N. E. 32; *Montgomery* ⁶¹⁰ v. *Wyman*, 130 Ill. 17, 22 N. E. 845; *People v. Watseka Camp Meeting Assn.*, 160 Ill. 576, 43 N. E. 716; *Cooley on Taxation*, 54; 2 *Sutherland on Statutory Construction*, 1003, and cases there cited. When words exempting property from taxation are susceptible of two constructions, courts will resolve any doubt as to the meaning of the language in favor of the state and hold the property not exempt. The application of the foregoing rule is illustrated by the case of *Winona etc. Land Co. v. Minnesota*, 159 U. S. 526, 16 Sup. Ct. Rep. 83, 40 L. ed. 247. In that case lands granted to a railroad company were exempt from taxation "until sold and conveyed," and it was held that such lands ceased to be exempt when the full equitable title was transferred by the company though it might retain the legal title.

In *Lake Shore etc. Ry. Co. v. City of Grand Rapids*, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195, it was held that a provision in the charter of a railroad company exempting its property from taxation did not exempt lines of road leased and operated by said company. This case is very similar to the case at bar. The question before the Michigan court was whether leased lines of railroad "belonged" to the company claiming the exemption under its charter, and this question was answered in the negative. The charter of the *Bennett Medical College* exempted "all property, real, personal and mixed, belonging to said corporation," etc. The word "belonging" means "to be the property of," and denotes title or ownership: *Humphreys v. Little Sisters of the Poor*, 29 Ohio St. 201; *Douglas County Agr. Soc. v. Douglas County*, 104 Wis. 429, 80 N. W. 740.

In the Ohio case above cited the statute under which the exemption was claimed provided as follows: "All buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with the view to profit," etc. The institution known as the *Little Sisters of the Poor* held ⁶¹¹ and used exclusively for the purposes of the institution certain premises under a lease for a term of years. The supreme court of Ohio held that the premises leased did not belong to the institution, and that the duty to list them for taxation rested upon the owners of the fee, notwithstanding the lease provided that the lessee was to pay the taxes.

In *Montgomery v. Wyman*, 130 Ill. 17 (22 N. E. 845), this court, page 22, said: "That which is exempt from taxation

is the property of the institution of learning, which plainly means the property owned by the institution. The property of and the property owned by an individual or corporation, as commonly used and understood, means precisely the same thing."

Coombs v. People, 198 Ill. 586, 64 N. E. 1056, was an action of debt to enforce a personal liability, under the statute, for back taxes on certain real estate which had been forfeited for the nonpayment of taxes for several prior years. The right of action, under the statute, to enforce a personal liability only exists against the owner. In that case the party sued had only a tax deed to the premises, which he was permitted to show was not valid. This court reversed the judgment because the proof did not show that Coombs was the owner of the premises. On page 588 this court said: "The word 'owner,' as applied to land, has no fixed meaning which can be declared to be applicable under all circumstances and as to any and every enactment. It usually denotes a fee simple estate"—citing authorities.

The real estate in question did not belong to the Bennett Medical College, within the meaning of section 8 of its charter. No question is raised as to whether the leasehold interest would be exempt if it had been assessed separately from the fee.

The decision of the board of review will be reversed and set aside.

Exemptions from Taxation must Positively Appear, and no implication will arise that any species of property or subject of taxation was intended to be excluded if it comes within the fair purview of the statute imposing the tax: *English v. Crenshaw*, 120 Tenn. 531, 127 Am. St. Rep. 1025. Under a statute exempting from taxation the personal property of benevolent, charitable and scientific institutions and such real estate belonging to them as shall be actually occupied for the purposes for which they are incorporated, the real property of such a corporation is subject to taxation when rented out to tenants, though the proceeds are devoted to the objects for which the institution was established: *Hibernian Benevolent Society v. Kelly*, 28 Or. 173, 52 Am. St. Rep. 769, and see cases cited in the cross-reference note thereto. Under the Wisconsin statute exempting the property of any religious, scientific, literary or benevolent association from taxation, a school and academy is entitled to exemption: *St. John's Military Academy v. Edwards*, 143 Wis. 551, 139 Am. St. Rep. 1123. The exemption from taxation of land located under a soldier's warrant is personal to the locator and does not pass to his assignee: *Herrick & Stevens v. Sargent & Lahr*, 140 Iowa, 590, 132 Am. St. Rep. 281.

The Exemption from Taxation or Assessment of Lands Owned by Governmental Bodies or in Which They have an Interest is the subject of a note to *Herrick & Stevens v. Sargent & Lahr*, 132 Am. St. Rep. 281.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

STATE v. PENCE.

[173 Ind. 99, 89 N. E. 488.]

LIQUORS—Sale by Druggist—Prescriptions are Private Records.—The prescription and applications required by statute to be kept by druggists upon the sale of intoxicating liquors are private papers and not public records or documents. (p. 242.)

LIQUORS—Sale by Druggists—Restrictions.—The Legislature has Power to impose such reasonable restrictions upon the sales of liquor by druggists as it deems necessary to the public good. (p. 243.)

STATUTES—Strict Construction.—Statutes Which are Criminal or penal in their nature, or which are in derogation of a common-law right, must be strictly construed. (p. 243.)

CONSTITUTIONAL LAW—Compelling Druggist to Produce Records as Evidence.—A druggist or pharmacist cannot be compelled to produce, for use as evidence before a court or grand jury, in a proceeding where such use may tend to incriminate himself, prescriptions and applications for intoxicating liquors sold by him. (p. 244.)

CONSTITUTIONAL LAW—Compelling One to Testify Against Himself—Private Papers.—The constitutional provision that no person in any criminal action shall be compelled to testify against himself secures a person against the involuntary production of his private books and papers in response to any order of court addressed to him in the character of a witness, as well as against the giving of compulsory testimony, in every case where the use of such documentary evidence, or such testimony, may tend to incriminate himself. (p. 244.)

INDICTMENT Found upon Testimony Coerced from Defendant.—A plea in abatement to indictment for a misdemeanor, found upon evidence coerced from the defendant by order of court, and given against his will, should be sustained. (p. 245.)

James Bingham, attorney general, A. G. Cavins, E. M. White, W. H. Thompson and George M. Barnard, prosecuting attorney, for the state.

Forkner & Forkner, for the appellee.

⁹⁹ MONTGOMERY, C. J. Appellee, a druggist, was charged by indictment, in two counts, with having made a sale of whisky ¹⁰⁰ without license. The first count alleged

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that the sale was not made for medicinal, industrial or scientific purposes, and the second, that the purchaser was not a person known to appellee not to be in the habit of using liquors as a beverage. The state's demurrer to a plea in abatement of the indictment was overruled, and, the state declining to plead further, appellee was discharged.

The correctness of the ruling upon demurrer is the only question presented for our decision.

The plea in abatement alleged facts in detail, showing, in substance, that, after repeated refusals so to do, appellee was required, by order of the circuit court, to produce and deliver to the grand jury of the county, within a prescribed time, all applications made to him by persons desiring to purchase liquors, upon which sales were made by him, for the use of said grand jury in investigating alleged illegal sales of liquor made by him as a druggist, in violation of what is commonly known as the blind tiger law; that he did deliver such applications to said jury involuntarily, and only because he was coerced so to do by the order and judgment of the circuit court, and to avoid threatened arrest and imprisonment, and disgrace to himself and family; that the indictment in this cause was based wholly upon the applications delivered by him to said grand jury under duress as aforesaid, and without any other evidence of any kind or character, and that the indictment was not found or returned upon any knowledge of any member of the grand jury or any officer thereof, or upon any evidence or information given by defendant to the grand jury.

This prosecution was founded upon the act of March 16, 1907 (Acts 1907, p. 689, secs. 1, 2; Burns' Rev. Stats. 1908, secs. 8351, 8352). It is provided by section 1 of said act: "That any person not being licensed under the laws of the state of Indiana who shall sell . . . any spirituous . . . liquors except as herein provided," shall be guilty of a misdemeanor, "provided, that none ¹⁰¹ of the provisions of this section shall apply to any druggist or pharmacist who is licensed as such by the state board of pharmacy."

Section 2 provides: "It shall be lawful for any druggist or pharmacist to sell vinous or spirituous liquors in quantities not less than a quart at a time for medical, industrial or scientific purposes, and for no other purposes, and then only upon the written (not printed or typewritten) prescription of a reputable physician in active practice, or upon the written and signed application of any other person who is personally known to such druggist or pharmacist and who is by him known not to be a person in the habit of using intoxicating liquors as a beverage, such person stating therein that such liquor is desired and will be used for medicinal, scientific or educational purposes only, and upon

making such sale such druggist shall indorse in writing on such application a statement that in his opinion such liquor is desired for the purposes last above stated, and for no other purposes whatever. . . . Such prescription or application shall be plainly written, dated and signed in his or her full and correct name, by the maker thereof, and the date of sale shall be plainly written thereon by the person making such sale, and such prescription or application shall be filed and carefully preserved for at least one year from the date of such sale, by the person making such sale, and only one sale shall be made under such prescription or application."

It is further provided that any person violating the provisions of the act shall be punished by a fine, and for a second offense the license of the druggist or pharmacist shall be revoked; and any person making any false or misleading statement touching the purpose for which such liquor is purchased, or who shall use the same as a beverage, shall be fined, and for a second offense shall be imprisoned in the county jail.

The contention in this case arises from differing views as to the legislative purpose in requiring the preservation of such written prescriptions and applications for liquors. The attorney general argues that under the law these papers¹⁰² when filed become public documents, and are preserved wholly for the use and benefit of the public, while counsel for appellee insist that they are private papers, the production of which for use as evidence cannot be enforced in a criminal proceeding against the druggist charged with their custody.

In our opinion, it was not the intent of the legislature to deprive druggists and pharmacists of their proprietary interest and privacy in such papers, and that it has not done so. No sales of intoxicating liquors by a druggist or pharmacist are authorized except for specified uses, and then only upon compliance with the numerous restrictions and limitations of this act. If an illegitimate sale of liquor be made by a druggist or pharmacist, the fact and consequences are likely soon to become manifest, and prosecution, if any, be instituted within one year. If the prosecution be directed against the seller, his justification for the sale must in large measure, appear in writing made at the time and preserved by himself. If the prosecution be against the purchaser for misrepresentation, or for misuse of the liquor, the writing may be available for the use of the state in proving the offense charged. In either case the evils resulting from a resort to uncertain and treacherous memories, and the commission of perjury, are obviated.

Numerous cases from other states have been cited, wherein the use of similar papers and records as evidence has been

enforced and justified, but in every instance the statute providing for their preservation in express terms subjected them either to the custody or inspection of police and public officials.

The statute of Massachusetts upon this subject reads as follows: "The book, certificates and prescriptions before provided for, or referred to, shall at all times be open, in the city of Boston to the inspection of the board of police, and in all cities and towns of the commonwealth to the inspection of the mayor and aldermen, board of license commissioners, ¹⁰³ selectmen, overseers of the poor, sheriff, constables, police officers and justices of the peace": Acts 1887 (Mass.), c. 432, sec. 4.

In Michigan, every druggist is required on Monday to make detailed weekly reports of sales of liquor, and to deliver or mail such report "to the prosecuting attorney of the county where such store is situated, who shall preserve the same in his office, and all such statements shall be open to inspection to all citizens": Acts 1899 (Mich.), p. 280, sec. 25. The statutes of Kansas and North Dakota require druggists to keep a daily record of sales, and provide that "such record and affidavits shall be open for the inspection of the public at all reasonable times during business hours, and any person so desiring may take memoranda or copies thereof": Laws 1887 (Kan.), c. 165, sec. 2; Laws 1890 (N. D.), c. 110, sec. 4. In the state of Washington, druggists are required to keep a register of all sales of liquor, giving details, which "shall at all times, during business hours, be subject to the inspection of the prosecuting attorney, or to any authorized agent of the board of pharmacy": Laws 1891 (Wash.), p. 372, sec. 12. In Iowa, druggists are required to make bi-monthly reports to the county auditor of all requests for liquor filled by them and their clerks: Acts 1890 (Iowa), c. 35, sec. 11.

The legislature had undoubted power to impose such reasonable restrictions upon sales of liquor by druggists as it deemed necessary to the public good, and in the light of existing legislation in other states upon the same subject, and from which our statute was doubtless borrowed, we can see no excuse for the omission of specific provisions subjecting all applications for liquor to police inspection, or requiring them to be filed in a public office, if it was the legislative desire and purpose to make such papers public documents. We are not warranted in supplying words which appear to have been designedly omitted, or in accomplishing the same result indirectly, ¹⁰⁴ by giving to the words used the broad import and meaning for which the state contends. It is a familiar principle that statutes which are criminal or penal in their nature, or which are in derogation of a common-law

right, must be strictly construed: *Fahnestock v. State*, 102 Ind. 156; *Steel v. State*, 26 Ind. 82; *Commonwealth v. Beck*, 187 Mass. 15, 72 N. E. 357; *Chicago etc. R. Co. v. People*, 217 Ill. 164, 75 N. E. 368; *Clark v. American Express Co.*, 130 Iowa, 254, 106 N. W. 642; *State v. Woodruff*, 68 N. J. L. 89, 52 Atl. 294; *Gray v. Stewart*, 70 Kan. 429, 109 Am. St. Rep. 461, 78 Pac. 852; *Casey v. St. Louis Transit Co.*, 116 Mo. App. 235, 91 S. W. 419; *Texas etc. R. Co. v. Blocker*, 48 Tex. Civ. App. 100, 106 S. W. 718; *Johnson v. State*, 1 Ga. App. 195, 58 S. E. 265.

It is our conclusion, therefore, that, under the statute now before us, a druggist or pharmacist cannot be compelled to produce, for use as evidence before a court or grand jury, in a proceeding where such use may tend to incriminate himself, prescriptions and applications for intoxicating liquors sold by him.

The bill of rights in the constitution of this state provides: "No person, in any criminal prosecution, shall be compelled to testify against himself": Const., art. 1, sec. 14. This constitutional guaranty secures a person against the involuntary production of his private books and papers in response to any process or order of court addressed to him in the character of a witness, as well as against the giving of compulsory testimony in every case where the use of such documentary evidence, or such testimony, may tend to incriminate himself: 3 Wigmore on Evidence, sec. 2264; *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. Rep. 372, 48 L. ed. 575; *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, 29 L. ed. 746; *Duren v. City of Thomasville*, 125 Ga. 1, 53 S. E. 814; *People v. Reardon*, 124 App. Div. 818, 105 109 N. Y. Supp. 504; *In re Beer*, 17 N. D. 184, 115 N. W. 672, 17 Ann. Cas. 126; *Ex parte Andrews*, 51 Tex. Cr. 79, 100 S. W. 376; *State v. Gardiner*, 88 Minn. 130, 92 N. W. 529; *People v. O'Brien*, 176 N. Y. 253, 68 N. E. 353; *People v. Argo*, 237 Ill. 173, 86 N. E. 679; *State v. Enochs*, 69 Ind. 314; *Frazee v. State*, 58 Ind. 8; *Ford v. State*, 29 Ind. 541, 95 Am. Dec. 658; *French v. Venneman*, 14 Ind. 282; *Wilkins v. Malone*, 14 Ind. 153; *Lister v. Boker*, 6 Blackf. 439.

The offense charged against appellee is a misdemeanor under our classification of offenses, and it is shown by the plea in abatement that the indictment was found and returned upon evidence coerced from him over his constitutional objection, and given against his will. It is provided by statute in this state that "whenever any person is required to testify touching the commission of any misdemeanor . . . he shall not be liable to trial by indictment or affidavit, or to punishment for such misdemeanor": Acts 1905, p. 584, sec. 237; Burns' Rev. Stats. 1908, sec. 2113.

See, also, *Mackin v. People*, 115 Ill. 312, 3 N. E. 222; *State v. Gardner*, 88 Minn. 130, 92 N. W. 529.

It follows that appellant's demurrer to the plea in abatement was correctly overruled.

The judgment is affirmed.

The Right of a Person to the Protection of His Books and Papers from Examination is the subject of a note to *State v. Davis*, 32 Am. St. Rep. 643; and see *Hammond Packing Co. v. State*, 81 Ark. 519, 126 Am. St. Rep. 1047, and *People v. Adams*, 176 N. Y. 351, 98 Am. St. Rep. 675.

The Admissibility of Evidence Wrongfully Obtained is the subject of an extended note to *State v. Turner*, 136 Am. St. Rep. 135, the subject being specially considered with regard to the constitutional privilege against self-incrimination at page 143.

Compelling the Accused in a Criminal Case to Perform Acts or submit his person to inspection and examination is the subject of a note to *State v. Height*, 94 Am. St. Rep. 323.

The Privilege of a Witness as to Incriminating Testimony is the subject of a note to *Evans v. O'Connor*, 75 Am. St. Rep. 318, and to *Fries v. Brugler*, 21 Am. Dec. 55.

Seizure of Books and Papers as Evidence.—The constitutional provision that no person shall be compelled to testify against himself in a criminal cause precludes the seizure of one's private books and papers in order to obtain evidence against him: *State v. Davis*, 108 Mo. 666, 32 Am. St. Rep. 640. A statute taxing stock transfers, which authorizes the controller to secure evidence from a person's private books and papers of violations, if any, of the statute, which might be made the basis of criminal proceedings against him thereunder or of an action for penalties, violates the constitutional prohibition against compelling an individual "in any criminal case to be a witness against himself": *People v. Reardon*, 197 N. Y. 236, 134 Am. St. Rep. 871.

Druggists' Prescriptions and Records.—Statute requiring all prescriptions filled by druggists to be kept by them and produced before courts or grand juries is not unconstitutional as compelling one to testify or furnish evidence against himself. Such prescriptions are not the private papers of the druggist: *State v. Davis*, 108 Mo. 666, 32 Am. St. Rep. 640. But in *State v. Davis*, 117 Mo. 614, 23 S. W. 759, it was held that a subpoena requiring a druggist to produce all prescriptions filed by him between certain dates was too indefinite and an intrusion on his private affairs and business. As holding that statements and reports of sales required to be kept by druggists are not private papers but public documents, and therefore admissible in evidence against the druggist without violating the constitutional prohibition against compelling one to testify against himself, see *State v. Smith*, 74 Iowa, 580, 38 Mo. 492; *State v. Cummings*, 76 Iowa, 133, 40 N. W. 124; *State v. Thompson*, 74 Iowa, 119, 37 N. W. 104; *State v. Gregory*, 110 Iowa, 624, 82 N. W. 335; *State v. Elliott*, 45 Kan. 525, 26 Pac. 55; *People v. Kenwood*, 123 Mich. 317, 82 N. W. 70; *People v. Shuler*, 136 Mich. 161, 98 N. W. 986; *People v. Van Alstyne*, 157 Mich. 366, 122 N. W. 193; *State v. Russell*, 99 Mo. App. 373, 73 Ill. 297; *State ex rel. McClory v. Donovan*, 10 N. D. 203, 86 N. W. 709; *State v. Shelton*, 16 Wash. 590, 48 Pac. 258, 49 Pac. 1064.

STATE v. TILLET.

[173 Ind. 133, 89 N. E. 589.]

APPEAL—Review of Instructions—Absence of Evidence.—

Where an instruction attempts to state the law applicable to the facts which the court says are shown by the evidence, it is not necessary that the supreme court have the evidence before it or that it determine what facts are shown by the evidence. (p. 246.)

LARCENY—Pleading Ownership.—It is Proper in a prosecution for larceny to describe the property as that of the real owner, or of the person in possession. (p. 246.)

LARCENY—Pleading Ownership—Special Property.—In a prosecution for larceny the property may be alleged to be that of one who is in possession as bailee, agent, trustee, executor or administrator, without describing his trust character; that is, the property may be described as his individually. (pp. 246, 247.)

LARCENY—Proof of Ownership.—Evidence of Possession is sufficient proof of ownership of property held by a bailee, agent, trustee, executor or administrator. (p. 247.)

LARCENY—Ownership—Directing Verdict of Acquittal.—An instruction to the jury to find a verdict of not guilty in a prosecution for larceny, because the evidence showed he who was alleged to be the owner of the property held it as an executor, is erroneous. (p. 247.)

James Bingham, attorney general, Wesley Taylor, prosecuting attorney, A. G. Cavins, E. M. White and William H. Thompson, for the state.

A. W. Reynolds, A. K. Sills and A. K. Sills, Jr., for the appellee.

¹³⁴ MONKS, J. Appellee was tried in the court below on a charge of larceny, and the jury, by direction of the court, returned a verdict of not guilty. It is insisted by the attorney general that the court below erred in giving an instruction which reads as follows: "Gentlemen of the jury, there being no evidence in this cause that James Lowe is the owner of this property, but does own it and has possession of it as executor of the estate of Jacob Schneckenger, it is my duty to instruct you to return a verdict of not guilty. I have directed such a form to be prepared."

It is insisted by appellee that no question is presented as to the correctness of said instruction, because the evidence is not in the record. This instruction, however, attempts to state the law applicable to the facts, which the court says are shown by the evidence. It is not ¹³⁵ necessary in such a case that we have the evidence before us or that we determine what facts are shown by the evidence. It is well settled: (1) That it is proper in a prosecution for larceny to describe the property as that of the real owner, or of the person in possession. (2) It may be alleged to be the property of one who is in possession as bailee, agent, trustee,

executor or administrator. (3) Such bailee, agent, trustee, executor or administrator may be alleged to be the owner thereof by name, without describing his trust character, that is, the property may be described as his individually. (4) Evidence of possession is sufficient proof of ownership under such an allegation: 1 Wharton's Criminal Law, 10th ed., sec. 950; 2 Bishop's Criminal Procedure, 4th ed., sec. 725; 2 Wharton's Criminal Law, 7th ed., secs. 1824, 1825, 1830; Clark and Marshall on Crimes, 2d ed., p. 442; 1 McClain's Criminal Law, secs. 546, 603; Gillet's Criminal Law, 2d ed., sec. 536; 22 Cyc. 462-464; *Cole v. Commonwealth*, 5 Gratt. 696; *United States v. Barlow*, 1 Cranch C. C. 94, Fed. Cas. No. 14,521; *State v. Heaton*, 23 W. Va. 773; *Walker v. State*, 111 Ala. 29, 20 South. 612; *State v. Somerville*, 21 Me. 14, 38 Am. Dec. 248; *Adams v. State*, 45 N. J. L. 448; *State v. Hardison*, 75 N. C. 203; *State v. Stanley*, 48 Iowa, 221; *People v. Nelson*, 56 Cal. 77; *Edson v. State*, 148 Ind. 283, 47 N. E. 625. It is said in 1 Wharton's Criminal Law, tenth edition, section 950: "Goods of a deceased person must be averred, until distribution, to be the property of the executor or administrator by name; though it is not necessary to insert the words executor of A., deceased. An executor or administrator has, per se, such a special property as will permit the goods to be described as his individually." The court said in the case of *People v. Nelson*, 56 Cal. 77, "'Proof that the person alleged to be the owner had a special property, or that he held it to do some act upon it, or for the purpose of carriage, or in trust for the benefit of another, ¹³⁶ would be sufficient to support the allegation in the indictment': *State v. Somerville*, 21 Me. 14, 38 Am. Dec. 248."

In this case the property was described as the property of James Lowe, and the court directed a verdict of not guilty, because the evidence showed that he did not own it, but had possession of it as executor of the estate of Jacob Schneckenberger. The instruction was erroneous, for the reason that, under the authorities before cited, proof of possession by said Lowe as executor of said estate was sufficient proof of ownership in said Lowe as charged in the affidavit.

The appeal is therefore sustained.

The Crime of Larceny is discussed at length in the notes to *People v. Miller*, 88 Am. St. Rep. 559, and *State v. Holmes*, 57 Am. Dec. 286.

Larceny of Property in the Possession of a Bailee is discussed in the note to *People v. Miller*, 88 Am. St. Rep. 559, at page 575, and special ownership with relation to the crime of larceny in the same note at page 595. The ownership of money stolen is properly alleged to be in one who holds it as a bailee: *Niberg v. State*, 138 Ala. 100, 100 Am. St. Rep. 22.

Larceny—Owner may be Guilty of.—If personal property is in the possession of another than the general owner, by virtue of some

special right or title, as bailee or otherwise, the taking of the property by the general owner from such person in possession is larceny, if done with the felonious intent of depriving such person of his rights: *State v. Nelson*, 36 Wash. 126, 104 Am. St. Rep. 945.

Larceny.—A Husband may be Guilty of Larceny of the Property of His Wife where by statute she has complete dominion and control of her property: *Hunt v. State*, 72 Ark. 241, 105 Am. St. Rep. 34.

Larceny—Property in Possession of Infant.—If property is taken and retained by an infant under ten years of age, or other person incapable of committing a crime, the custody is that of the owner, and one taking it from such irresponsible agent with intent to convert it is guilty of larceny, as in case of finding lost goods: *Rice v. State*, 118 Ga. 48, 98 Am. St. Rep. 99; *Allen v. State*, 91 Ala. 19, 24 Am. St. Rep. 856.

HAMMER v. STATE.

[173 Ind. 199, 89 N. E. 850.]

NEW TRIAL—Motion for, Waived by Motion in Arrest of Judgment.—Any question depending for presentation upon a motion for a new trial is waived by filing and procuring a ruling on a motion in arrest of judgment before filing the motion and causes for a new trial, there being no showing either of a cause not existing or not known when the motion in arrest was filed. (p. 249.)

CONSTITUTIONAL LAW—Fourteenth and Fifteenth Amendments.—Both the fourteenth and fifteenth amendments to the federal constitution operate on state actions, not on individual actions, and the privilege and immunity clause applies to privileges and immunities arising out of the nature and essential characters of the federal government, and granted or secured by the constitution. (p. 250.)

CONSTITUTIONAL LAW—The Words "Immunity" and "Privilege" are synonymous terms, and mean a right conferred peculiar to some individual or body; a favor granted; a special privilege. (p. 250.)

CONSTITUTIONAL LAW—Regulating the Wearing of Badges or Emblems of societies, and prohibiting the wearing thereof by those who are not members of the society represented, is within the police power of the state. (p. 250.)

CRIMINAL LAW—Statute Void in Part.—If the part of a statute under which a defendant is prosecuted is valid it is immaterial that another part is invalid, if the two parts are separable. (p. 251.)

CONSTITUTIONAL LAW—The Word "Creed," as used in article 1, section 4 of the constitution of Indiana, is used as applied to religious belief and has no reference to any other subject. (pp. 251, 252.)

CRIMINAL LAW—Badges.—A Statute Prohibiting the Wearing of a badge or emblem of a society by one who is not a member thereof does no more than make a misdemeanor of that which at common law was indictable as a "cheat." It is in the same class as statutes against false pretenses and false personation. (p. 252.)

CONSTITUTIONAL LAW—Badges.—A Statute Prohibiting the wearing of a badge or emblem of a society by a person not a member thereof is constitutional. (p. 253.)

CONSTITUTIONAL LAW—Right of Dress and Adornment.—

The right of a person to dress and adorn oneself as he pleases is subject to the modification that he may not adorn himself so as to represent himself to be one whom he is not, and thereby assume a status to which he is not entitled. (p. 253.)

G. R. Estabrook and Elmer Marshall, for the appellant.

James Bingham, attorney general, A. G. Cavins, E. M. White and W. H. Thompson, for the state.

²⁰¹ MYERS, J. Under the provisions of the act of March 7, 1891 (Acts 1891, p. 340, Burns' Rev. Stats. 1908), secs. 2717, 2718), appellant was, on July 22, 1908, charged, by affidavit, with unlawfully wearing the badge and emblem adopted by an incorporated secret society of the state, he at the time not being a member of the society, and was convicted and fined.

Appellant's contention is that this act was repealed by the Criminal Code of 1905 (Acts 1905, p. 584), by being omitted from that act, and that the act of 1891 is obsolete, and if not, it is unconstitutional, being in violation of the fourteenth amendment to the federal constitution, which says that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," of article 1, section 4, of the state constitution, which declares that "no preference shall be given, by law, to any creed," of article 1, section 23, of the state constitution, which is as follows: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens," and of article 4, section 22, of the state constitution which says that "the General Assembly shall not pass local or special laws," etc.

The sufficiency of the affidavit is the only question properly presented. Any question depending for presentation upon the motion for a new trial was waived by filing and procuring a ruling on a motion in arrest of judgment before filing the motion and causes for a new trial, there being no showing either of a cause not existing or not known when the motion in arrest was filed: *Yazel v. State*, 170 Ind. 535, 84 N. E. 972, and cases cited.

²⁰² The point made by appellant, that the act of 1891, *supra*, is not in force, because it is omitted from the act of 1905, *supra*, and was repealed by that act, as being within its purview, has been decided adversely to appellant: *Clark v. State*, 171 Ind. 104, 84 N. E. 984, 16 Ann. Cas. 1229. It is not pretended that the subject is embodied in the act of 1905, *supra*, and we are unable to discover any provision which would bring the act of 1891, *supra*, within its purview, and none is pointed out or suggested.

Both the fourteenth and the fifteenth amendments to the federal constitution are held to operate on state actions, and not on individual actions, and the privilege and immunity clause applies to privileges and immunities arising out of the nature and essential character of the federal government and granted or secured by the constitution, and the provision of the federal constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed: *Hodges v. United States*, 203 U. S. 1, 27 Sup. Ct. Rep. 6, 51 L. ed. 65; *Field v. Barber Asphalt Pav. Co.* 194 U. S. 618, 24 Sup. Ct. Rep. 784, 48 L. ed. 1142; *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. Rep. 570, 38 L. ed. 485.

In the case of *Hodges v. United States*, 203 U. S. 1, 27 Sup. Ct. Rep. 6, 51 L. ed. 65, there was a dissenting opinion but in the extended review of the cases by Mr. Justice Harlan there is no indication of any dissent from the proposition that the immunity or privilege must be such as is derived from, or dependent upon, the constitution. "Immunity" and "privilege" are synonymous terms; and mean a right conferred peculiar to some individual or body; a favor granted; a special privilege; in short, an affirmative act of selection of special subjects of favors, not enjoyed by citizens in general, under the federal constitution: *Long v. Converse*, 91 U. S. 105, 23 L. ed. 233; *Slaughter-house Cases* 16 Wall. 36, 21 L. ed. 394; *Ex parte Levy*, 43 Ark. 42, 51 Am. Rep. 550; *Lawyers' Tax Cases*, 8 Heisk. 565; *Harrison v. Willis*, 7 Heisk. 35, 19 Am. Rep. 604; *Lonas v. State* 3 Heisk. 287; *International Trust Co. v. American etc. Trust Co.*, 62 Minn. 501, 65 N. W. 78, 632; *Dike v. State*, 38 Minn. 366, 38 N. W. 95; *Douglass v. Stephens*, 1 Del. Ch. 465; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136; *North River Steam Boat Co. v. Livingston*, Hopk. Ch. 170; *Territory v. Stokes*, 2 N. M. 161; *State v. Betts*, 24 N. J. L. 555; *Guthrie Daily Leader v. Cameron*, 3 Okl. 677, 41 Pac. 635.

It can scarcely be urged that the right to wear a badge or emblem of a society of which a person is not a member is a right conferred by the constitution or laws of the United States. The statute confers no right, exemption or privilege on any class or individual to do a thing denied to others as of common right, except it may be said negatively to authorize one who is a member of the society to wear a badge if he chooses, but prevents all who are not members from doing so. The constitution and laws of the United States do not furnish nor guarantee such right, nor can a person under them claim that right as a privilege, or that he shall be immune from regulation by the state, so far as the federal constitution is concerned. It is simply the denial by the state under its police power, of a claim of a right by appellant. I

is the negation of a claim, and is a matter that concerns the state only.

In the Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. Rep. 18, 27 L. ed. 835, it was held that the fourteenth amendment did not control the conduct of private persons, but of the states, and was not applicable to a regulation by a private person for the conduct of his business, though of a quasi-public character. And it is held that the states may provide for separate schools, separate locations in theaters, and separate cars for white and colored people: *People v. School Board*, etc., 161 N. Y. 598, 56 N. E. 81, 48 ²⁰⁴ L. R. A. 113; *Chilton v. St. Louis etc. R. Co.*, 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269; *Younger v. Judah*, 111 Mo. 303, 33 Am. St. Rep. 527, 19 S. W. 1109, 16 L. R. A. 558.

As appellant was charged with unlawfully wearing a "badge or emblem," it is unnecessary that we should examine the statute as to any other of the prohibited acts; for, even if the act were unconstitutional as to them, it would not be considered, as it would be unnecessary to the decision of this cause, if the act is separable, and the clause under which appellant is charged is valid: *Hart v. Smith*, 159 Ind. 182, 95 Am. St. Rep. 280, 64 N. E. 661, 58 L. R. A. 949. He could only present a question which invades his rights: *Knight & Jillson Co. v. Miller*, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146; *Harlan v. Schafer*, 169 Ind. 1, 81 N. E. 721; *Wilkinson v. Board*, etc., 158 Ind. 1, 62 N. E. 481; *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; *Wagner v. Town of Garrett*, 118 Ind. 114, 20 N. E. 706.

If the act is valid in part, and separable, and capable of being executed, the invalid part may be disregarded: *State v. Barrett*, 172 Ind. 169, 87 N. E. 7; *Smith v. McClain*, 146 Ind. 77, 45 N. E. 41; *City of Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857; *Henderson v. State*, 137 Ind. 552, 36 N. E. 257, 24 L. R. A. 469.

Article 1, section 4, of the state constitution provides that "no preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent." This section is one of seven, in successive order, all addressed to the one subject matter—the complete divorcement of state and church, and the language of the section itself indicates that as the object in view. The word "creed" has a definite meaning, as a formal declaration of religious belief: *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82.

²⁰⁵ An examination of that instructive case discloses the close relation of church and state, and the religious qualifications for participation in the affairs of government in the colonies and early states, even down to the adoption of the

federal constitution and the first amendment thereto, when the constitutional separation was made, which continued to be adopted as all the new states came in. Our own constitutional provision was manifestly adopted with the ordinary and usual meaning of the word "creed," as applied to religious belief, and just as manifestly having no reference to any other subject. It had no reference to benevolent, philanthropic or fraternal organizations, secret or otherwise, even though of a moral character, and even though it had, the statute under consideration does not profess to give them any preference, or require anyone to become a member, or to contribute to the maintenance, of either. It is a matter of common knowledge that the membership in most, if not all, societies or organizations, whether secret or otherwise, is the result of fitness and selection, which give members standing and character, at least among their fellows, and to a greater or lesser degree with the public, and he who wears a badge or emblem of the order or society without being a member holds himself out to the public and to actual members as guilty of a false personation. It is of itself a deceit and a false pretense, and its object could be nothing else than deception, with possibly ulterior motives. It is evidence of the first act of an impostor in the course of a premeditated design to prey upon those who, from fraternal, charitable or sympathetic motives, become the victims of false personation, imposition and fraud, whether members of the society or not, and the object of the statute was the prevention of this species of fraud, not only in the interest of the members of the society, but of the public at large, who might be deceived through their good opinion of the society and its members. It is a ²⁰⁶ police regulation, pure and simple, upon grounds of public policy, directed against false personation and false pretenses of that particular kind. False pretenses need not be in words. At common law, "cheats," not amounting to a felony, are such as are effected by deceitful or illegal symbols or tokens which may affect the public at large, and against which common prudence could not have guarded, to the injury of one in some pecuniary interest: *Blanchard v. State*, 3 Ind. App. 395, 29 N. E. 783; 2 *Wharton's Criminal Law*, 10th ed., secs. 1116, 1118, 1143-1152, 1158; 1 *Bishop's Criminal Law*, 8th ed., sec. 571; 2 *Bishop's Criminal Law*, 8th ed., secs. 141-168.

The statute does no more than make a misdemeanor of that which at common law was indictable as a "cheat." It is independent of our statute as to false pretense and false personation. We had no statutes covering both, before this act was passed, and it is a modification of the rigors of those acts.

Article 1, section 23, of the constitution of this state is the antithesis of the fourteenth amendment to the federal con-

stitution, for while the latter operates to prevent abridgment by the states of constitutional rights of citizens of the United States, the former prevents the state from granting privileges or immunities—that is, exemptions from otherwise common burdens—or advantages to any citizens or class of citizens which, upon the same terms—that is under like circumstances and conditions—shall not equally belong to all citizens. One section prevents the curtailment of the constitutional rights of citizens, and the other prohibits the enlargement of the rights of some in discrimination against others; but so long as all are treated alike, under like circumstances, neither section is violated: *Cory v. Carter*, 49 Ind. 327, 17 Am. Rep. 738; *Cumming v. Richmond County Board, etc.*, 175 U. S. 528, 20 Sup. Ct. Rep. 197, 44 L. ed. 262.

²⁰⁷ Appellant has not pointed out any ground of objection under article 4, section 22, of the state constitution, nor how it is involved in this action, and we perceive none.

It is argued by appellant that one may, without let or hindrance, so long as it is not done in an offensive way, dress or adorn himself as he pleases, and that any curtailment of this right is against the spirit of our institutions. This contention is true in a modified sense. The modification is, that he may not adorn himself so as to represent himself to be one whom he is not, and thereby assume a status to which he is not entitled, and which affects the public to its detriment, or he may not, by a pretense through a badge or emblem, which only those who are commended by membership are supposed to wear, enjoy some right or privilege belonging to others. The legislative power and discretion to determine what shall constitute a crime or misdemeanor do not seem to have been overstepped. It can work no hardship to anyone who is not falsely pretending and advertising himself to be different from what he is, precisely as the "cheat" at common law. We perceive nothing in the suggestion that the statute applies to secret societies only, but even if it does, it is not amenable to the objection urged by appellant.

The judgment is affirmed.

Police Power—Prevention of Fraud.—The state may institute any reasonable preventive remedy when the frequency of fraud, or the difficulty experienced by individuals in circumventing it, is so great that no other means will prove efficacious: *People v. Wagner*, 86 Mich. 594, 24 Am. St. Rep. 141.

The Fourteenth Amendment Considered With Relation to Special Privileges, Burdens and Restrictions is the subject of an extended note to *State v. Goodwill*, 25 Am. St. Rep. 870, and on page 887 rules and restrictions to prevent imposition and fraud are specially considered.

FLEMING v. GREENER.

[173 Ind. 260, 87 N. E. 719, 90 N. E. 72.]

APPEAL.—Where the Assignment of Errors is joint and several, it is not subject to the objection “that it is joint and is not good as to all who join in it, and therefore is not good as to any of them.” (p. 254.)

MECHANICS’ LIENS—Title of Act.—Contractors are not within those entitled to mechanics’ liens under the Indiana statute of 1883, and its amendments, they not being within the terms “laborers” as used in the title of the act. (p. 256.)

MECHANICS’ LIENS—Persons Entitled to.—The mechanics’ lien law of 1883, with its amendments, confers the right to a lien upon mechanics, laborers and materialmen only. Contractors are not given the right. (p. 257.)

MECHANICS’ LIENS—Right to not Assignable.—The right to a mechanic’s lien is personal to the laborer, mechanic or materialman, and cannot be assigned prior to the perfecting of the lien. (p. 257.)

MECHANIC’S LIEN—Filing Notice.—There is No Lien for labor done or material furnished until notice has been filed in the proper office of the proper county as required by the statute. (pp. 257, 260.)

BUILDING CONTRACTS—Bond of Contractor.—The Surety on a bond given by a contractor to secure the faithful performance of a building contract is not liable to laborers for work done, or to materialmen for material furnished the contractor. (p. 258.)

TRIAL—Special Findings.—Evidentiary Facts and Conclusions in special findings must be disregarded. (p. 258.)

TRIAL—Findings Outside the Issues are nullities and must be disregarded. (p. 258.)

APPEAL—Order for New Trial When Justice Requires.—The supreme court is expressly authorized to order a new trial when the justice of the case requires it. (p. 259.)

Fields & Harmon, W. E. Cox, R. W. Armstrong, Herbert Jackson and Frank B. Shutts, for the appellants.

Leo H. Fisher, A. L. Gray, William A. Ketcham, W. A. Traylor and Bomar Traylor, for the appellees.

261 **MONKS, J.** This appeal is from decrees entered in favor of the appellees against appellants the Southern Railway Company, the Southern Railway Company of Indiana, and others, declaring and enforcing, among other relief, liens in favor of a subcontractor and in favor of the assignees of claims for labor, under what is known as the mechanics’ lien law of this state.

Objection is made to the assignment of errors, on the ground “that it is joint and is not good as to all who join in it, and therefore is not good as to any of them.” The errors assigned, however, are joint as to all the appellants except Waidley, and several as to each of said appellants. It appears from the special findings that said appellants railway companies entered into a contract with appellant McDon-

ald for the construction by him, on the line of their railroad, of a cement bridge and culvert, and that McDonald sublet a part of the work to appellant Waidley. There was no promise or agreement in the contract of McDonald with the railway companies to pay persons who performed labor or furnished material, but only ²⁶² that the railroads, when the work was completed, should be free from all labor or other liens on account of said work. To secure the faithful performance of said contract by said McDonald, the National Surety Company of New York executed a bond to said railway companies. There was no provision in said bond to pay for material or labor, but only a general provision that said McDonald would comply with the covenants in his said agreement. At the same time said appellants McDonald, the Southern Contracting Company and Robert H. Fleming executed to said surety company a bond to indemnify and save it harmless against all losses, payments and liabilities on account of its said bond to said railway companies.

After a part of said work had been performed by said McDonald under his contract and by said Waidley under his subcontract, said McDonald, by and with the consent of said railway companies and the parties to said surety and indemnifying bonds, assigned and transferred all of his rights and interests in and to the unfinished part of his said contract to his surety and coappellant, the Southern Contracting Company, by a written contract, which provided, among other things, that said contracting company should be bound by, and carry out and complete the work under the contract of said McDonald, and should be paid any amount due for work done by said McDonald under said contract, but should not be bound or required to pay any of the liabilities of said McDonald, except to said railway companies, and to indemnify said companies and protect them from liabilities or liens on their property on account of the acts of said McDonald. Vouchers and checks for the sums due to said McDonald under his contract with said railway companies, one for \$1,452.92 and one for \$893.10, in all \$2,346.02, were turned over and paid to said Southern Contracting Company by said railway companies. McDonald and Waidley each employed a large number of persons to perform work and labor in the construction of said bridge and culvert, ²⁶³ and purchased from various persons material to be used in said work. They issued to those to whom they respectively became indebted for such labor and material written evidences of such indebtedness, called time checks.

The holders of these checks, without having filed notice of an intention to hold a lien on said railroad for their claims as provided by the statute, for a valuable consideration assigned said time checks, by indorsement in writing, to

appellees Greener Brothers, who afterward, in their own name and in the names of their assignors, filed in the office of the recorder of the county wherein said work was done notice of their intention to hold a lien on said railroad for their labor claims, to which notice they also appended the names of their assignors, without authority to do so, except as such authority might be inferred from the assignment of the time checks.

Appellee McLaughlin "had three and sometimes four teams at work, and he employed men to drive them, he driving one himself. He paid his employees out of his own pocket, and his employees and teams performed work on said railroad under a contract with Waidley, the subcontractor, to the value of \$255.20, for which he filed a notice of his intention to hold a lien upon said railway companies' railroad in said county," under the mechanics' lien law of this state.

The court below stated conclusions of law in favor of Greener Brothers, assignees of said time checks for labor and material issued by McDonald, and by McDonald and Waidley, against said McDonald and Waidley, said railway companies, and against the National Surety Company, the Southern Contracting Company, and Robert H. Fleming, appellants on said surety and indemnifying bonds, and rendered personal judgments against them, together with attorneys' fees, because the same were liens on the road of said railway companies under the law known as the mechanics' lien law of this state. Conclusions of law were stated in favor of said Greener Brothers against said Southern ²⁶⁴ Contracting Company for the amount of \$2,346.02 and in favor of Bretz, receiver of Waidley, for \$1,452.92, being a part of said sum of \$2,346.02 received by said contracting company from said railway companies due from them to said McDonald, with interest thereon. A conclusion of law was stated in favor of Bretz, receiver of Waidley, on his subcontract against said railway companies for the amount due thereon, with attorneys' fees, by virtue of what is known as the mechanics' lien law of this state. A conclusion of law was stated in favor of McLaughlin for the amount due him under his contract with said Waidley, together with interest and attorneys' fees against said railway companies, under the provisions of what is known as the mechanics' lien law of this state, and judgment was rendered against said railway companies therefor.

It was held by this court, in the case of Indianapolis etc. Traction Co. v. Brennan, 174 Ind. —, 87 N. E. 215, that the term "laborers," as used in the title of the mechanics' lien act of 1883 and its amendments (Acts 1899, p. 569, Acts 1889, p. 257, secs. 2, 3, 4, 6, Acts 1883, p. 140, secs. 7-11, 13, 14, Burns' Rev. Stats. 1908, secs. 8295-8307), "does not

include or apply to the class of persons known as contractors, but must be construed as applying only to and including mechanics, laborers and materialmen; that to construe said sections so as to apply to contractors or to persons other than mechanics, laborers and materialmen would make the same to that extent in violation of article 4, section 19, of the constitution of this state, for the reason that mechanics, laborers and materialmen are the only persons within the scope of the title of the act." It is evident, therefore, that any provision in said act giving anyone except "mechanics, laborers and materialmen" a lien is in violation of said article 4, section 19, of the constitution of this state, and therefore is void because not expressed in the title of the act. We therefore hold, upon the authority of *Indianapolis etc. Traction Co. v. Brennan*, ²⁶⁵ 174 Ind. —, 87 N. E. 215, that the conclusion of law stated in favor of Bretz, receiver of Waidley, against said railway companies, and the conclusion of law in favor of McLaughlin against said railroad companies are erroneous, because said Waidley, the subcontractor, and said McLaughlin (at least as to labor not performed by himself) are not mechanics, laborers or materialmen, and therefore are not entitled to the benefit of the act of 1883, *supra*, and the amendments thereof.

We shall next consider whether the assignment of said labor claims to Greener Brothers carried to the assignees the right to perfect the lien allowed by the provisions of sections 8305, 8306, Burns' Revised Statutes of 1908. In the case of *Jenckes v. Jenckes*, 145 Ind. 624, 44 N. E. 632, this court, speaking of such claims, said: "Such claims may, of course, be assigned, but they carry no lien, unless a lien has first been perfected by the mechanic or materialman in whose favor the right to the lien primarily exists. The right to the lien is in the mechanic, laborer or materialman, and it is only such mechanic, laborer or materialman that may perfect the lien; and it is only after the lien has been perfected, as in the case of any other lien, that it may be assigned." It is clear that section 9305, *supra*, giving a lien to persons that perform labor or furnish material in the construction of railroads, was intended for the sole benefit of the persons named therein that are embraced in the title of said act; that there is no lien for such labor or material until notice has been recorded in the proper office of the proper county as required in section 8306, *supra* (*Green v. Green*, 16 Ind. 253, 79 Am. Dec. 428; *Millikin v. Armstrong*, 17 Ind. 456; *Waldo v. Walters*, 17 Ind. 534; *Sharp v. Clifford*, 44 Ind. 346); and that the assignment of such claims by the persons performing the labor or furnishing the material, that are entitled under the law to perfect the lien therefor, before such lien is perfected, carries with it no right

to the assignee to have, perfect or enforce such ²⁶⁶ lien. This view harmonizes with the manifest purpose of the statute, and is sustained by the weight of the authorities: 20 Am. & Eng. Ency. of Law, 2d ed., 471; 2 Jones on Liens, 2d ed., secs. 1493, 1494; Boisot on Mechanics' Liens, sec. 10; Phillips on Mechanics' Liens, 3d ed., sec. 54; Mills v. La Verne Land Co., 97 Cal. 254, 33 Am. St. Rep. 168, 32 Pac. 169; McCrea v. Johnson, 104 Cal. 224, 37 Pac. 902; Mason v. Germaine, 1 Mont. 263; Dano v. Mississippi etc. R. Co., 27 Ark. 564; Tewksbury v. Bronson, 48 Wis. 581, 4 N. W. 749; Brown v. Smith, 55 Iowa, 31, 7 N. W. 401; Langan & Noble v. Sankey, 55 Iowa, 52, 7 N. W. 393; Merchant v. Ottumwa Water Power Co., 54 Iowa, 451, 6 N. W. 709; Frailey v. Winchester etc. R. Co., 96 Ky. 570, 29 S. W. 446; O'Connor v. Current River R. Co., 111 Mo. 185, 20 S. W. 16; Rollin v. Cross, 45 N. Y. 766; Roberts v. Fowler, 4 Abb. Pr. 263; Hooper v. Sells, 58 Ga. 127; Goodman B. & S. v. Pence, 21 Neb. 459, 32 N. W. 219; Brown v. Harper, 4 Or. 89; Noll v. Kenneally, 37 Neb. 879, 56 N. W. 722; Casey v. Ault, 4 Wash. 167, 29 Pac. 1048; Fleming v. Greener, 41 Ind. App. 77, 83 N. E. 354. See, also, Chicago etc. R. Co. v. Glover, 159 Ind. 166, 62 N. E. 11. To the extent that the case of Midland R. Co. v. Wilcox, 122 Ind. 84, 23 N. E. 506, is in conflict with this opinion it is overruled. It follows that the conclusions of law in favor of Greener Brothers against said railway companies as to said time checks for labor and material are erroneous.

The conclusions of law in favor of Greener Brothers against the National Surety Company, the Southern Contracting Company and Robert H. Fleming on said surety and indemnifying bonds are erroneous, for the reason that there is no agreement in said bonds or the contract secured thereby to pay mechanics, laborers or materialmen for labor done in constructing said bridge and culvert or for material furnished and used in the construction ²⁶⁷ thereof. It is evident that neither said laborers and materialmen who assigned said time checks to Greener Brothers, nor said assignees thereof, the Greener Brothers, were entitled to the benefit of said contract, because not within the terms thereof: Greenfield Lumber etc. Co. v. Parker, 159 Ind. 571, 65 N. E. 747. It will be observed that the written contract of the Southern Contracting Company and the other parties thereto, concerning the assignment of the contract between McDonald and the railway companies to said contracting company, provided that all amounts due McDonald, under said contract so assigned, from said railway company should be paid to said contracting company.

Disregarding the evidentiary facts and the conclusions in the special findings, as we must (Fisher v. Louisville etc. R.

Co., 146 Ind. 558, 45 N. E. 689, it is evident that said sums of \$1,452.92 and \$893.10 were paid to said contracting company by said railway companies under said written contract as a part of the consideration therefor. Therefore the conclusions of law that said contracting company holds the same in trust, or is liable to any of the appellees therefor, are erroneous. Moreover the findings and the conclusions of law, as to said sums of money so received by said contracting company from said railway companies, are outside the issues of the case, and therefore nullities, and must be disregarded: *Citizens Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Burton v. Morrow*, 133 Ind. 221, 32 N. E. 921.

By express provision of the statute, this court is authorized to order a new trial when the justice of the case requires it (*Burns' Rev. Stats. 1908, sec. 702, Rev. Stats. 1881, sec. 660*), and this power has often been exercised: *McCoy v. Kokomo R. etc. Co.*, 158 Ind. 662, 64 N. E. 92, and cases cited; *Donaldson v. State*, 167 Ind. 553, 78 N. E. 182; *Farmers etc. Ins. Assn. v. Stewart*, 167 Ind. 544, 78 N. E. 490. We think such an order should be made in the case of *McLaughlin* ^{2es} v. *Southern Railway Company* and another, as to the judgment in favor of *McLaughlin* against the two railway companies.

All the judgments and decrees against the two railway companies, the National Surety Company, the Southern Construction Company and Robert H. Fleming, or any one of them or any two or more of them, are reversed, with instructions to restate the conclusions of law as to them in accordance with this opinion, that said Greener Brothers are not entitled to recover any judgment or foreclose any lien against them or against any one or more of them, and to render judgment thereon that said Greener Brothers take nothing by their said action against them and for costs in their favor against said Greener Brothers, and that Bretz, receiver, is not entitled to recover any judgment or foreclose any lien against them or against any one or more of them, and to render judgment on said conclusions of law that said Bretz, receiver, take nothing by his said action against them and for costs against said receiver, payable out of any money in his hands as such receiver; that the trial court grant a new trial in the case of *McLaughlin v. Southern Railway Company* and another (No. 3402 in the Dubois circuit court), and for further proceedings in said cause not inconsistent with this opinion.

ON PETITION FOR REHEARING.

MONKS, J. Appellees have filed a petition for rehearing, in which they insist that, under section 8305, *Burns' Revised Statutes of 1908, Acts 1889, page 257, section 6*, the assignors of said labor claims were entitled to a lien against the two railway companies without giving any notice thereof to

said companies; and that said lien passed to Greener Brothers, as the assignees thereof. Said section, however, does not provide for or create a personal liability against the owner of the property in favor of the person performing the work or furnishing the ²⁶⁰ material, but only gives a lien for the same "upon the right of way and franchises of such railroad corporation, . . . and upon all works and structures mentioned in this section and that may be upon the right of way and franchise of such railroad corporation within the limits of the county." Before any lien can be acquired under section 8305, *supra*, it is required by section 8306, Burns' Revised Statutes of 1908, Acts 1883, page 140, section 13, that notice of intention to hold such lien shall be recorded in the recorder's office. There is nothing in section 8305, *supra*, which dispenses with the notice required by section 8306, *supra*. As the assignors of said labor claims gave no notice of their intention to hold a lien as required by section 8306, *supra*, before they assigned the same to Greener Brothers, said claims were not a lien on said railroads, and no lien passed to said Greener Brothers by said assignments.

The other questions presented were fully considered and determined in the original opinion, and we see no reason to change the views there expressed, and the petition is therefore overruled.

The Assignment of the Liens of Mechanics and Materialmen, is the subject of a note to *Kinney v. Duluth Ore Co.*, 49 Am. St. Rep. 530. One who purchases a mechanic's lien at a discount is entitled to enforce it for its full face value as against other lienholders toward whom he stands in no fiduciary relation: *Title Guarantee Co. v. Wrenn*, 35 Or. 62, 76 Am. St. Rep. 454. An assignment of the debt before the lien is perfected invests the assignee with the right to perfect and file the lien: *Peatman v. Centerville Light, Heat & Power Co.*, 105 Iowa, 1, 67 Am. St. Rep. 276; but it has been held that the assignment of the debt destroys the lien: See note to *Goble v. Gale*, 41 Am. Dec. 221, on waiver of mechanic's lien. If one entitled to a mechanic's lien makes an absolute assignment of the sum due him, and not merely as security, a lien statement filed by him on his own account, after such assignment, is void and will not inure to the benefit of the assignee; but if the assignment is made as collateral security only, a sufficient interest is left to entitle him to file a lien which will protect his equitable interest, and also inure to the benefit of the assignee: *Davis v. Crookston Water Works etc. Co.*, 57 Minn. 402, 47 Am. St. Rep. 622, and see cases cited in cross-reference note thereto.

Who are Laborers Within the Meaning of the Lien Laws is the subject of a note to *Oliver v. Macon Hardware Co.*, 58 Am. St. Rep. 306, and to *Stryker v. Cassidy*, 32 Am. Rep. 264; and who is a laborer within the meaning of exemption statutes is considered in the note to *Brown v. Hebard*, 91 Am. Dec. 419.

STATE v. WILLIAMS.

[173 Ind. 414, 90 N. E. 754.]

STATUTES—"Passage of Act."—In Ordinary Usage the passage of an act is understood as that time when it is stamped with the approval of the requisite vote of both houses, in the constitutional manner, signed by the presiding officer of each house, and approved by the governor, or passed over his veto, or becomes a law by lapse of time. (p. 262.)

STATUTES—When Take Effect.—A Legislative Enactment can go into effect only by the declaration of an emergency in the act itself, or upon distribution of the session laws to the various counties, and the proclamation of the governor. (p. 262.)

STATUTES—When Take Effect.—Repealing or Saving Clauses in an act do not take effect at a different time from the act as a whole, though expressed in the present tense. (p. 263.)

LOCAL OPTION LAW—Construction.—"After the Passage of This Act."—The phrase, "after the passage of this act," as used in the provision of the Indiana local option law of 1908, providing that licenses issued "after the passage of this act" shall be void ninety days after the holding of an election at which the sale of intoxicating liquors shall be prohibited, is used in a technical sense, and means the time at which the act took effect. (pp. 263, 266.)

INTOXICATING LIQUORS—Nature of License to Sell.—A license to sell intoxicating liquor is not a vested or property right, but a matter of purely legislative grace which may be extended or denied. (p. 267.)

James Bingham, attorney general, A. G. Cavins, Edward M. White and William H. Thompson, for the state.

Murphy & Todd and Condo & Browne, for the appellee.

⁴¹⁴ MYERS, J. An election was held in Wabash county on December 29, 1908, under the act of September 26, 1908 ⁴¹⁵ (Acts 1908 [S. S.], p. 4), at which a majority of the legal votes cast were in favor of prohibiting the sale of intoxicating liquors as a beverage in that county. Appellee, on November 3, 1908, had been granted a license for the sale of intoxicating liquors for the term of one year. The local option statute passed both houses of the legislature on September 26, 1908. The acts were published and were circulated in the several counties November 20, 1908, and the governor's proclamation so made. Appellee was prosecuted upon an affidavit charging him with having made an unlawful sale on April 12, 1909.

The question for determination depends upon the construction of section 9 of the act of 1908, *supra*, reading as follows: "If a majority of the legal votes cast at said election shall be in favor of prohibiting the sale of intoxicating liquors as a beverage in said county, then after ninety days from the date of holding said election, all licenses for the sale of intoxicating liquors granted in said county after

the passage of this act shall be null and void, and the holder thereof shall be liable for any sale of liquors made by him thereafter, the same as if a license had never been issued to him; if the holder of such void license shall surrender the same within ninety days from the date of holding said election, the county, town or city issuing said license shall refund to the holder an amount proportionate with the unexpired time for which the license fee shall have been paid: Provided, however, that no license issued prior to the passage of this act shall be terminated by virtue of this act or any vote thereunder."

It is not contended that the legislature had no power to annul the license, but it is claimed that section 9 does not apply to appellee, for the reason that he comes within the proviso of the section as the holder of a license "issued prior to the passage" of the act, and the sole inquiry is as to the meaning of the phrase, "after the passage of this act." It is urged by the state that the phrase is synonymous ⁴¹⁶ with "enactment" of the statute, and has no reference to the time of its going into effect, and that when the act went into effect it related back to the time of the enactment, and that the language means such in its ordinary use and acceptance. On the part of appellee it is insisted that the phrase has reference to the time of its coming into force, and that an act cannot be said to be passed until it becomes effective as a law.

Two classes of cases are dealt with by this section, both having relation to the same period of time, one class not to be, and the other to be, affected by the act. What is that period of time? In ordinary usage, the passage of an act is well understood as that time when it is stamped with the approval of the requisite vote of both houses in the constitutional manner, signed by the presiding officer of each house, and approved by the governor, or passed over his veto, or when it becomes a law by lapse of time. But its going into effect is an entirely different thing, as is well understood. The inquiry is, Is there anything to indicate that the phrase "after the passage of this act" has a legal or technical meaning in this statute that will take it out of the generally accepted use and understanding of the term?

It is beyond question that a legislative enactment can only go into effect either by the declaration of an emergency in the act itself, or upon distribution of the session laws to the various counties, and the proclamation of the governor. An act without an emergency clause cannot go into effect in advance of distribution of the session laws and proclamation, even though it fixes a time for its going into effect in advance of distribution and proclamation: *Cain v. Goda*, 84 Ind. 209; *McCalment v. State*, 77 Ind. 250; *Noel v. Ewing*, 9 Ind. 37;

Hendrickson v. Hendrickson, 7 Ind. 13; McCool v. State, 7 Ind. 378; Ex parte Lucas, 160 Mo. 218, 61 S. W. 218.

⁴¹⁷ Repealing or saving clauses in an act do not take effect at a different time from the act as a whole, though expressed in the present tense: Leyner v. State, 8 Ind. 490; Schneider v. Hussey, 2 Idaho, 8, 1 Pac. 343.

Outside this jurisdiction there is a decided conflict in the states as to the meaning of the phrase "after the passage of an act." It is held in some of the states and in the United States courts to mean the date of its enactment, authentication and approval by the governor or President, or its passage over a veto: Eliot v. Cranston, 10 R. I. 88; Walker v. Mississippi etc. R. Co., Fed. Cas. No. 17,079; In re Tebbetts, Fed. Cas. No. 13,817; Johnson v. Fay, 16 Gray, 144; Wartman v. City of Philadelphia, 33 Pa. 202; Burgess v. Salmon, 97 U. S. 381, 24 L. ed. 1104; State v. Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243; Matter of Chardavoyne, 5 Dem. Surr. 466. The rule of the latter case is however denied in the case of Matter of Howe, 48 Hun, 235, and the opinion of the supreme court is affirmed in Matter of Howe, 112 N. Y. 100, 19 N. E. 513, 2 L. R. A. 825. There are many cases to the point that the phrase "after the passage" of an act is a technical term, and refers to the time of its going into effect: City of Davenport v. Davenport R. Co., 37 Iowa, 624; Thompson v. Independent School Dist. etc., 102 Iowa, 94, 70 N. W. 1093; Bennett v. Bevard, 6 Iowa, 82; Charless v. Lamberson, 1 Iowa, 435, 63 Am. Dec. 457; Harding v. People, 10 Colo. 387, 15 Pac. 727; State v. Bemis, 45 Neb. 724, 64 N. W. 348; Walker v. State, 46 Neb. 25, 64 N. W. 357; Schneider v. Hussey, 1 Idaho, 8, 1 Pac. 343; Jackman v. Inhabitants, etc., 64 Me. 133; Patrick v. Perryman, 52 Ill. App. 514; Ex parte Lucas, 160 Mo. 218, 61 S. W. 218; Andrews v. St. Louis etc. R. Co., 16 Mo. App. 299; ⁴¹⁸ Hill v. State, 73 Tenn. 725; Logan v. State, 3 Heisk. 442; In re Alexander, 53 Fla. 647, 44 South. 175; Shook v. Laufer (Tex. Civ. App.), 100 S. W. 1042; Scales v. Marshall, 96 Tex. 140, 70 S. W. 945; Galveston etc. R. Co. v. State, 81 Tex. 572, 17 S. W. 67. In the case of Mills v. State Board etc., 135 Mich. 525, 98 N. W. 19, 3 Ann. Cas. 735, the court, referring to four or five of the cases here cited, uses this language: "In each of these cases, except Patrick v. Perryman, 52 Ill. App. 514, the effect of holding that the language 'at the time of the passage of this act,' referred to the date the act was approved made the law take effect at an earlier time than under the constitution it could. There was presented to the court in each of these cases, therefore, the alternative of declaring that this language meant when the law took effect or that it meant nothing, and the court was therefore compelled to decide

that it meant when the law took effect." An examination of those cases fails to convey to our minds the inference drawn by the supreme court of Michigan as to all of them, though it does as to some, but they followed the case of *Patrick v. Perryman*, 52 Ill. App. 514.

This act undertakes to fix a time prior to which licenses issued theretofore shall not be affected and subsequent to which licenses issued thereafter shall be so affected. As the right to acquire license was not denied by the act, but recognized, with the contingent liability of annulment, by reason of the vote, it must follow that this right was intended to be unaffected, irrespective of the question whether the contingency of the ninety-day period should relate in time to the enactment by the two houses and the approval by the governor, or to the date of the going into effect of the act up to the time of an election. That is, that an applicant might acquire license, even after the act went into effect, subject to its being annulled by the vote, and except by an annulling vote, it would be immaterial when the license was issued. With the general license statute otherwise unaffected, ⁴¹⁹ it was doubtless contemplated that there might be counties in which there never would be a vote adverse to licensing, or that it might be at some remote time, and that the right to apply for and obtain license should continue up to the holding of an adverse election. After such election, the privilege can be no further extended, and prior to such election, but subsequent to the going into effect of the act, and up to the time of the election, there is a modified right. The contention of the state, that upon the going into effect of the act it relates back to the time of the enactment, and fixes that as of the date of passage, we think untenable. It could not of course, relate back so as to make that an offense which was not an offense until the act went into force.

In the case of *Tarlton v. Peggs*, 18 Ind. 24, it was held that an act was passed on the date of its filing in the office of the Secretary of State, where the session had adjourned with the bill in the hands of the governor, who had returned it without objection, but that case turns on the constitutional provision that "it shall be a law, without his signature." In the case of *Cain v. Goda*, 84 Ind. 209, it was held that one act passed without an emergency clause could not be put into force by a so-called supplemental act putting the first act in force "from and after its passage." There it is manifest that the legislature treated the "passage of the act" as the time when the act had received the signatures of the presiding officers of the two houses and the governor.

Certainly section 9 was not intended to go into effect at a different time from the remainder of the act for any pur-

pose, and the phrase "after the passage of this act" only becomes important when taken in connection with an election, which is a wholly indefinite period, but which could not be held until the act went into force. And while there is no question as to when the act went into effect, the different sections and portions of the same are so related that it seems a fair construction to conclude that, taking the whole ⁴²⁰ together, the phrase was used in a technical sense. The only purpose which could have been in the legislative mind in giving the phrase its ordinary meaning was not to prevent the issuing of a license, but to curtail the time the license should run; but that depends upon an election, a wholly indefinite event, and the purpose of the act as a whole was to leave the general license laws in force and operative, and the construction insisted upon by the state would, in effect, make the law effective for some purposes or in part, and not in effect as to others, and it seems to us that the intention was that the whole act should become effective at one and the same time. If the phrase was intended as a deterrent, the going into effect of the act would have the same effect, and it is reasonable to suppose that the legislature had in mind that it would be in force in a very short time in any event, and the construction that the phrase was intended to operate as a deterrent is hardly probable. The provision for a rebate of the license is of some significance as indicating that it was not intended as a deterrent, for such provision, if not in the nature of an invitation to pursue the ordinary practice, certainly shows no intention to deal harshly with those engaged in the business. It is sought to put all upon as near an equality, as between the municipalities and those engaged in the business, as the nature of the case will permit, and to fix one period of time applicable alike to all persons; and the operation of the act in all its effects is prospective, reckoning from the date it went into effect.

By reference to the Senate journal of the special session of 1908, pages 40, 62, it will be discovered that as originally drawn section 9 did not contain the phrase "after the passage of this act," or the proviso at the close of the section, or the provision for license running ninety days, but for thirty days only, and rendered void all licenses issued prior to an adverse election, at the expiration of thirty days from the election, and used the word "theretofore" before ⁴²¹ the word "granted" in line 5 of the section, referring to the date of the election, and the time for obtaining a rebate was forty days. If the act had passed as originally introduced, at the expiration of thirty days from an election, all licenses granted prior to the election would have been annulled, and of course the election could not be held until the act went into force, and after not less than twenty, nor

more than thirty days from the order for an election, and after ten days' notice was given. What could have been the object of the change? It might be argued that it was to fix an early day from which to reckon, to curtail the number of saloons, by so many as might obtain license after the approval of the act; but if that were so why extend the period to ninety days, and why omit an emergency clause? The act as originally introduced would have treated all alike, while the contention of the state would treat different persons similarly situated differently, without any apparent reason for so doing. The fact that the phrase "after the passage of this act" was inserted by amendment, indicates a purpose, and if used literally it not only made a distinction between persons, but it would have a retroactive effect on some, and not on others, and instead of extending grace and equality would fix a date of reckoning by which to cut down grace to some and extend it to others, when the conditions are the same; so that while the question of grace was wholly with the legislature, it will not be presumed that it was intended to be extended without any element of equality. The amendments made in the Senate extended the privilege ninety days from an election, and rendered the operation of the act, in that respect at least, prospective. It is a fair inference that the entire act was intended to operate prospectively from its going into effect. Whether the time intended by the phrase "after the passage of this act" refers to the date of its approval or the date of its going into effect, the discrimination between persons is the same—those having licenses issued before are not affected, those ⁴²² having licenses issued after are limited. There is this difference, however, that until the act took effect no one was bound to take notice thereof, and all persons up to the time of holding the election had the same rights, supposing them to be otherwise qualified, to acquire license; but the effect of the construction insisted upon by the state would be to make one class liable to punishment after the expiration of ninety days from the election for an act which became criminal by virtue of the fact that such persons did not have license when the act was approved, though they may have had when it went into effect, while the other class would not be punishable, by reason of having a license both when the act was approved and when it went into effect. In the former case the act would be in a sense retroactive and ex post facto, in that it would create a liability to punishment by reason of its fixing a status or a period of time, by a statute which was not in force, from which to reckon guilt or innocence, depending upon the result of an election. The result would necessarily be that the act would become effective for some purposes before the time when by the organic law it could take effect.

We do not mean to be understood as holding or intimating that the legislature had not the power in this character of legislation to fix the date of the approval of the act or any other definite time as the time from which to reckon in discriminating between persons, or to fix their status, for it does not affect a vested or property right, and is a matter purely for legislative grace, which may be extended or denied. But in the absence of the statute's fixing definitely the date when the reckoning shall begin, even though it be a matter of grace, it should not be left open to construction or implication, and especially when involving even indirectly the element of punishment. So that the act may well be regarded as one which should receive a liberal construction, and the history of the ⁴²³ legislation is to some extent impressed with that element of legislative intention. To hold that one who had a license before the approval of the act should be put in a different situation from one who acquired license in the interim between the approval of the act and its going into effect, so that one would be affected by the election, which, after all, is the pivotal question in the statute, and the other would not be, would be to impress the statute with some measure of unreason, which should not be done if it can be avoided: 26 Am. & Eng. Ency. of Law, 2d ed., 646, and note.

The failure to attach an emergency clause indicates a lack of necessity in the legislative mind for the immediate operation of the act, and rationally leads to the conclusion that grace was intended to be extended to give time to those who might be affected to adjust themselves to the new state of things if an election adverse to licensing should be held, and that up to the time of the act's going into effect all should be put on an equality. The liberality of the legislation seems fairly to call for liberality of construction. The facts that there is no emergency clause, and that there is no adjudicated definition of the phrase in this state, but a very largely preponderating number of the states have declared its meaning as technical, tend to enforce the proposition that it was so used in this act, and that is our judgment.

The court below did not err, and the judgment is affirmed.

Monks, J., absent.

No Person has a Vested Right to Retail Intoxicating Liquors. The power of the legislature, as a part of the police power of the state, is practically unlimited upon this subject: *State v. Pitts*, 160 Ala. 133, 135 Am. St. Rep. 79; *Marks v. State*, 159 Ala. 71, 133 Am. St. Rep. 20; *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82; *State v. Herring*, 145 N. C. 418, 122 Am. St. Rep. 461; *Beauvoir Club v. State*, 148 Ala. 643, 121 Am. St. Rep. 82; *New Orleans v. Smythe*, 116 La. 685, 114 Am. St. Rep. 566; *Hart v. State*, 87 Miss. 171, 112 Am. St. Rep. 437; *Equitable Loan and Security Co. v. Edwardsville*, 143 Ala. 182, 111 Am. St. Rep. 84.

CASES
IN THE
SUPREME COURT
OF
IOWA.

SPEER v. SPEER.

[146 Iowa, 6, 123 N. W. 176.]

WILLS—Mental Capacity—Evidence.—When the Sickness of a testator at the time of the execution of his will was wholly physical, proof of his condition as to lethargy, suffering or unconsciousness on days preceding or following the execution of the will is entitled to very little consideration; the sole question being whether at the time of its execution he was conscious and able to understand what he was doing. (p. 269.)

WILLS—Mental Capacity.—Mere Mental Weakness not due to mental disease, but solely to physical infirmity, does not constitute mental unsoundness; but there may be testamentary incapacity without actual insanity or unsoundness of mind. (p. 270.)

WILLS—Mental Capacity.—Testimony as to the Suffering and stupor of a testator, who was suffering from a progressive illness, on the day following the execution of the will, cannot be considered to show his condition on the day the will was executed. (p. 271.)

WILLS—Mental Capacity.—Testimony of a Witness that on the day a will was executed the testator "could not indicate that he could understand what I said to him," is a mere inference and is properly stricken out. (p. 271.)

WILLS—Testimony of Subscribing Witness—Presumptions.—The admission of a will to probate gives rise to no presumption of testimony, express or implied, by a subscribing witness that the testator was of mental capacity. The law affords the necessary evidence of that fact by way of a presumption as long as the presumption remains uncontroverted. (p. 272.)

WILLS—Mental Capacity.—Declarations of a Subscribing Witness, made after the execution of a will, to the effect that the testator was mentally incompetent are hearsay and not admissible. (p. 273.)

WILLS—Mental Capacity.—Opinions of the Mental Condition of a testator, who was suffering with a progressive physical illness, based upon his condition at other times than when the will was executed, either on that day or other days, have no probative force with reference to his condition when the will was made, and are therefore inadmissible. (p. 275.)

Z. F. Yost and O. P. Myers, for the appellants.

E. J. Salmon and Geo. C. Kipp, for the appellee.

⁷ **McCLAIN, J.** An instrument purporting to be the last will and testament of Alexander Speer was admitted to probate in the district court of Jasper county on February 17, 1902. It purported to have been executed on the third day of the same month, and it appeared that the testator died on the 6th. By this instrument the testator, who was without issue, left his property to defendant, his surviving widow. In August, 1906, within less than six months of the expiration of the statutory period for instituting action to set aside the probate of this instrument, the plaintiffs, William C. Speer, a brother of testator, and John M. and Samuel J. Black, his nephews, instituted this action to set aside said probate on the ground that the instrument purporting to be a will was admitted to probate without any contest, and that it was not the last will and testament of Alexander Speer, for the reason that it was procured by the fraud and undue influence of defendant, the sole beneficiary therein, and that said testator was of unsound mind at the time said instrument was executed, and on the further ground that said testator was unconscious and in such physical condition at the time said instrument purports to have been executed by him that he could not sign the same, and never did sign the same, so that it is not his will. We find no evidence in this record ⁸ tending in the remotest way to show affirmatively any undue influence exercised upon testator in connection with the execution of his will, and we find no evidence of a diseased mind which would indicate that if the instrument was consciously and intentionally executed it was not entitled to probate. The sole question which plaintiffs attempted by their evidence to present was whether testator was so enfeebled in mind by physical disease that he was unable to exercise the discretion necessary to make a will. The complaints of appellants are: First, that there was enough evidence to go to the jury on the question whether testator was on the day of the execution of the will sufficiently conscious to enable him to execute it; and, second, that the court erred in rejecting evidence which, if admitted, would have required the submission of the case to the jury.

1. The disease of which testator died is described by the witnesses as broncho-pneumonia with pleurisy, with which testator had been seized about five days before the will was executed, and of which he died the second day after its execution. As testator's sickness was wholly physical, proof of his condition as to lethargy, suffering, or unconsciousness on days preceding or following the execution of the will is entitled to very little consideration; the sole question being whether at the time of its execution he was conscious and able to understand what he was doing: *Fothergill v. Fothergill*, 129 Iowa, 93, 105 N. W. 377. Only two of the witnesses saw

him on the day when the will was executed. Neither of these witnesses was present at the time of its execution, or attempted execution. They speak of his physical weakness, his failure to recognize them, and his apparent inability to converse as to his condition or his affairs. Without considering the evidence which was excluded by the court, we are unable to find anything in the record substantially tending to show that testator may not ⁹ have been in such condition when the will was in fact executed that he could understand what he was doing and express his deliberate purpose as to the disposition of his property.

Mere mental weakness, not due to mental disease, but solely to physical infirmity, does not constitute mental unsoundness: *Hanrahan v. O'Toole*, 139 Iowa, 229, 117 N. W. 675. On the other hand, it is well settled that there may be testamentary incapacity without actual insanity or unsoundness of mind: *Manatt v. Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717; *Garretson v. Hubbard*, 110 Iowa, 7, 81 N. W. 174. But mere weakness of mental power will not render a person incapable of executing a will. It is not necessary that he should be competent to make contracts or transact business. Old age and failure of memory do not of themselves necessarily take away a testator's capacity to dispose of property: *Perkins v. Perkins*, 116 Iowa, 253, 90 N. W. 555. There is nothing in this case to bring it within the case of *In re Wiltsey's Will*, 135 Iowa, 430, 109 N. W. 776, where it appeared that relatives in attendance upon testator at the time the will was executed took advantage of his lack of mental capacity due to sickness to practically dictate to him the disposition which he should make of his property. In *Duggan v. McBreen*, 78 Iowa, 591, 43 N. W. 547, there was affirmative evidence to show that testator was in confusion as to the person and objects which he would reasonably have had in mind in an attempt to dispose of his property.

Here the disposition was not complicated, and there is nothing to indicate that the execution of the will was not simply the carrying out of a plan previously and definitely entertained, so that the only mental capacity necessary to be exercised was that of determining whether or not he should make a will in that form. We are satisfied that the evidence as admitted by the court did not present such a case as to justify the submission to the jury of the question whether testator at the time this instrument was ¹⁰ executed was incapable of making a valid will. A verdict setting aside the probate of the will would, we think, have been without proper support: *Fothergill v. Fothergill*, 129 Iowa, 93, 105 N. W. 377.

2. Turning now to the many assignments of error alleged to have been committed in sustaining objections to questions or striking out portions of answers calling for opinions on

witnesses as to testator's physical condition on the day on which the will was executed, we need refer to but a few instances to illustrate the line of decision adopted by the trial judge. Statements of the witness Lyda Kenyon, as to testator's condition, such as that he "seemed to be suffering," "seemed to be in a stupor," and did not talk to her that day "because he was too sick," related to the day following that on which the will was executed, and, under the circumstances of the case, we think could not be considered as showing what his condition was on the preceding day. He was suffering from a progressive illness, and he may well have been in a much worse condition than when he signed the will.

The testimony of witness Dibbel that, when he saw testator on the day on which the will was executed, it seemed to be hard work for him to breathe, added nothing to the statement already made that the manner of his breathing "seemed to be labored, heavy."

A portion of an answer of witness Thomson, in which he stated that, when he saw testator on the day on which the will was executed, he "could not indicate that he could understand what I said to him," was properly stricken out as a mere inference, and, if it had been allowed to stand, could not have added any weight to the other testimony of the witness on the same subject.

An objection to a question to the same witness as to whether the recognition of the testator at this time was the same as his recognition in good health was properly sustained, for the reason that the question was altogether ¹¹ too indefinite to lead to any answer of probative value. Many other alleged errors of the same kind have been investigated in the record, with the conclusion that none of them resulted in the exclusion of testimony which would have added anything to the weight of the testimony of the witness.

3. One James Martin, deceased when the case was tried, was an attesting witness to the will. Plaintiffs offered to show that Martin, immediately after attesting the will, made declarations to the effect that testator had waited too long, and that he (Martin) was sorry he had signed the will as a witness thereto, and that if he had it to do over again he would not do it, and that testator did not know what he was doing. The court refused to receive this evidence, and appellants assign this refusal as error. The offered evidence was clearly incompetent as hearsay, unless the fact that Martin was an attesting witness rendered it competent. The argument is that the validity of the will is presumed to stand, in the absence of other evidence upon the faith and credit given to the attesting statement of Martin that testator signed it, and that Martin's attestation therefore stands as affirmative evidence of a fact, and his declarations inconsistent with his

attestation should be received to impeach its effect. We may concede that the mere formal difficulty of the want of a preliminary question to Martin as a witness calling upon him to say whether he made such a declaration in order to lay the foundation for the impeaching testimony ought not to stand in the way of the receipt of the impeaching evidence, if it is properly impeaching. There are analogies for dispensing with such formal step where it is impossible by reason of death or absence of one who would otherwise be a witness. See, for instance: *Felder v. State*, 23 Tex. App. 477, 59 Am. Rep. 777, 5 S. W. 145; *Mattox v. United States*, 156 U. S. 237, 15 Sup. ¹² Ct. Rep. 337, 39 L. ed. 409; *People v. Elliott*, 172 N. Y. 146, 64 N. E. 837, 60 L. R. A. 318. But the difficulty seems to us to be much deeper. The offer was to show by way of affirmative proof that testator was incapable of executing a will by testimony of witnesses who heard Martin say so. It does not appear in this record whether on the formal offer of the will for probate Martin was called and testified, or not. If he were dead or beyond reach, proof of the genuineness of his signature would be sufficient. If he were in fact present in court, it would be sufficient to justify the probate of the will, in the absence of any contrary evidence, that Martin should testify to signing the will at the request of the testator. There would have been no occasion to examine Martin as to testator's capacity, unless an issue had been raised with reference thereto, and until some evidence had been introduced in support of an allegation of want of such capacity, for in that respect the contestants would have had the burden of proof, and the testator would have been presumed sane until some evidence had been introduced to the contrary: *Kirsher v. Kirsher*, 120 Iowa, 337, 94 N. W. 846; *In re Will of Dunahugh*, 130 Iowa, 692, 107 N. W. 925; *In re Goldthorp's Estate*, 115 Iowa, 430, 88 N. W. 944. We think, therefore, that the admission of the will to probate gave rise to no presumption of testimony, express or implied, by Martin as attesting witness that testator was of testamentary capacity. The law afforded the necessary evidence of that fact by way of a presumption so long as the presumption remained uncontroverted. To now allow the plaintiffs contesting the validity of the will on the ground of want of mental capacity to prove Martin's declarations is to enable them to make out a case by showing the declarations of a third person which were wholly inadmissible as hearsay. In other words, the will stands as to the mental capacity of testator upon a presumption of law regardless of any testimony by subscribing witnesses as to that fact. Plaintiffs, having the ¹³ burden of introducing evidence on the question, cannot sustain that burden by offering evidence which is in its very nature incompetent.

There is another view which to our minds is controlling. The statute provides that a will, to be valid, must be in writing, signed by the testator, and "witnessed by two competent persons": Code, sec. 3274. So far as appears, testator complied with the requirements of the statute by expressing his will in writing, by signing such writing, and by having two competent subscribing witnesses affix their signatures to a proper attesting clause, reciting the execution of the will in their presence by testator with the declaration that it was his last will and testament, and their subscribing as witnesses at his request and in his presence. So far as appears, testator died in the belief that he had made a valid will. It is now proposed to invalidate that will by proving that one of the persons who signed it as witness afterward made random declarations to the effect that he thought testator not to have been capable at the time to execute a will. If a subscribing witness may defeat the very purpose for which he is requested by the testator and authorized by law to affix his signature to the attesting clause, by simply making general statements indicating his belief that the testator was not of sound or disposing mind, which declarations may be proven in his absence or after his death and years after they were made, then another peril is added to those already surrounding the exercise by living persons of the statutory right to dispose of their property by will. This cannot be in accordance with the policy of the law. It cannot have been the purpose of the legislature in providing for subscribing witnesses to make the persons thus chosen by the testator competent to defeat his intention by such random declarations.

Appellants' contention is not, however, without support in authority. Counsel have cited five cases, and we ¹⁴ find no others, which seem to sustain their position: *Harden v. Hays*, 9 Pa. 151; *Abraham v. Wilkins*, 17 Ark. 292; *Townshend v. Townshend*, 9 Gill (Md.), 506; *Colvin v. Warford*, 20 Md. 357; *Otterson v. Hofford*, 36 N. J. L. 129, 13 Am. Rep. 429. This is the view adopted in 2 *Wigmore on Evidence*, secs. 1505-1514. The contrary conclusion has been reached in *Stobart v. Dryden*, 1 Mees. & W. 615, and *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459. And this conclusion finds some support by way of analogy rather than by express decision in *Kent v. State*, 42 Ohio St. 426; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Eppert v. Hall*, 133 Ind. 417, 31 N. E. 74, 32 N. E. 713; *Bessman v. Girardey*, 66 Ga. 18; *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446, 56 N. E. 27; *Fox v. Evans*, 3 Yeates (Pa.), 506; *Bott v. Wood*, 56 Miss. 136. The precise question now before us is considered in *Greenleaf on Evidence*, and what is there said is so cogent that we quote the entire paragraph:

"An exception to this [the hearsay] rule has been contended for in the admission of the declarations of a deceased attesting witness to a deed or will, in disparagement of the evidence afforded by his signature. This exception has been asserted, on two grounds: First, that as the party offering the deed used the declaration of the witness, evidenced by his signature, to prove the execution, the other party might well be permitted to use any other declaration of the same witness to disprove it; and, secondly, that such declaration was in the nature of a substitute for the loss of the benefit of a cross-examination of the attesting witness, by which either the fact confessed would have been proved, or the witness might have been contradicted, and his credit impeached. Both these grounds were fully considered in a case in the exchequer (*Stobart v. Dryden*, 1 Mees. & W. 615), and were overruled by the court: The first, because the evidence of the handwriting, in the attestation, is not used as a declaration by the witness, but is offered merely to show the fact that he put his name ¹⁵ there, in the manner in which attestations are usually placed to genuine signatures; and the second, chiefly because of the mischiefs which would ensue, if the general rule excluding hearsay were thus broken in upon, for the security of solemn instruments would thereby become much impaired, and the rights of parties under them would be liable to be affected at remote periods by loose declarations of the attesting witnesses, which could neither be explained nor contradicted by the testimony of the witnesses themselves. In admitting such declarations, too, there would be no reciprocity; for though the party impeaching the instrument would thereby have an equivalent for the loss of his power of cross-examination of the living witness, the other party would have none for the loss of his power of re-examination": 1 Greenleaf on Evidence, 15th ed., sec. 126.

This section is omitted from the text of Professor Wigmore in his (the sixteenth) edition of Greenleaf's work.

We reach the conclusion that the court properly excluded the offers of proof as to the declarations of Martin, the deceased subscribing witness.

4. The two witnesses who saw testator on the day, but not at the time, when this will was executed, after testifying to his condition, were asked questions relating to their opinions touching his mental capacity on that day, and error is assigned in the ruling of the court excluding evidence as to such opinions. One of these witnesses, a remote relative of testator, was asked to state whether in his opinion, as a result of the facts to which he had testified, testator was on that day of sound or unsound mind, and was capable of attending to the ordinary business affairs of life. We think objections to these questions were properly sustained, for the reason that

there is nothing whatever in the testimony of the witness to indicate that the mind of testator was unsound, however it may have been weakened by his illness, and, as already indicated, mere incapacity at that time for attending to the ordinary business affairs of life ¹⁶ would not tend to show incapacity at another time during that day to make a will. What this witness says as to the condition of testator two days before the will was executed could under such circumstances have been entitled to no weight, for, as already said, the testator was seriously sick, and there is no presumption that his mental faculties, as affected by such sickness, were not in entirely different conditions on those two days: *Fothergill v. Fothergill*, 129 Iowa, 93, 105 N. W. 377; *Blake v. Rourke*, 74 Iowa, 519, 38 N. W. 392.

The other witness, a minister to whose congregation the testator belonged, was asked whether testator on the date of the execution of the will, but at a different time on that day, was capable of transacting ordinary business and capable of intelligently disposing of his property. These questions were open to the same objections already indicated as to proposed testimony of the other witness. Incapacity to transact ordinary business, due to physical weakness, would surely not be sufficient to sustain an opinion that the testator was incompetent to make a will; and the testator may have been incapable, by reason of temporary stupor resulting from disease, of intelligently disposing of his property at that particular moment, although at another time during the same day he was sufficiently intelligent and conscious to exercise his judgment with reference to such a matter. For the reasons already indicated, we do not think the opinions of this witness with reference to the condition of testator two days after the will was executed were entitled to consideration. In short, we have a case where a man suffering from disease, but of perfectly sound mind so far as the evidence tends to indicate, was at times conscious, recognizing those about him and fully aware of his conditions and surroundings, while at other times he was in a stupor or apparently asleep, and we think that the opinion of a witness based upon the testator's condition at a time other than that at which the ¹⁷ will was executed would have no probative force with reference to his condition when the will was made.

The action of the trial court in directing a verdict for defendant and entering judgment thereon is affirmed.

The Standard or Test of Testamentary Capacity is a matter of law to be defined by the court for the guidance of the jury in reaching a decision in a given case; whether the evidence in the case measures up to that standard is, as a general rule, a matter of fact to be decided by the jury: *Johnson v. Johnson*, 105 Md. 81, 121 Am. St. Rep. 570.

Neither Illness, Old Age, nor Physical or Mental Weakness Renders a Testator Incapable of making a will, unless the mental weakness deprives him of testamentary capacity: *Dillman v. McDauel*, 222 Ill. 276, 113 Am. St. Rep. 400; *Waters v. Waters*, 222 Ill. 26, 113 Am. St. Rep. 359; *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446; *Henry v. Hall*, 106 Ala. 84, 54 Am. St. Rep. 22; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352; *In re Cline's Will*, 24 Or. 175, 41 Am. St. Rep. 851; *Maddox*, 114 Mo. 35, 35 Am. St. Rep. 734; *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85.

The Attestation and Witnessing of Wills is the subject of an extended note to *Lane v. Lane*, 114 Am. St. Rep. 209.

Subscribing Witnesses Attesting a Will in the presence of the testator thereby impliedly state that he is of sound mind and competent to make a will: *In re Shapter's Estate*, 35 Colo. 578, 117 Am. St. Rep. 216. If one of the subscribing witnesses whose testimony is essential to the probate of a will testifies that he had no reason to question the capacity of the testatrix because he did not know her, and it appears that he had no opinion on the subject, the will is not, according to *Hill v. Kehr*, 228 Ill. 204, 119 Am. St. Rep. 425, entitled to probate. We regard this proposition, however, as more than doubtful.

The Testimony of Subscribing Witnesses in Support or Opposition of the will when propounded for probate is discussed in the note to *Stevens v. Leonard*, 77 Am. St. Rep. 459.

MOORE V. CRANDALL.

[146 Iowa, 25, 124 N. W. 812.]

MORTGAGES—Breach of Covenant to Insure.—Notice of the Election of a mortgagee to consider the whole amount of the debt and interest due upon breach of a condition to keep the mortgaged premises insured to his satisfaction is not required. (p. 278.)

MORTGAGES—Breach of Covenant.—Commencement of an Action to foreclose a mortgage for breach of a covenant thereof is an election to consider the whole debt due under an option given by the mortgage. (p. 278.)

MORTGAGES—Breach of Condition.—A Tender After the Commencement of an Action to foreclose a mortgage for breach of a condition thereof cannot abate the action or excuse the breach. (p. 279.)

MORTGAGES—Covenant for Insurance—Breach.—Under a covenant of a mortgage to furnish insurance satisfactory to the mortgagee, the mortgagor must tender some insurance, and until such tender is made it is not incumbent upon the mortgagee to state what will be satisfactory. (p. 279.)

MORTGAGES—Foreclosure.—Attorney's Fees should not be allowed upon foreclosure of a mortgage for breach of a covenant or condition, upon the election of the mortgagee, without a demand upon or notice to the mortgagor. (p. 280.)

MORTGAGES—Foreclosure.—Waiver of Right to Foreclose a mortgage for breach of a covenant or condition cannot be taken advantage of unless pleaded. (p. 281.)

APPEAL—Amended Brief.—Points Raised by an amended brief, filed before the appellee's argument is served, may be considered. (p. 281.)

APPEAL—Approval of Form of Decree—Estoppel.—The approval of the form of a decree of the lower court by counsel for the appellant will not estop him from questioning the correctness of any ruling expressed therein. (p. 281.)

MORTGAGES—Foreclosure—Alternative Decree.—A decree of foreclosure directing sale on special execution against the premises and general execution for any unsatisfied balance, or, at plaintiff's option, a general execution against all the defendant's property upon waiver of any right under foreclosure, is, so far as the option is concerned, contrary to section 4289 of the Iowa Code. (p. 281.)

John F. and Wm. R. Lacey, for the appellant.

F. D. Reid and Burrell & Devitt, for the appellee.

²⁷ **LADD, J.** The defendant borrowed four thousand dollars of plaintiff, his wife's mother, and executed his promissory note therefor, bearing interest at five per cent per annum, dated March 4, 1907, and payable on or before five years thereafter. To secure payment, he executed a mortgage on forty acres of land, therein stipulating that:

"Said mortgagor shall, while any part of said principal or interest remains unpaid, pay all taxes on said mortgaged premises before they become delinquent, and he shall keep the buildings thereon insured to the satisfaction of the mortgagee, and the policy payable in case of loss to the holder hereof as his interest may then appear, and in case of his failure to comply with either of these provisions the holder hereof may, at his option, cause such taxes to be paid and insurance to be effected, and may thereon add the amount so paid by him to the sum next falling due and shall have the above rate of interest thereon from the time of payment until repaid. It is provided that if said mortgagor shall fail to pay the installments of principal and interest as they fall due or neglect or refuse to pay the taxes or effect the insurance as above provided for for more than thirty days, then the holder hereof may, at his option, without giving notice, consider the principal and interest, and the amount paid by him for taxes, and insurance on said premises, due and payable, and may, without delay, proceed to foreclose this mortgage."

The defendant had procured a policy of insurance for two thousand eight hundred dollars on buildings from the Prairie Farmers' Mutual Insurance Company in 1903, conditioned that, if the subject of insurance be or become encumbered, unless ²⁸ otherwise agreed, it should be void. Prior to March 21, 1908, there was no agreement obviating this condition, nor any indorsement such as exacted by the policy. This action was begun March 17, 1908, and the petition, filed two days later, alleged that defendant had failed to comply with the

provisions of the mortgage quoted, and that the "petitioner decided to consider said principal and interest due and payable." The defendant denied that he had failed or neglected to keep the buildings insured as required, denied that any demand had been made for insurance or change in the conditions thereof prior to the beginning of the action, and averred that immediately thereafter, and when first apprised of plaintiff's objection thereto, he caused the policy heretofore referred to to be properly indorsed, and tendered the same to plaintiff's attorney, who refused it because of a mutual company, and immediately thereafter procured insurance in a stock company which said attorney also declined to accept. The defendant further averred that the requirement that insurance to the satisfaction of the mortgagee necessarily gave the mortgagor the right to be informed of such dissatisfaction in order to enable him to correct the policy or procure another, and, no opportunity of the kind having been accorded him, the suit ought not to be maintained.

1. A stipulation like that in the mortgage in suit, save that it related to the payment of interest, was considered in *Swearingen v. Lahner*, 93 Iowa; 147, 57 Am. St. Rep. 261, 61 N. W. 431, 26 L. R. A. 765, and the court there held that no previous notice of the election to declare the principal and interest due because of a breach of such a provision or demand of payment was essential prior to the maintenance of an action for the entire indebtedness. This was put on the ground that such stipulations are not to be regarded as in the nature of a penalty or forfeiture, and for this reason viewed with disfavor by the court, but are agreements for bringing the indebtedness ²⁰ to an earlier maturity than expressed upon the face of the instruments, and are to be construed and the intention of the parties ascertained by the same rules as other contracts. The election to declare the indebtedness due in such a case is not merely the mental act of the mortgagee, as argued by the appellant, but is clearly manifested by the commencement of the action.

In that case it was also held that, after the indebtedness had fully matured, any subsequent tender of the interest will not defeat the action. Here the parties had expressly agreed that the mortgagee might, at her option, upon the neglect to effect the insurance as provided, consider the principal and interest due, and might without delay begin proceedings to foreclose the mortgage, and we know of no reason why such a stipulation should not be enforced. In *1 Jones on Mortgages*, section 78, it is said that the condition of the mortgage that the mortgagee shall keep the buildings upon the mortgaged premises insured against fire in a certain sum for the benefit of the mortgagee is a usual condition of a mortgage, and that the breach of such condition is "as effectual in giving the mortgagee a right to enforce his mortgage as is a breach of

the condition to pay an installment of interest or principal or the whole debt.''' To the same effect, see *Walker v. Cockey*, 38 Md. 75.

2. The defendant neglected for more than a year to effect insurance. Even if plaintiff had expressed her satisfaction with the company or policy prior to the execution of the mortgage, this did not warrant the defendant in not obtaining an indorsement to her as stipulated in the mortgage as thereafter executed, nor exonerate him from obtaining the company's consent to the encumbrance in accordance with the provisions of the mortgage. That on March 21, 1908, the policy was indorsed as payable to the mortgagee as her interest might appear and tendered ³⁰ to plaintiff's attorney, or that on April 4th of the same year, defendant procured a policy in a stock company properly indorsed and tendered to said attorney, will not defeat the action. The indebtedness had become due, the action begun, and it could not be abated by a subsequent tender of compliance with the conditions of the mortgage.

3. The mortgage did not define the kind or amount of insurance nor the character of the company. Because of such indefiniteness, had defendant furnished any kind of insurance contract on the buildings with any company in any amount, there might have been ground for insisting that the mortgagee indicate her dissatisfaction therewith, and that reasonable opportunity be afforded to render it satisfactory. If the policy was such as the mortgagee approved prior to the execution of the mortgage, it was rendered void thereby, and she was furnished no indemnity whatever against the contingency of the security being impaired by the destruction of the buildings. The defendant testified to ignorance on his part of what was required, but the terms of the policy declaring it void in event of the premises being or becoming encumbered were plain, and the mortgage specified precisely the indorsement required. The provisions of an instrument stipulating security cannot be frittered away on the excuse of not knowing what he was presumed to have been aware of, or because of forgetfulness: *Spring v. Fisk*, 21 N. J. Eq. 175; *Noyes v. Clark*, 7 Paige, 179, 32 Am. Dec. 620. By the mortgage he had stipulated to keep the buildings insured, and this meant that they should be insured all the time during the period of the mortgage: *Heins v. Wicke*, 102 Iowa, 396, 71 N. W. 345. Possibly because of the indefiniteness of the insurance clause consultation might have been essential to the furnishing of satisfactory indemnity, but the mortgagee was not required to take the initiative. The obligation to keep the buildings insured ³¹ to her satisfaction was his, and, until he took some action, there was nothing for her to do. Had he effected insurance or tendered performance, a different ques-

tion might have arisen. One who undertakes to perform such an obligation for the benefit of another cannot excuse its entire omission by insisting that he was unaware of what might prove satisfactory: See *Iowa-Minnesota Land Co. v. Conner*, 136 Iowa, 674, 112 N. W. 820. There is no merit in counsel's suggestion that the agreement to keep the buildings insured was a promise to pay property, and therefore a demand was essential to mature the indebtedness: See Code, sec. 3056.

4. Appellant contends that, inasmuch as he was afforded no opportunity to pay before the plaintiff elected to declare the indebtedness due, no attorney fee should have been taxed as part of the costs. Section 3871 of the Code reads: "No such attorney fee shall be taxed if the defendant is a resident of the county and the action is not aided by an attachment, unless it shall be made to appear that such defendant had information of and a reasonable opportunity to pay the debt before action was brought. This provision, however, shall not apply to contracts made payable by their terms at a particular place the maker of which has not tendered the sum due at the place named in the contract." The manifest design of this statute is that as a condition precedent to the taxation of attorney's fees a debtor must be afforded a reasonable opportunity to discharge his debt. But for the last sentence, it could not well be claimed that attorney's fees should be taxed. That, however, forms no exception to the rule of the first sentence, for, when the instrument names the place of payment, the maker ordinarily is afforded a reasonable opportunity to pay before maturity. In neither situation, however, is there such opportunity where the indebtedness becomes due on the ³² election of the obligee by bringing suit. In such event, tender when due would be practically impossible. The evident purpose of the last sentence is to obviate the necessity of a demand at maturity when the place of payment is specified, but has no application to a situation where the debt only becomes due on election unless the maker is advised thereof long enough before suit brought to afford a reasonable opportunity to pay. In other words, the last sentence relates to instruments which may be complied with at maturity by payment or tender thereof at a particular place, and not to those in which the opportunity to pay depends on the election of the maker, and not on the designation of the place of payment. Both the parties resided in the county, and the note was payable at Oskaloosa, but it was matured by the election of the payee in bringing suit of which the defendant had no other notice. No attorney fees should have been taxed. In *Livermore v. Maxwell*, 87 Iowa, 705, 55 N. W. 37, liability was denied, while here the indebtedness was not questioned, and therefore the case is not in point.

5. The contention that the right to mature the indebtedness was waived is disposed of by the fact that such waiver was not pleaded. The allegation that twenty-two dollars and fifty cents for insurance was paid by the mortgagee was not put in issue by the answer, and for this reason was rightly included in the judgment.

6. The decree as entered provided that the amount awarded draw interest at the rate of six per cent per annum, whereas the instruments by their terms bore but five per cent and for this the petition prayed. The point is raised by the amendment to appellant's brief first filed. Appellee asked that this be stricken because the point was not among those originally asserted. The amendment was filed before appellee's argument was served, and no prejudice ³³ could have resulted by stating the point in a separate paper. The motion is overruled.

There is some dispute as to whether the form of decree as prepared was marked "O. K." by an attorney for defendant before being entered of record. If so, this no more than approved the form of the entry as expressing the decision as announced by the court, and ought not to be construed as estopping a party from questioning the correctness of any ruling therein expressed: See *Christie v. Iowa L. Ins. Co.*, 111 Iowa, 177, 82 N. W. 499; *Callanan v. Votruba*, 104 Iowa, 672, 65 Am. St. Rep. 538, 74 N. W. 13, 40 L. R. A. 379. The error was such as might be raised on appeal and corrected: *Ainley v. American M. F. Insurance Co.*, 113 Iowa, 709, 84 N. W. 504; *Kenyon v. Tramel*, 71 Iowa, 693, 28 N. W. 37.

The decree directed sale on special execution against the premises and general execution for any unsatisfied balance, or, at plaintiff's option, she was allowed to waive any right under the foreclosure, and cause to be issued general execution against all defendant's property. The portion allowing the exercise of the option was contrary to section 4289 of the Code, and should have been omitted: *Ayers v. Rivers*, 64 Iowa, 543, 21 N. W. 23.

The decree will be modified in the respects found to be erroneous, and, as so modified, is affirmed.

Where a Mortgage Provides That on Failure to Pay one of several secured notes all of them shall become due, a default in payment does not ipso facto mature the whole debt: Spencer v. Alki Point Transportation Co., 53 Wash. 77, 132 Am. St. Rep. 1058.

Under a Mortgage Clause Providing That the Whole Amount of the mortgage debt shall become due, at the option of the mortgagee, for default in the payment of taxes before the same becomes delinquent, a default and subsequent sale of the mortgaged property does not entitle the mortgagee to foreclose, where all taxes, penalties and interest lawfully assessed against the property have been fully paid and discharged by the mortgagor and notice thereof given to the

mortgagee before suit: *Fleming v. Franing*, 22 Okl. 644, 132 Am. St. Rep. 658, and see cases cited in the cross-reference note thereto.

Where a Mortgage Securing a Series of Notes due at intervals of one year provides that nonpayment of any one of them, together with nonpayment of the taxes, shall mature the entire debt, the mortgagor has an equal right with the mortgagee to insist upon the provision and to receive whatever advantages it may confer upon him: *Snyder v. Miller*, 71 Kan. 410, 114 Am. St. Rep. 489.

If a Mortgage Stipulates That upon Default in the payment of interest, or any part thereof, the principal sum, with all arrears of interest, shall, at the option of the mortgagee, become and be due and payable immediately, and he elects to exercise such option, the election is irrevocable, and he cannot subsequently rescind it and refuse to receive payment of the mortgage debt: *Kilpatrick v. Germania Life Ins. Co.* 183 N. Y. 163, 111 Am. St. Rep. 722.

TALLY v. BROWN.

[146 Iowa, 360, 125 N. W. 248.]

TAXATION—Construction of Statutes.—The various sections of the code upon the subject of taxation manifest the legislative purpose of taxing all property, not expressly excepted as exempt, and, in construing them, this design is not to be ignored. (p. 284.)

TAXATION.—Claims Under a Fire Insurance Policy after the destruction of the property are taxable under a statute providing for the taxation of every claim or demand due or to become due, and this although their payment depends upon whether there has been a breach of the conditions of the policy, whether proofs of loss are made, and whether the insurer exercises his option to rebuild. (pp. 283, 285.)

TAXATION.—Intentional Omission by the Assessor of certain property interposes no obstacle to its subsequent assessment by the board of review. (p. 290.)

TAXATION.—Omission of Property by Assessor—Assessment by Other Officers.—The act of the assessor in assessing property is not a judicial act, nor is it a final adjudication, and property omitted by him, intentionally or otherwise, may thereafter be assessed by the board of review, and thereafter, as to property not called to its attention, by the county auditor or treasurer, subject to appeal to the courts. (p. 294.) (Weaver and Evans, JJ., dissent.)

Edwin J. Stason, for the appellant.

Strong & Whitney, for the appellee.

³⁰¹ LADD, J. A building on land of defendant was destroyed by fire December 23, 1904. It was insured in several companies, but the loss was not adjusted until January 5, 1905, when these companies and the insured agreed that he was entitled to the payment on the several policies of \$25,250 in the aggregate within sixty days. Each of these policies contain the following paragraph:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deductions for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; and such ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided, and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality ³⁰² within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described. . . . No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity, until after full compliance by the insured with the foregoing requirements, nor unless commenced within twelve months after the fire."

On January 1st, then, the validity of defendant's claims against the several companies depended on (1) whether there had been any breach in the conditions of the policies on the part of the assured; and (2) upon the making of necessary proofs of loss. And payment was contingent upon the exercise of the option to rebuild, and, in event this was not exercised, the extent of the damages for which they were liable was yet to be determined. Were these contingencies such as to relieve the claims for loss from assessment as property of the insured? The assessor omitted the claims, and the county treasurer assessed them as omitted property.

Under the laws of this state, personal property is "listed and assessed each year in the name of the owner thereof on the first day of January": In re Estate of Kauffman, 104 Iowa, 639, 74 N. W. 8. "All other property, real and personal, is subjected to taxation. . . . And credits including bank bills, government currency, property or labor due from solvent debtors on contract or judgment, mortgages or other like securities": Code, sec. 1308. "The term 'credit,' as used in this chapter, includes every claim or demand due or to become due for money, labor or other valuable thing, . . . and all money or property of any kind secured by deed or . . . otherwise": Code, sec. 1309. "Accounts, contracts for

cash or labor, choses in action shall be assessed as provided in this chapter": Code, sec. 1310. These in connection ³⁶³ with other sections of the Code manifest the legislative purpose of taxing all property, not expressly excepted as exempt, and, in construing them, this design is not to be ignored. On the other hand, if the language quoted does not fairly include the claims on the policies as they existed January 1, 1905, this manifest intent of the lawmakers cannot supply the omission of the language sufficiently comprehensive to include them. To be assessable, the liabilities on the policies must be construed to be "a claim or demand due or to become due for money, labor or other valuable thing," or "property or labor due from solvent debtors on contract" or "contracts for cash" or "choses in action." The word "due" as here employed does not have reference to the time of payment or the fulfillment of an obligation, but is synonymous with "owing": See *Jasper v. District Township Sheridan*, 47 Iowa, 183; *Barto v. Stewart*, 21 Wash. 605, 59 Pac. 480; *United States v. Bank of North Carolina*, 6 Pet. 29, 8 L. ed. 308.

Were these policies claims or demands in the hands of defendant? The words "debt" and "demand" are of kindred meaning, but "demand" is of more comprehensive signification than "debt." The term "debt" imports a sum of money owing upon a contract, express or implied, while "demand" embraces rightful claims whether founded on a contract, a tort, or a superior right to property: *United States Rolling Stock Co. v. Clark*, 95 Ala. 322, 10 South. 917. "Demand" is regarded as a word of wider signification than any other except "claim": *Vedder v. Vedder*, 1 Denio (N. Y.), 257. Judge Story defined a "claim" in *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. ed. 1061, as "in a judicial sense a demand of some matter as of right by one person upon another to do or to forbear to do some act or thing as a matter of duty": See cases collected in 2 Words and Phrases, 1202, 1973. ³⁶⁴ In Webster's Dictionary "claim" is defined as "a demand of a right, a calling on another for something due or supposed to be due." Without pursuing the inquiry further, it will be perceived that these policies, after the fire, came within the ordinary definition of claims, and there can be no doubt but that the legislature employed the word in its most comprehensive sense. But it is objected, even if claims, they were contingent, and not perfected on January 1st, and therefore could not properly have been assessed. True, the proofs of loss had not been furnished. But the statute includes claims "due or to become due." If these were within the class to "become due," it would be immaterial whether this were because of the policy postponing the obligation to pay six days or owing to the necessity of serving proofs of loss. "If the claim had been merely one which would be due in

sixty days, it comes within the definition of credits, which embraces claims to become due as well as claims 'due,' and it would equally come within the definition if it was not yet due because the 'proofs' had not been made": *Cooper v. Board of Review*, 207 Ill. 472, 69 N. E. 878, 64 L. R. A. 72.

Again, it is said that the amount of damages had not been ascertained. The value of claims must necessarily be estimated by the assessor; and that there were difficulties in the way will not obviate the requirement that there be an assessment. Moreover, in estimating the value on January 1st, the assessor is not limited to conditions then known, but may use such information bearing thereon as may be available at the time the work of assessing is done. The value of the claims January 1st had become definitely known at that time. It is contended, however, that, as the insurance companies had the option to rebuild, the claims were purely contingent, and therefore not subject to taxation. Authorities holding that when in that situation insurers are not subject to garnishment ³⁰⁵ are cited: See *Hurst v. Home P. Ins. Co.*, 81 Ala. 174, 1 South. 209; *Dowling v. Lancashire Ins. Co.*, 89 Wis. 96, 61 N. W. 76; *Martz v. Detroit F. & M. Ins. Co.*, 28 Mich. 201; 20 Cyc. 997. But these decisions proceed upon the theory that there must be a definite or absolute money liability in order to warrant holding the garnishee. An election to rebuild necessarily would relieve the company from liability as garnishee, but it would not destroy the character of the policy as constituting a claim. Conceding that, in event of electing to rebuild, the companies would cease to be insurers and become parties to a contract by which they agree to erect for the insured a building substantially like that destroyed (*Beals v. Home Ins. Co.*, 36 N. Y. 522), it is still "property due on contract" under section 1308 of the Code or "a claim due or to become due for money, labor or other valuable thing" under section 1309. In other words, the policies in connection with the loss constituted claims for money in compensation for damages for which indemnity had been contracted by payment of money or by the restoration of property destroyed, and, in either event, are included with the language of the assessment statutes. Should the insurers elect to rebuild, the building would not be included in the valuation of the realty for that year, and the claim of the insured would be for property and labor in the improvement of his land, and plainly within the terms of the statute quoted. To authorize the assessment of the policies as credits, it was not essential that the assessor know whether the claims were for money or might turn out to be for property, for in either event they would be assessable as credits, though these matters would have an important bearing in estimating the value of such claims. We

are of opinion that the claims for loss under the policies were subject to taxation.

The assessor, with full knowledge of the facts, concluded that the claims were not assessable, and notified ³⁶⁶ defendant that he need not list them. Appellant contends that, in the absence of fraud or bad faith, this was such a determination as should be regarded as conclusive against another taxing officer attempting to assess the claims as omitted property. The nature of the act was such that, but for statutes indicating that this was not the design of the legislature, it might well be regarded as quasi judicial, and not open to subsequent review. Such a result is obviated by the system of assessment which obtains in this state. To secure a fair assessment of large aggregation of capital, whether in the hands of individuals or corporations and a complete listing of moneys and credits are the difficult problems constantly confronting the taxing officers. So much is at stake in the valuation of great properties that, owing to causes not necessary to enumerate, the tendency is always toward undervaluation. The ingenuity of law-makers has been exercised for generations in devising schemes for discovering personalty and getting it into the open for the purposes of assessment, and still it is a matter of common knowledge that but a small percentage of moneys and credits is ever listed for taxation. Apparently this is due to no fault in the law, for our statutes, as heretofore construed, have seemed sufficiently drastic to secure the proper assessment of all property. The prime difficulty is in their administration, and this accounts for statutory provisions intended to close every avenue of escape through collusion, evasion, or mistake. Thus the duty of listing for taxation is cast on the person who owns or controls the property. "Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed": Code, sec. 1312. By section 1320 the duty of listing also devolves on an agent in possession ³⁶⁷ or control of personal property for another. The same duty is exacted of private banks or bankers, as well as of national, state and savings banks and different corporations: Sec. 1321 et seq. Not only is this required, but the owner must subscribe to an oath that the assessment-roll of property listed or assessed "to me" is a "full, true and correct list of my taxable property, both real and personal property, subject to taxation within this district, and all property which should be listed on this assessment-roll to me or by me": Code, sec. 1360. Refusal is punishable as a misdemeanor: Code, sec. 1354. And other lists or information from which to make them exacted in the several sections cited must be verified, and on refusal one hundred per cent may

be added to the assessments: Code, sec. 1357. It will be noted that the oath is not that the assessment-roll contains all that such assessor found to be assessable as would be likely if the assessor were exercising quasi-judicial functions, but that the list is of "all taxable property which should be listed on this assessment-roll to me or by me." If the act of listing were thought judicial, it is scarcely conceivable that the owner would be required to verify the assessor's findings. Ordinarily, it is enough to submit to the judgment of a court without swearing to its correctness. The several statutes cited plainly indicate the design of casting upon the taxpayers the burden of truly listing all property.

What is exacted from them under oath is required of the assessor as an official duty. Section 1352 of the Code provides that: "Each assessor shall enter upon the discharge of the duties of his office immediately after the second Monday in January in each year, and shall, with the assistance of each person assessed, or who may be required by law to list property belonging to another, enter upon the assessment-rolls furnished him for that purpose the several items of property required to be entered for ³⁶⁸ assessment. He shall personally affix values to all property assessed by him." Section 1354: "The assessor shall list every person in his township, and assess all the property, personal and real therein, except such as is heretofore exempted or otherwise assessed, and any person who shall refuse to make the oath required by the next section, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not to exceed five hundred dollars." Section 1360 directs the county auditor to furnish appropriate assessment-rolls, and section 1356 that a copy of the assessment be delivered by the assessor to each person assessed with this notice: "If you are not satisfied that the foregoing assessment is correct, you can appear before the local board of review." Section 1357 prescribes a penalty for knowingly failing to make the assessment at the true value of the property, and section 1368 provides for the examination of assessors before boards of review concerning methods adopted in fixing valuations. It will be observed that these sections contain no intimation that the act of the assessor in listing or omitting property is to be regarded as final or conclusive. On the contrary, he is required to notify every taxpayer that such is not the case, but that he may appear before the board of review, and have any error corrected. Without such notice, he may appear, and the omission thereof by the assessor in no way affects the validity of the assessment: In re Kauffman's Estate, 104 Iowa, 639, 74 N. W. 8. In some states the assessor may demand a sworn list of property, and in others the law requires the property holder to furnish such a list. The effect thereof, when furnished, necessarily de-

depends on the wording of the several statutes. Thus in Massachusetts, when such a list is exacted, the assessors cannot add thereto without notice to the person furnishing it: *Moors v. Boston St. Commrs.*, 134 Mass. 431. In Minnesota additions may be made by the assessors: *Thompson v. Tinkcom*, 15 Minn. 295 (Gil. 226). As seen in this state, the list is made up by the assessor with the assistance of the owner and each is made responsible for its correctness—the assessor because of his official duty and the owner by his oath. The proceeding is in no sense adversary, but necessary and indispensable to the determination of the exact share each property holder should take and may be supposed to be desirous of taking in meeting the public necessity for revenues: 1 Cooley on Taxation, 595. There is no provision for an appeal from the assessor, nor is any required, for nothing he does in the way of listing property is final. Until examined in detail and approved by the board of review, the assessment is of no validity as the basis of a tax levy: Code, sec. 1366.

It is the sanction of the board that fixes the valuation of the several items as quasi-judicial findings, and these are subject to review on appeal. Section 1370 of the Code provides that the board of review “shall adjust assessments for the township, city or town by raising or lowering the assessment of any person, partnership, corporation or association as to any or all of the items of his assessment, in such manner as to secure the listing of property at its actual value and the assessment of property at its taxable value, and shall also add to the assessment-rolls any taxable property not included therein, assessing the same in the name of the owner thereof, as the assessor should have done.” Section 1371: “The clerk or recorder of the township, city or town, as the case may be, shall be clerk of the board of review, and keep a record of its proceedings, and the assessor shall be present at its meeting and make upon the assessment-rolls all corrections or additions directed by the board. At such meetings it shall be the duty of the assessor to read each and every taxpayer’s name and assessment on ³⁷⁰ the assessor’s books, and, if the assessment is approved, pass to the next name. After checking the same, the board shall then take up the unchecked names in alphabetical order, and raise or lower the same as in their opinion will be just; checking off each taxpayer as the same is adjusted.” The effect of this statute is to refer to the board of review the name of every taxpayer and his assessment for its approval or disapproval. Section 1372 prescribes the notice to be given of assessments raised and of property added, and provides for an opportunity of being heard with reference thereto. Section 1373 of the Code Supplement of 1907 defines the procedure by which anyone aggrieved by the action of the assessor in assessing property (not

in omitting it) and of the board in raising the assessment or adding property may be reviewed. Any officer of the several municipalities interested or any taxpayer therein is authorized to make complaint with respect to the assessment of any property, and may appeal from the action of the board thereon. So that property may be added to the assessment-roll on the motion of the board or on the complaint of an officer or taxpayer, regardless of how it came to be omitted. It is the order of the board of review, if not appealed from, which is final, and the statutes will be searched in vain for suggestion that the action of the assessor is a finality as to anything save in correcting the assessment-rolls as directed so as to appear as approved by the board of review. The assessor is not required to report to the board of review property not assessed or thought by him to be nonassessable. Is it possible that his act in omitting it from the assessment-roll, if voluntarily done, is clothed with the sanctity of a solemn adjudication, even though the completed roll until approved by the board of review is not regarded as an assessment-roll upon which taxes may be levied?

Decisions of the courts of New York and New Hampshire ⁸⁷¹ are sometimes cited as so holding: See *Barhyte v. Shepherd*, 35 N. Y. 238; *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794. In New York three assessors are elected in each town or ward of a city. They, by mutual agreement, divide the same into convenient assessment districts, and then proceed to ascertain by "diligent inquiry" the names of all the taxable inhabitants in their respective towns or wards and also all the taxable property, real and personal, within the same. When the assessment-roll is completed, it is left with one of their number and public notice given it has been completed, where to be found and that on the third Tuesday in August at the designated place the assessors will meet and review the assessments, then hear and pass on all complaints, and, save for manifest errors to be corrected by the board of supervisors, their decision appears to be final: See 1 N. Y. Rev. Stats., 1st ed., pt. 1, c. 13, tit. 2, art. 2.

The decisions of that state disclose that the acts of the assessors declared to have been judicial in character were of the assessors sitting as a board of review. In *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794, the property had been declared exempt by a board known as the selectmen of the town, and the reference to the assessment was that of this body. We have been unable to discover any decision holding that the duty of merely listing for assessment is quasi judicial in its nature. In *Van Wagenen v. Supervisors*, 74 Iowa, 716, 39 N. W. 105, the stock had been assessed, and the assessment approved by the board of review. Moreover, it was taxable

as has since been held: *Judy v. Beckwith*, 137 Iowa, 24, 114 N. W. 565, 15 L. R. A., N. S., 142, 15 Ann. Cas. 890. All decided in *German Savings Bank v. Trowbridge*, 124 Iowa, 514, 100 N. W. 333, was that property assessed and on the tax list could not be assessed again by the county treasurer. The point was not touched in *Independent School Dist. v. Local Board etc.*, 131 Iowa, 195, 108 N. W. 220.

On the other hand, authorities are not wanting which ³⁷² proceed on the theory that the functions of the assessing officer are ministerial: *Baldwin v. Shune*, 84 Ky. 512, 2 S. W. 164; *Vandercock v. Williams*, 106 Ind. 345, 1 N. E. 619, 8 N. E. 113; *Auditor of State v. Atchison etc. Ry. Co.*, 6 Kan. 500, 7 Am. Rep. 575; *City of Baltimore v. Bonaparte*, 93 Md. 156, 48 Atl. 735. See *State Board of Equalization v. People*, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513. Some courts in construing particular statutes have held that in fixing values on taxable property the assessor acts judicially: See *Stewart v. Case*, 53 Minn. 62, 39 Am. St. Rep. 575, 54 N. W. 938. But the point has never been before this court, though it has been remarked that the making of an assessment is a quasi-judicial function: See *Security Savings Bank v. Carroll*, 128 Iowa, 230, 103 N. W. 379; *Beresheim v. Arnd*, 117 Iowa, 83, 90 N. W. 506. The assessments referred to in these cases were those appearing in the tax list, and thereafter after approval by the board of review. Whether in the preliminary work of making up the assessment-roll, every item of which must be read to and approved by the board of review, any act of the assessor can be said to be final or conclusive in a subsequent review is, to say the least, extremely doubtful.

But we are now concerned only with the act of omitting property from the assessment-roll; and, as seen, the circumstance that he has intentionally done this interposes no obstacle to its subsequent assessment by the board of review. Other statutes expressly authorize its assessment, if ignored, by both the board of review and assessor, and thereby plainly indicate the legislative intention that a finding by the latter should not be regarded as quasi judicial in character: Code Supp. 1907, sec. 1385b. "The auditor may correct any error in the assessment or tax list and may assess and list for taxation any omitted property; but before assessing and listing for taxation any omitted property, he shall notify by registered letter ³⁷³ the person, firm, corporation or administrator, or other person in whose name the property is taxed, to appear before him at his office within ten days from the time of said notice and show cause, if any there be, why such correction or assessment should not be made, and should such party feel aggrieved at the action of said auditor, he shall have the right of appeal therefrom to the district court." Is taxable property any the less omitted from the assessment-

roll when the assessor has been told of its existence on the street or in private conversation, and renders his opinion that it is not taxable, than when it is left off the assessment-roll through oversight or ignorance of its existence? What is meant by omitted? Webster's Dictionary says to omit means "to let fail, to leave out, not to insert or name." The Century Dictionary: "To fail to use or to do; neglect; disregard; to fail, forbear, neglect to mention or to speak of; leave out; say nothing of; to leave out; forbear, fail to assert or include, as to omit an item from a list." The Standard Dictionary: "To fail to include, insert or mention; leave out; pass over; overlook; drop, as to omit an important fact." The cause of omission is not suggested in this statute, so that, if for any reason taxable property has been "left out" of the assessment-roll by the assessor, it is subject to assessment by the auditor.

Still another officer is authorized to assess property which has not reached the assessment-roll. Section 1374 of the Code provides that: "When property subject to taxation is withheld, overlooked, or from any other cause is not listed or assessed, the county treasurer when apprised thereof, at any time within five years from the date at which such assessment should have been made, shall demand of the person, firm, corporation or other party by whom the same should have been listed, or to whom it should have been assessed, or of the administrator thereof, the amount the property should have been ³⁷⁴ taxed in each year the same was so withheld or overlooked and not listed and assessed, together with six per cent interest thereon from the time the taxes would have become due and payable had such property been listed and assessed, and upon failure to pay such sum within thirty days, with all accrued interest he shall cause an action to be brought in the name of the treasurer for the use of the proper county, to be prosecuted by the county attorney, or such other person as the board of supervisors may appoint, and when such property has been fraudulently withheld from assessment, there shall be added to the sum found to be due a penalty of fifty per cent upon the amount which shall be included in the judgment. The amount thus recovered shall be by the treasurer apportioned ratably as the taxes would have been if they had been paid according to law." The above language would seem to be broad enough to include all taxable property which has not been listed for taxation. Again, resorting to the lexicographers, we find that Webster's Dictionary defines "withhold" as meaning "(1) to hold back; to restrain; to keep from action; (2) to retain; to keep back; not to grant." The Century Dictionary says it means "to hold back; keep from action; to keep back; refrain from going, giving." Plainly enough by taxable property withheld is meant property held or kept from being entered on

the assessment-roll. This may have been done by the person owning or controlling the property, whose duty it was to assist the assessor, or by that officer in not listing property to which his attention was directed. As the duty of entering on the assessment-roll devolves on the assessor, there is as much reason for saying that the language of the statute applies to him as to the person whose property is assessed. The statute does not undertake to point out who may be at fault in withholding from assessment, but plainly covers all property voluntarily or purposely not listed on the roll. This view is emphasized ³⁷⁵ by the addition of the word "overlooked." Webster's Dictionary defines "overlook" as meaning: "To look beyond so that what is near by is not perceived; to omit to see by looking at other objects; to neglect by carelessness or inadvertence; to pass by. (2) Hence, to refrain willingly from noticing; to excuse, to pardon." The Century Dictionary: "To look beyond or by so as to fail to see or so as to disregard or neglect; pay no attention to; disregard; hence, to pass over indulgently; excuse, forbear to punish or censure." The Standard Dictionary defines the word as meaning: "To look over, by or beyond, so as to avoid seeing; disregard purposely; forgive; condone; to fail to see, notice or observe; disregard negligently or accidentally; slight; as he overlooked the papers in a hurry." Manifestly it was intended to cover by the word "overlooked" all property omitted because not noticed or disregarded by the owner or assessor whether due to neglect, accident, inattention or indulgence. These words would seem to cover every possible contingency; but out of abundance of caution the legislature added to what preceded—i. e., "When property subject to taxation is withheld, overlooked"—the clause "or for any other cause is not listed and assessed." The evil to be remedied was the escape of property from taxation because of being omitted from the tax lists. Prior to its enactment there was no remedy after the tax lists had been completed, and such as was afforded prior thereto was inadequate. The manifest design was to provide an adequate remedy by which all omitted property might be subjected to its proper share of the public burdens and to render this available within the reasonable period of five years.

It has been suggested that the rule of "*ejusdem generis*" has some place in the construction of this statute. If this be conceded and that "other cause" be "narrowed and restricted" to causes like those expressed in "withheld" or "overlooked," it would be well to indicate some ³⁷⁶ of like causes. What other taxable omitted property could there be save that which was overlooked, and that which was not overlooked, but was withheld from the assessment-roll? The statute does not undertake to designate the cause of being "withheld, overlooked" so that the words "other cause" must refer

to the manner of the omission from the list, and, even if such manner of omission must be of like kind, a contingency not covered thereby cannot be imagined. The language of the supreme court of Indiana in a somewhat similar case is especially pertinent: "The tax law contemplates instances of omission of property from current lists, not only on account of evasions and concealments of property owners, but also by reason of derelictions of the officers upon whom rests the primary duty of listing all taxables. It is conceivable that, if the primary taxing officers were infallible, there would be no instances of omitted property. Yet so careful is the state to guard against loss to its revenues from the remissness of those officers that four different officers are each commanded to look after the state's continuing claim for taxes from property omitted from assessment in any year, or number of years and from any cause. Nothing will discharge the state's claim but actual payment, and the general law must be liberally construed in aid of the taxing power: *Graham v. Russell*, 152 Ind. 186, 52 N. E. 806, and cases cited; *Burns' Annotated Statutes of 1894*, sec. 8642 (*Horner's Annotated Statutes of 1897*, sec. 6491). But no construction, however strict, would require the officers in listing omitted property to pass by the property of corporations when the statute empowers them to list any omitted property, or to overlook missions resulting from the fault or inaction of the primary listing agents, when the statute directs them to list omitted property from any cause": *Hunter Stone Co. v. Woodard*, 152 Ind. 474, 53 N. E. 947. The primary duty of assessing is imposed on the assessor and board of review. That any ²⁷⁷ property may have escaped their notice, or been purposely omitted by the assessor and not brought to the attention of the board of review, does not render such property any the less taxable, nor relieve its owner of his obligation to bear his proportional share of the governmental burdens. In dealing with vast amount and varieties of valuables, omission of considerable is inevitable. If such omission is discovered within a reasonable time, it ought not to escape taxation. To meet such a contingency, the duty of assessing omitted property is imposed on the county auditor and treasurer, the latter being authorized so to do at any time within five years. This works no hardship on owners, and circumstances seldom, if ever, are such as to justify a special plea for the construction of the assessment statutes in their interest. The law in every instance requires notice to the owner and an opportunity to be heard before adding omitted property, and the owner is in no wise injured by the belated assessment, for no penalty save where fraud has been perpetrated is imposed, interest being added at the lowest legal rate. Of course, property declared nontaxable by a tribunal on which authority

to decide has been conferred is not omitted property within the meaning of the law, for it has been adjudged otherwise.

Our statutes, as seen, contemplate no such adjudication, save on notice and hearing, and neither are provided with respect to anything exacted of the assessor. If, notwithstanding his rulings, the board of review discovers that through mistake, partisanship, corruption, or ignorance these have been erroneous in leaving taxable property off the roll, the board of review may add it. This is not owing to any appeal from the assessor, but for the reason that the assessor's findings are not binding on that body, as they were not intended by the legislature to be on the county auditor or treasurer. If the property is listed and no objection thereto is raised before that board, unless ³⁷⁸ changed by it, such listing is treated as approved, and cannot thereafter be assailed as not assessable. This is because of having been brought before the board where a hearing is authorized, and not owing to the assessor's decision in having entered it on the assessment-roll. Property neither listed nor brought to the attention of the board has not been the subject of a hearing, nor has the owner been put in a situation to demand it. The functions of the county treasurer and auditor in the matter of adding omitted property are like those of the board of review. An appeal may be taken from the findings precisely as from those of the board. That the procedure before the auditor and treasurer with reference to property omitted by the assessor is substantially like that before the board of review is convincing that the findings of the assessor were intended to be no more conclusive on the auditor or treasurer than on the board of review. The authority to determine finally what property is taxable must be lodged somewhere, and the statutes have plainly indicated that such final authority has been imposed on the board of review first, and thereafter as to property not called to its attention on the county auditor or treasurer subject to appeal to the courts. Only by giving to the statutes cited a construction not justified by the language employed and contrary to the manifest purpose of the legislature can any other conclusion be reached. That adopted will wrong no man. It will deprive no one of his property without a hearing. It will subject no one to a second trial of the same issues. It will result in the taxation of no taxable property which ought not to be taxed. It will defeat, and it ought to defeat, the successful interposition of a plea of former adjudication in proceedings for the assessment of omitted property by the county auditor or treasurer by the evidence of an assessor that he cannot remember and of the owner that he can ³⁷⁹ remember of having submitted the question of its taxability privately to such official.

We are of opinion that the finding of the assessor that the claims were not assessable was not conclusive, and was no obstacle to the subsequent assessment by the county treasurer. Affirmed.

Weaver and Evans, JJ., dissented.

The Taxation of Credits is the subject of a note to *People v. Worthington*, 74 Am. Dec. 93. It is within the power of the law-making authority of the state to tax any indebtedness which has taken a concrete form: *Monongahela River Consolidated Coal and Coke Co. v. Board of Assessors*, 115 La. 564, 112 Am. St. Rep. 275.

ESTATE OF SKILLMAN.

[146 Iowa, 601, 125 N. W. 343.]

HUSBAND AND WIFE—Liability—Expenses of Family.—A statute making family expenses "chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately," enlarges the husband's common-law liability for necessities, and as to the creditors renders the wife equally liable with the husband. As to them both are principals. (p. 296.)

HUSBAND AND WIFE—Funeral Expenses of Wife.—At Common Law, every husband was bound to bury his deceased wife in a suitable manner; that is, he was bound to defray all necessary funeral expenses. (p. 296.)

HUSBAND AND WIFE—Funeral Expenses of Wife.—Under a Statute providing that "as soon as the executor or administrator is possessed of sufficient means over and above the expenses of administration, he shall pay off the charges of the last sickness and funeral of deceased," preference is given these expenses over all other claims, and, regardless of the obligations of the living or of that of the husband at the common law, the duty of meeting them is especially imposed upon the executor of every deceased person. (p. 297.)

HUSBAND AND WIFE—Funeral Expenses of Wife.—Under a Statute requiring the executor or administrator to pay the expenses of the last sickness and funeral of every deceased person out of his estate, the estate of a deceased married woman is primarily liable for her expenses of this nature, and, if paid by the husband, he is entitled to recover therefor from her estate. (pp. 298, 299.)

F. Emma Skillman died in July, 1907, leaving her surviving her husband, E. H. Skillman, who had for many years been confined in an insane asylum. By her will she left certain property to him, and the residue to her sisters. After the admission of the will to probate, the court, upon application of the guardian of the husband, elected for him to take under the law as a surviving spouse and not under the will. The husband, by his guardian, filed a contingent claim

against the estate for eight hundred and ten dollars and thirty-seven cents, hospital charges and funeral expenses of the deceased, for such of said expenses as he might be compelled to pay. The husband died and the administrator of his estate was substituted as claimant. A demurrer of the wife's executors was sustained and the claim dismissed. The appeal is by the administrator of the husband's estate.

Stockman & Baker, for the appellant.

Chas. C. Heninger, for the appellees.

⁶⁰³ LADD, J. Both husband and wife are dead, the latter first having departed this life, and the sole question presented on this appeal is whether, assuming the estate left by each to be ample to satisfy all claims for the expenses of last sickness and funeral of the wife, the husband in his lifetime, or the administrator of his estate, may have established in his favor the amount of such expenses as a contingent claim against the estate of the wife. Section 3343 of the Code authorizes the establishment of a contingent liability against the estate of a deceased person, and plaintiff contends that this claim should have been allowed, for that, as counsel argue, the deceased wife's estate is primarily liable therefor, and the liability of the husband or his estate is only secondary. No question is made but that the expenses for hospital and medical attendance constitute a family expense, which, under section 3165 of the Code, was "chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." As noted in *Schrader v. Hoover*, 80 Iowa, 243, 45 N. W. 734, this statute enlarges the husband's common-law liability for necessities, and, as to the creditors, renders the wife equally liable with ⁶⁰⁴ the husband. As to them, both are principals: *Murdy v. Skyles*, 101 Iowa, 549, 63 Am. St. Rep. 411, 70 N. W. 714. But neither is surety for the other: *Vest v. Kramer* (Iowa), 114 N. W. 886, 14 L. R. A., N. S., 1032. The statute does not undertake to determine the relative obligations of the husband and wife as to such expenses, though the nature of these, owing to the solidarity of their interests, precludes any other conclusion than that these, being equal, payment by one confers no right of recovery or of contribution from the other.

At the common law, every husband was bound to bury his deceased wife in a suitable manner; that is, he was bound to defray all necessary funeral expenses: *Schouler's Domestic Relations*, sec. 199; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384. And notwithstanding the enactment of statutes like that hereinafter referred to, adhere to the doctrine. Thus in *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598, the

husband, as administrator of his wife's estate, claimed credit for her funeral expenses and the erection of a monument marking her last resting place, but the items were rejected because of the husband's paramount liability therefor. To the same effect, see *In re Weringer's Estate*, 100 Cal. 345, 34 Pac. 825; *Staple's Appeal*, 52 Conn. 425; *Gallaway v. Estate of McPherson*, 67 Mich. 546, 11 Am. St. Rep. 596, 35 N. W. 114. But where the deceased wife's will expressly directs the payment of funeral expenses from her estate, the husband is held to be entitled to reimbursement: *Willeter v. Dobie*, 2 Kay & J. 647; *Jackson v. Westerfield*, 61 How. Pr. (N. Y.) 399. But for section 3347 of the Code, then, the obligations of the husband were such that upon payment of the expenses of the last sickness and funeral of his wife unless as administrator of her estate, claim therefor might not be established against her estate. That section provides that, "as soon as the executor or administrator is possessed of sufficient ~~est~~ means over and above the expenses of administration, he shall pay off the charges of the last sickness and funeral of deceased, and next, any allowance made by the court for the maintenance of the widow and minor children." Thereby preference is given over all ordinary debts, taxes, and the like, and, regardless of the relative obligations of the living or that of the husband at the common law, the duty of meeting these expenses is especially imposed upon the executor of every deceased person.

In *McClellan v. Filson*, 44 Ohio St. 184, 58 Am. Rep. 814, 5 N. E. 861, the court held that a statute directing the payment of funeral expenses out of the estate applied to the estates of married women, and like rulings are found elsewhere: *Buxton v. Barrett*, 14 R. I. 40; *Carpenter v. Hazelrigg*, 103 Ky. 538, 45 S. W. 666; *Schneider v. Breier's Estate*, 129 Wis. 446, 109 N. W. 99, 6 L. R. A., N. S., 917. While in England the law cast on the husband the duty of burying his deceased wife, this was not always at his own expense. In *Re McMyn*, 33 Ch. D. 575, the wife was engaged in a separate business, and by will left her husband a legacy and named him as executor, but made no provision for funeral expenses. The court, speaking through Chitty, J., said that: "In most cases, the husband takes all his wife's personal property by reducing it into possession during his lifetime. To call upon him out of his own moneys in a case like the present, where the wife exercised the power of appointment and made the fund general assets for her creditors, but has omitted to mention her funeral expenses, would be too hard. I think, therefore, the husband is entitled to retain the sum expended for her funeral." This would seem to hold that the interest of the husband in the wife's property may have had something to do in fixing the husband's liability, but in *Gould v.*

Moulahan, 53 N. J. Eq. 341, 33 Atl. 483, wherein the court held the wife's ⁶⁰⁶ estate liable for funeral expenses where the husband was unable to pay, said: "His liability for the expense of the interment does not arise in virtue of any interest he may have in the wife's property, but from the personal advantage it is to himself to have those personae conjunctae with him, his wife and lawful children, properly maintained during life and suitably buried at death."

In Moulton v. Smith, 16 R. I. 126, 27 Am. St. Rep. 728, 12 Atl. 891, the husband was administrator of his deceased wife's estate, and as such paid the expenses of funeral and last sickness. Upon his death, the administrator of his estate presented a claim therefor and expenses of administration, and the court held that though the husband was entitled to settle the estate as if no such relation existed, and if he so elected to pay therefor from the funds of the estate, but as she might not contract a debt, being covert, for physician's services, claim therefor was held not allowable. In Towery v. McGaw (Ky.), 56 S. W. 727, the husband as administrator was allowed a credit for moneys paid out of his wife's estate for funeral expenses, but the hospital expenses of her last sickness were held to be "necessaries" within the statute of the state for which he was liable and not a proper credit. These decisions were independent of statutory provisions like those of this state, but in Constantinides v. Walsh, 146 Mass. 281, 4 Am. St. Rep. 311, 15 N. E. 631, the precise question before us was under consideration. The wife had died possessed of a separate estate and left a will naming her son executor. The husband, without knowing this, paid for her necessary funeral expenses, and his claim against her estate therefor was allowed. The statutes of Massachusetts, though in different language, are in substance like those of this state in directing that, "when a person dies possessed of personal estate, the necessary expenses of his funeral and last sickness and charges of administrator" be first paid, and the court, speaking ⁶⁰⁷ through Holmes, J., said: "The funeral expenses of the testatrix were a preferred charge upon her estate: Pub. Stats., c. 135, sec. 3, c. 137, sec. 1; Stats. 1182, c. 141. Under these statutes, those establishing the independent position of married women with regard to their property, we think that, as between the estate of a married woman leaving property and her husband, the liability of the estate must be regarded as primary, and that it would be unreasonable to charge the husband for the funeral expenses, in all events as necessities, irrespective of any fault on his part. If, then, it was still, as formerly, the plaintiff's legal duty to see that his wife was buried, but her estate was primarily liable, he is entitled to recover his reasonable expenditures, as in other cases when a person has paid, in pursuance

of a legal duty, what, as between himself and another, that other was bound to pay.

"There is no technical difficulty in a husband's imposing a liability upon his wife's executor after her death. It was the plaintiff's legal duty to do what he did; nevertheless, we are of opinion that he stood on no worse ground than a stranger would have done. A stranger could have recovered against the estate of a man, if he was justified in intermeddling: *Sweeney v. Muldoon*, 139 Mass. 304, 306, 52 Am. Rep. 708, 31 N. E. 720. And formerly, in the case of a married woman, he could have recovered against her husband: *Lakin v. Ames*, 10 Cush. (Mass.) 198, 221; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Bradshaw v. Beard*, 12 Com. B., N. S., 344. Undoubtedly he could now recover against her estate. If so, the husband can." The statute quoted makes it obligatory on executors and administrators of estates having sufficient means to meet both the charges of the last sickness and of the funeral of a deceased person. Neither necessarily depends on the contract of deceased or others but may rest on this statute. While the expenses of last ~~cos~~ sickness differ from those of funeral in that they are rendered during the life of the person on whose estate they are made a charge, the necessity for their rendition is similar to the latter, and the law authorizing their payment may be justified on like principles: *Cunningham v. Lakin*, 50 Wash. 394, 97 Pac. 447. The legislative design in enacting the statute quoted was to assure to every person care in his last sickness and appropriate burial by declaring the charges therefor preferred claims, and exacting their payment as soon as funds enough to satisfy them come into the possession of his personal representative. It is mandatory in form. It contains no discrimination as between creditors to whom such charges may be owing, and the duty to pay is declared independently of any obligation which may exist on the part of others. Its language obviates the inference otherwise to be drawn that it was intended merely to declare a preference as between claims against the estate. As seen, it may be deemed the basis for the allowance of such expenses, and we are of the opinion that the legislative intent was to impose on the estate of every deceased person a primary liability for the charges of the last sickness and funeral. If so, the obligation of either husband or wife therefor is secondary thereto in character, and, in event of payment by either, such charges may be established as claims against the estate of the deceased. This construction is not only reasonable, but is well calculated, in a case like this, where both husband and wife are dead, and each has left an ample estate, to protect the property of the one against the unseemly efforts of the heirs or devisees of the other to evade the satisfaction of the reason-

able charges of the last sickness and funeral from the estate of the decedent under whom they take. The claims should have been established as contingent claims against the estate.

Reversed.

Deemer and McLain, JJ., Dissented, the latter writing an opinion which concludes as follows: "The substantial ground, however, for my inability to agree with the views of the majority is that at common law, and under our statute relating to family expenses, there is a direct and primary obligation resting on the husband to make payment, and that there is no purpose inferable from the provisions of Code, sections 3347, 3348, to relieve the husband from this liability. The estate of the wife is no doubt also liable, but I see no purpose to allow the husband or his estate to cast such liability on the wife's estate if the husband or his estate should be charged. I think, therefore, that the decision of the lower court should be affirmed."

A Husband Who Pays Funeral Expenses of Wife may recover them from her executor, in Massachusetts, her estate being primarily liable therefor under the statutes: *Constantinides v. Walsh*, 146 Mass. 281, 4 Am. St. Rep. 311. In Michigan, where a husband is able, it is his duty to pay his wife's funeral expenses, and in the absence of proof of his inability so to pay, they cannot be charged against her estate: *Galloway v. Estate of McPherson*, 67 Mich. 546, 11 Am. St. Rep. 596.

The Funeral Expenses of a Minor Child are not a charge against his estate where he leaves a father surviving him who is able to pay them: *Rowe v. Raper*, 23 Ind. App. 27, 77 Am. St. Rep. 411.

CURRIE v. CONTINENTAL CASUALTY COMPANY.

[147 Iowa, 281, 126 N. W. 164.]

ACCIDENT INSURANCE—Limitation of Liability—"Beyond the Seas."—If an indemnity policy of insurance covers only injuries received "within the United States (not including its parts beyond the seas), Mexico and Canada," there is no liability for an injury to, and the death of, the insured occurring in the Canal Zone on the Isthmus of Panama. (pp. 301, 302.)

ACCIDENT INSURANCE—Waiver by Insurer, What is.—A waiver is the intentional relinquishment of a known right, and any conduct relied upon which warrants the belief that such relinquishment has been made constitutes in law a waiver. (p. 303.)

ACCIDENT INSURANCE—Waiver—Question for Jury.—The question of waiver is generally one of fact for the jury. The questions as to whether an indemnity policy sued upon had been absolutely canceled, and whether a provision therein, in the light of evidence concerning it, limited liability for injuries to places within the United States, should be submitted to the jury. (p. 303.)

Action on an accident insurance policy. There was a directed verdict for the plaintiff, and the defendant appealed.

Manton Maverick and McNett & McNett, for the appellant.
Jaques & Jaques, for the appellee.

²⁸² SHERWIN, J. In December, 1905, the defendant insured to Eben Currie, husband of the plaintiff, an indemnity policy in the sum of \$1,000. At the time the policy issued the insured was a resident of Wapello county, Iowa, and the policy contained the following clause: "This policy covers only injuries received within the United States (not including its parts beyond the seas), Mexico and Canada." In June, 1906, Mr. Currie accepted a position as a locomotive engineer in the engineering department of the Isthmian Canal Commission, and soon thereafter went to the Isthmus of Panama and took charge of a railroad engine in the Panama Canal Zone, where he was killed in a collision in September, 1906. Mr. J. G. Sorenson was the defendant's agent who took the application for the policy, and after the deceased had gone to the Canal Zone he and the plaintiff herein had some talk with reference to the policy, the substance of which, it may fairly be inferred, was communicated to the deceased in a letter from the plaintiff. On the 27th ²⁸³ of July, 1906, the insured wrote to the defendant as follows: "Empire, July 27, 1906. Continental Casualty Company, Chicago, Ill.—Dear Sirs: I have been notified that my policy No. 1008021 is not of any good to me while I remain on the Isthmus of Panama. Mr. Sorenson wrote my wife at Eldon, that my policy was no use to me, as they were a clause in the policy that covered it. Now, if I have paid for something that is of no benefit which you received the last payment out of May pay, I will expect you to remit balance due the part of the year from date of notice to my wife, as I expect to stay here this year. Please let me have reply soon as I don't care to pay out money for nothing. Yours fraternally, Eben Currie. Add. Eben Currie, Empire Canal Zone, Isthmus of Panama. Please remit to Mrs. Eunace Currie, Eldon, Iowa." On August 11, 1906, the defendant wrote the insured as follows: "This company is in receipt of your favor of the 27th inst., asking for cancellation of policy 1008021. If you will present the policy at this office or send it here, it will be canceled and refund of premium will be made as provided in the short rate rider attached to it." Nothing more was done by either party before the death of Mr. Currie.

The appellant contends that the policy was not in force at the time of the death of the insured because he was then not "within the United States" within the meaning of the clause in the policy from which we have already quoted, and because he was then "beyond the seas" within the meaning of those words as used in the policy; and, further, for the reason that the insured had canceled the policy in his letter of July 27,

1907. On the other hand, the appellee insists that the deceased was not without the United States or beyond seas when he was killed, and that, if he was, the defendant waived that provision of its policy by its letter of August 11th, and by its subsequent action. ²⁸⁴ We think there can be no serious question as to the construction that should be given to the clause of the policy limiting the territorial liability. It says in so many words that it covers only injuries received "within the United States, not including its parts beyond the seas." If it be conceded that the Panama Canal Zone is in any sense a part of the United States, we think it must still be said that it is "beyond the seas," within the meaning of that term and within the meaning of the language of the policy. Had the limitations been to the United States alone, a more difficult question would have been presented. The additional statement that the policy did not cover any part of the United States beyond the seas, and did cover Mexico and Canada, clearly excludes the Canal Zone on the Isthmus of Panama. It excluded all parts of the United States beyond the seas as the term would be literally construed. The term "beyond the seas" has been construed to mean different things, depending upon the evident intent of the users thereof. Thus in statutes of limitation containing an exception in favor of persons "beyond the seas" it has been held to mean "beyond or without the United States" *Davie v. Briggs*, 97 U. S. 628, 24 L. ed. 1086. The term as used in a statute of wills was construed in like manner *Mason v. Johnson*, 24 Ill. 159, 76 Am. Dec. 740. It has also been held to mean without the state: *Whitney's Lessee v. Webb*, 10 Ohio, 513. In England the term is understood to mean out of the realm of Great Britain, including England and Scotland. In Maine the term as used in a statute providing a penalty for transporting a minor out of the state to parts "beyond the seas" without the consent of his parents, etc., means some foreign part or place, and not merely another state: See, also, *Whitney v. Goddard*, 20 Pick. 303, 32 Am. Dec. 216. These decisions are not of special help in the instant case, however, for the reason that each contract or statute must be construed ²⁸⁵ according to its own language, and, as we have already said, we are of the opinion that the policy in question should be construed to exclude the Isthmus of Panama. The legal territorial status of the Canal Zone presents an interesting question that we need not now decide. But the Articles of Treaty between the United States and the Republic of Panama and the following decisions leave little room for doubt on the subject: *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. Rep. 770, 45 L. ed. 1088; *Rasmussen v. United States*, 197 U. S. 516, 25 Sup. Ct. Rep. 514, 49 L. ed. 862; *Hawaii v. Mankichi*, 190 U. S.

197, 23 Sup. Ct. Rep. 787, 47 L. ed. 1016; *Dorr v. United States*, 195 U. S. 138, 24 Sup. Ct. Rep. 808, 49 L. ed. 128, 1 Ann. Cas. 697; *Kopel v. Bingham*, 211 U. S. 468, 29 Sup. Ct. Rep. 190, 53 L. ed. 286; and see, also, Act of April 28, 1904, c. 1758, 33 Stat. 429; U. S. Comp. Stats. Supp. 1909, p. 1370.

The appellant's claim that the policy was absolutely canceled by the insured's letter of July 27th cannot be sustained. The intent of the letter is uncertain enough to require a finding of fact, and it should not be said as a matter of law that it was intended to cancel the policy, or that the defendant was justified in so treating it. Mr. Currie's letter of July 27th to the appellant will bear the construction that its primary purpose was to ascertain directly from the home office of the company the effect on his policy of his residence in the Canal Zone. And, if such was the purpose of the letter, the appellant's letter in answer thereto evaded the question, and was calculated to induce the belief that the policy would remain in force unless its cancellation was effected by the means designated in the letter, to wit, its presentation at the office of the company. In other words, the insured might infer from the contents of his own letter and the appellant's answer thereto that the cancellation of the policy was optional ²⁸⁰ with him, and that, if he did not cancel it, his residence in the Canal Zone would not affect its validity. The intent of both parties as shown by their letters and conduct were questions for the jury. And, if the appellant was not warranted in treating the letter of July 27th as an absolute cancellation of the policy, its own letter in answer thereto constitutes evidence of waiver of the condition of the policy limiting liability to certain territory. A waiver is the intentional relinquishment of a known right, and any conduct relied upon which warrants the belief that such relinquishment has been made constitutes in law a waiver: *May on Insurance*, sec. 507; *Hexom v. Knights, etc.*, 140 Iowa, 41, 117 N. W. 19; *Walsh v. Aetna Ins. Co.*, 30 Iowa, 133, 6 Am. Rep. 664; *Kimbrow v. New York L. Ins. Co.*, 134 Iowa, 84, 108 N. W. 1025, 12 L. R. A., N. S., 421. And the question of waiver is one of fact for the jury: *Taylor v. Anchor M. F. Ins. Co.*, 116 Iowa, 625, 93 Am. St. Rep. 261, 88 N. W. 807, 57 L. R. A. 328.

We are of the opinion, therefore, that the court rightly refused to direct a verdict for the defendant, and should not have directed a verdict for the plaintiff. The case should have been submitted to the jury for its finding of fact on the question of waiver.

Reversed.

As to the Meaning of the Expression "Beyond Seas," see note Forbes v. Foote, 13 Am. Dec. 733.

An Insurance Company may Waive Conditions inserted in the policy for its benefit, and such waiver may be inferred from the conduct of its agents and representatives: Providence-Washington Ins. v. Wolf, 168 Ind. 690, 120 Am. St. Rep. 395.

TRETTER v. CHICAGO AND GREAT WESTERN RAILROAD COMPANY.

[147 Iowa, 375, 126 N. W. 339.]

DAMAGES—Growing Crops—Measure of Recovery.—In an action to recover damages for an injury to growing crops, where recovery for injury to the land is sought, the value of the crops in the field, or else on the market with deductions of the reasonable cost of maturing and marketing, is the correct measure of damages. (pp. 305, 306.)

DAMAGES—Growing Crops.—Instructions stating, in substance, that the action is to recover, not for damages to plaintiff's land, but to his growing crops; that the jury, in arriving at the amount, should consider the labor, care, attention and expense bestowed thereon up to the time of loss—in other words, the cost of production; that they may consider the market value of the crops in the field or in the market place, and how nearly the crops were ready for market in either place; that they are to consider all evidence as to plaintiff's damage or loss, and weigh the opinions of witnesses as to the value of the crops and the cost of producing them; and that to whatever amount is found interest shall be added, are not objectionable as assuming plaintiff's right to recover; nor are they objectionable as proceeding on the theory that all the crops were destroyed; nor because unsupported by evidence of the cost of production where there was evidence from which such cost might have been inferred. (pp. 306, 307.)

DAMAGES—Growing Crops.—An instruction on the measure of damages, in an action to recover for injury to a growing crop, is insufficient unless the jury are told whether the plaintiff should be allowed the market value of the crop in the field or in the market place, and, if in the market place, whether deductions should be made of the cost of maturing the crop and placing it upon the market, whether such expense is to be eliminated. (p. 307.)

SURFACE WATERS—Obstructing Natural Flow.—In filling a passageway for surface water, usually and naturally flowing beneath a railroad bridge, the railroad company is bound to the exercise of ordinary care not to unnecessarily dam up and throw the water back to the injury of neighboring land owners. (pp. 307, 308.)

DAMAGES—Growing Crops—Evidence of Value.—In an action to recover damages for an injury to crops, caused by so obstructing surface water as to cause it to be thrown back and to overflow plaintiff's land, evidence as to the value of the crops must be confined to such crops as the plaintiff had; and the exclusion of a price list is without prejudice where it gives the same prices for growing plants that the plaintiff has given in his testimony. (p. 308.)

Action for damages for injury to growing crop. There was a judgment against the defendant, from which it appealed.

Carr, Carr & Evans and Carney & Carney, for the appellant.

Bradford & Johnson, for the appellee.

³⁷⁶ LADD, J. The two lots belonging to plaintiff and containing about five acres of land are bounded on the southeast by the right of way of the Chicago and Northwestern Railway Company, parallel with which and immediately beyond is the right of way of the Chicago Great Western Railway Company. These lots are lower than the land surrounding them, and the water gathering on them flows through a natural depression from the northwest to the southeast, passing therefrom beneath a bridge sixteen or eighteen feet long in the roadbed of the Chicago and Northwestern Railway Company, and prior to July, 1907, under a similar bridge in the roadbed of the Chicago Great Western Railway Company. About that time a carload of earth was dumped into the way beneath the latter bridge, obstructing the passage of water, to plaintiff's injury. Later on seven or eight gravel cars were emptied at the same place, filling the space beneath the bridge, and this so obstructed the passage of water that upon a ³⁷⁷ heavy fall of rain in the fore part of August the water was thrown back on plaintiff's land, where it stood for several days, destroying about four hundred heads of cabbage, three hundred tomato plants, and about two-thirds of thirteen thousand celery plants. The cabbages were mature. The celery appears to have been ready for bleaching, but whether this process is to be regarded as essential to maturity or merely as a preparation for market we are not advised. The tomato vines, though large, had no tomatoes on.

Recovery for the value of these, and not for injury to the land, was demanded. Their value in the field or else on the market with deductions of the reasonable cost of maturing and marketing was the correct measure of damages: *Blunck v. Chicago & N. W. Ry Co.*, 142 Iowa, 146, 120 N. W. 737. See, also, *Smith v. Chicago etc. Ry. Co.*, 38 Iowa, 518, and *McMahon v. Dubuque*, 107 Iowa, 62, 70 Am. St. Rep. 143, 77 N. W. 517. In *Drake v. Chicago etc. Ry. Co.*, 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215, relied on by appellant, permanent damages to the premises were claimed in connection with the loss of crop, and this accounts for the approval of a different rule in that case. The same is true of *Harvey v. Mason City etc. Railway Co.*, 129 Iowa, 465, 113 Am. St. Rep. 483, 105 N. W. 958, 3 L. R. A., N. S., 973. Where damage to the crop only is claimed, and not to the soil, either because of injury to it in connection with a permanent or perennial growth thereon, there is no good reason for not

estimating the damage to such crop directly, rather than indirectly, by estimating the values of land with it before and after the injury. Necessarily such difference is the difference between the values of the growing crops thereon before and after the injury, and the same result is reached. The circumstance that growing crops ordinarily are regarded as part of the realty is not controlling. These may be disposed of apart from the land (*Strawhacker v. Ives*, 114 Iowa, 661, 87 N. W. 669), and in measuring damages thereto the value of the land is not involved. The cause was tried on this theory, and the objections ³⁷⁸ to the evidence because not presenting the proper measure of damages were rightly overruled.

2. It is contended, however, that, even though the measure of damages be as stated, the instructions did not so inform the jury. In the ninth instruction the court stated that the action was "to recover, not for damages done to his land, but for damage done to his celery, cabbage, and tomatoes." The tenth instruction may be set out: "In arriving at the amount you find the plaintiff entitled to recover, you should take into consideration the labor, care, and attention and expense you find he bestowed upon his celery, cabbage, and tomatoes up to the time of the loss; or, in other words, an element to be considered by you is the cost of production. You may consider the market value of said crop in the field or in the market place upon the streets and how near they were ready for the market in either place, or what further was necessary to be done to make them ready for the market in either place. The main thing is to take into consideration everything in the evidence that will aid you in arriving at a fair and just verdict. To whatever amount you find add interest at the rate of six per cent from time of loss." This was all that was said bearing on the measure of damages, save a remark in the eleventh instruction "that, in ascertaining and fixing the amount of plaintiff's damage or loss, consider all the evidence upon that point, and also consider and weigh the opinion of witnesses who have testified as to the value of such crops and the cost of producing them." The criticisms of the instruction quoted are (1) that it assumes that plaintiff will recover; (2) it allows the cost of production, though no evidence thereof was introduced; (3) it allows recovery for market value without requiring deductions for cost of maturing and marketing; and (4) it proceeds on the theory that all the plants were destroyed. Taking these up separately, it is to be said of the first ³⁷⁹ that there is no occasion for the jury to resort to an instruction on the measure of damages, unless the finding on the other issues is for the plaintiff. Only in that event is such an instruction made use of, and this is quite as manifest to the jury as to the court. Prior instructions had clearly stated that proof of specified

allegations by a preponderance of the evidence was essential to plaintiff's recovery, and, in view of this, it is inconceivable that the jury could have inferred from the above that they were to find for plaintiff in any event. Consideration of the instructions as a whole obviates any such inference.

Next, it is said there was no evidence of the cost of production. This is not so. It appeared that plants were started from seed in a hothouse, and then transplanted. The value of plants before being transplanted was proven. One of defendant's witnesses testified to the cost of labor on an acre of celery up to the time of hilling and bleaching, and from then on, and it appeared that the plaintiff had about three-fourths of an acre in that crop. From this evidence the cost of production might have been inferred.

The fourth criticism is equally without foundation, but, as to the third, it must be conceded that no definite measure for damages was stated to the jury. Consideration of the cost of production as well as the market price in the field or in the market place, and cost of labor necessary yet to be done was authorized, but the purpose of so doing was not stated, and no intimation was given as to any rule by which the jury should be guided in determining the amount of damages to be awarded. Was plaintiff to be allowed the market value of the plants in the field or in the market place, and, if the latter, were deductions to be made of the reasonable cost of maturing the crop, preparing for and placing it on the market, or was such cost to be eliminated as plaintiff seems to have done in ³⁸⁰ testifying for that in any event he would have done the work? On what theory did the jury proceed? The record leaves these inquiries unanswered, and the conclusion necessarily follows that there was error in omitting to instruct the jury the measure of damages to be awarded.

3. Complaint is made of the charge of the court with reference to defendant's liability for obstructing the flow of surface water. The argument, in so far as based on the assumption that defendant's right of way was taken from plaintiff's land, requires no attention, as there is not the slightest warrant in the record for such assumption. The instruction proceeded on the theory that defendant in filling the passageway beneath the bridge and where surface water was wont to flow in the usual and natural way, according to the lay of the land, owed plaintiff the duty not to unnecessarily dam up and throw back said water, to the injury of neighboring land owners, but was bound to exercise ordinary care in what it did, so as not to occasion unnecessary inconvenience and damage to such owners. This is in harmony with the golden maxim of the law, that one must so use his own property as not to injure the rights of another, which also is the fundamental principle on which all the decisions of this state relat-

ing to surface water are based. In *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563, the right of each to do with his own as he pleases was recognized, but with the qualification that each should so use his own as not to injure his neighbor, and it was there said that "he cannot make his estate more valuable by an act which unnecessarily renders his neighbor's less valuable." In *Willitts v. Chicago etc. Ry. Co.*, 88 Iowa, 281, 55 N. W. 313, 21 L. R. A. 608, after referring to previous holdings, it was said to be the rule in this state that each proprietor in improving his land must do so in a careful and prudent manner so as to occasion no unnecessary inconvenience or damage to his neighbor, and in *Sullens v. Chicago etc. Ry. Co.*, ³⁸¹ 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545, the rule was declared to be just, and that "the reasons for requiring that improvements on land be so made as to do no unnecessary injury to other lands apply with especial force to the construction of railways": See, also, *Wilson v. Duncan*, 74 Iowa, 491, 38 N. W. 371; *Wharton v. Stevens*, 84 Iowa, 107, 35 Am. St. Rep. 296, 50 N. W. 562, 15 L. R. A. 630; *Matteson v. Tucker*, 131 Iowa, 511, 107 N. W. 600; *Hume v. City of Des Moines*, 146 Iowa, 624, 125 N. W. 846, 29 L. R. A., N. S., 126. Undoubtedly there are cases to the contrary, but these are from states where the common-law rule prevails, though even in such states decisions are to be found announcing the doctrine above. The evidence without dispute disclosed that surface water after rainfalls usually flowed from the surrounding territory down several streets into that along plaintiff's land, and from there, as so collected on said street, onto plaintiff's land at one place, and then along a depression from the northeast corner to the opening under the bridges of the two railways. That the water after a rainfall gathered in a stream was the only inference to be drawn from the evidence and as such flowed through a depression or swale beneath the bridges, and there is no ground for the suggestion that the water was in a diffused state and not so gathered in a course or stream as to exact the duty of defendant in making the improvement to avoid unnecessary injury to plaintiff's crop.

4. The ruling by which Ford was not permitted to testify to the value of a field of celery is approved on the ground that the limitation was not to such a crop of celery as plaintiff had. The price list offered in evidence gave the price of plants the same as testified by plaintiff, so that its exclusion was without prejudice, regardless of whether the proper foundation for its introduction had been laid.

We discover no error in the record save the omission to instruct on the measure of damages.

Reversed.

DAMAGES FOR INJURIES TO GROWING CROPS.

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 - 1. In General, 326.
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 - a. In General, 328.
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I. Preliminary Observations.

The questions of the measure of damages for injuries to growing crops and of the manner of estimating damages in such cases are not altogether devoid of difficulty. The courts are not agreed upon the subject, and the cases are in more or less confusion. This confusion arises partly from a difference in the rules applicable to the measure of damages for injuries to growing crops, and in the various holdings of the courts as to what evidence is admissible in such cases, and partly from the way in which various propositions of law as well as of fact are stated. These differences, added to the inherent difficulty of estimating the value of a growing crop, create some misgiving in the formulation of general rules respecting the subject.

There is no doubt, however, that compensation for the real injury is the purpose of all remedies. Such a standard of damages is reasonable, and does justice to both parties. The inquiry should therefore be, in each case, how much was the plaintiff injured by the loss or destruction of his crop? This proposition is undisputed, but the courts, in arriving at the value of a growing crop, resort to several methods of computation, and either or all combined may afford a fair basis. One might be a year's rental value of the land, with the cost of planting and bringing forward the crop until the time of its loss; another, what the crop would bring in its immature state at a sale; and a third, the proof of the average yield and the market value of crops of the same kind planted and cared for in the same manner, less the cost of maturing, harvesting and marketing. While no one of these methods would afford positive proof, they would all seem to be proper, and the only way by which a jury could get the necessary data upon which to base a verdict, and the jury should always be furnished with a rule for the measure of damages, whatever the evidence introduced may be.

II. Rules as to Measure of Damages.

a. **Market Value of Crops or Land.**—In an action for damages to crops, the market value of the crops injured or destroyed at the time and place of such injury or destruction is said to be the measure of damages: *Smith v. Chicago etc. R. R. Co.*, 81 Neb. 186, 115 N. W. 755; *Missouri Pac. Ry. Co. v. Johnson*, 3 Wills. Civ. Cas. Ct. App. (Tex.) 275; *Receivers of Missouri etc. Ry. v. Pfuger* (Tex. Civ. App.), 25 S. W. 792; *Galveston etc. Ry. Co. v. Chittim*, 31 Tex. Civ. App. 40, 71 S. W. 294; *Missouri etc. Ry. Co. v. Riverhead Farm*, 53 Tex. Civ. App. 643, 117 S. W. 1049; *Gulf Pipe Line Co. v. Brymer* (Tex. Civ. App.), 124 S. W. 1007; such value to be fixed by what they would have been worth in the market had they matured, less the cost of cultivating, harvesting and marketing: *Suderman-Dolson Co. v. Rogers*, 47 Tex. Civ. App. 67, 104 S. W. 193; and if they had no market value, then the use to which they were to be put: *Galveston etc. Ry. Co. v. Chittim*, 31 Tex. Civ. App. 40, 71 S. W. 294.

Thus, in an action for the destruction and injury of an onion crop, it was held that the plaintiff's measure of damages was the market value of the part of the crop destroyed when it was destroyed, at the nearest market: *Missouri etc. Ry. Co. v. Riverhead Farm*, 53 Tex. Civ. App. 643, 117 S. W. 1049; and, in an action for injuries to grass and cornstalks destroyed, that the measure of damages was their market value at the place when and where they were destroyed: *Gulf Pipe Line Co. v. Brymer* (Tex. Civ. App.), 124 S. W. 1007. In *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339, *Sabine etc. Ry. Co. v. Smith*, 73 Tex. 1, 11 S. W. 123, it is said that, in general, the proper measure of damages for the destruction or loss of growing crops is the value of the same standing upon the ground; and in *Adam v. Chicago etc. Ry. Co.*, 139 Mo. App. 204, 122 S. W. 1136, a matured crop is treated as personal property, and the measure of damages for the destruction of such a crop is said to be the market value of the crop standing on the ground. In an action to recover damages for injuries caused by the overflowing of a field of rice, it appeared that a crop was raised on the field, but there was evidence that the yield was not as large as it would have been but for the overflow, and, in submitting the measure of recovery for the value of the rice which plaintiffs would have made but for the overflow, in excess of that which they did make, it was said that the court should have confined the jury to a consideration of the market value of such excess: *Texas etc. R. R. Co. v. Ochiltree* (Tex. Civ. App.), 127 S. W. 584.

In several cases the measure of damages for the loss of or destruction of a growing crop caused by the wrongful act or negligence of the defendant is held to be the market value of the crop when matured, less the cost of producing, harvesting and marketing it: *Smith v. Chicago etc. R. R. Co.*, 38 Iowa, 518; *Mattis v. St. Louis etc. Ry. Co.*, 138 Mo. App. 61, 119 S. W. 998; *Smith v. Hicks*, 14 N. M. 560, 98 Pac. 138, 19 L. R. A., N. S., 938; *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254. Thus, in an action for damages against a railway company for injuries caused to growing crops in consequence of a failure to construct cattle-guards, it was said to be just and reasonable to instruct the jury that the measure of damages "would be the fair market value of said crops when matured and in a marketable condition, less the necessary expense of caring for and

fitting said crops for market from the time of the alleged injury; and if said crops were not entirely destroyed, the value of the portion saved should also be deducted from said market value of said crops": *Smith v. Chicago etc. R. R. Co.*, 38 Iowa, 518; and where a lessee's growing crop was destroyed, to the extent of rendering it worthless, by the lessor's breach of a covenant to furnish water for irrigation, the measure of damages was said to be the value on the farm where it was produced, or at the closest market, at maturity, less the cost of labor, care and attention necessary to put the crop in condition for the closest market and upon such market: *Smith v. Hicks*, 14 N. M. 560, 98 Pac. 138, 19 L. R. A., N. S., 938.

Other cases state the rule as to the measure of damages for injuries to, or the destruction of, a growing crop to be the difference in the reasonable market value of the standing and growing crop, immediately before and immediately after the injury, taking into account the right to mature and harvest the same: *Jefferis v. Chicago etc. Ry. Co.*, 147 Iowa, 124, 124 N. W. 367; *Chicago etc. R. R. Co. v. Mitchell*, 74 Neb. 563, 104 N. W. 1144; *Missouri etc. Ry. Co. v. Riverhead Farm*, 53 Tex. Civ. App. 643, 117 S. W. 1049. In *Jefferis v. Chicago etc. Ry. Co.*, 147 Iowa, 124, 124 N. W. 367, a distinction was made between the measure of damages for an injury, caused by flooding, to crops growing on the land of an owner, and the measure of damages for an injury, caused by flooding, to crops grown on the land of another. In the former case, the measure was said to be the difference between the value of the land with the crops growing thereon prior to the flood, and its value after the flood; but in the latter case, the difference in the reasonable market value of the standing and growing crops, immediately before and immediately after the injury, taking into account the right to mature and harvest the same. So, in *Ward v. Chicago etc. Ry. Co.*, 61 Minn. 449, 63 N. W. 1104, it is said that an action to recover damages for a partial loss or a complete destruction of growing crops, whether annual or perennial, is practically an action to recover for an injury to real property, and that, in principle, such an action cannot be distinguished from one brought to recover for an injury to growing trees, nor is the measure of damages at all different, though stated differently. It was therefore held that the measure of damages for an injury to growing grass is the difference in the market value of the real property immediately before and its value immediately after the infliction of the injury.

The rule, however, that the measure of damages is the difference between the market value of the crops when ripe and their value in an injured state, less the cost of growing them, has been criticised as objectionable, because it assumes, without proof, that the crops would have come to maturity: See *Lester v. Highland Boy Gold Min. Co.*, 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341, 1 Ann. Cas. 761; *Candler v. Washoe Lake etc. Ditch Co.*, 28 Nev. 151, 80 Pac. 751, 6 Ann. Cas. 946.

b. Rental Value of Land.—Where crops were totally destroyed at a time when they were so young that they had no market value, and it was too late in the season to replant, cultivate and mature crops of a like kind, the proper measure of damages has been held to be the rental or usable value of the land: *St. Louis etc. Ry. Co. v.*

Saunders, 85 Ark. 111, 107 S. W. 194. Thus, the measure of damages for growing grass burned is its value at the time and place of burning, but its value cannot be determined by the value of hay necessarily fed to stock because of the destruction of such grass. If the land on which the grass was destroyed was used for pasturage, the damages would be the value of such land for that purpose: Missouri etc. Ry. Co. v. Couch (Tex. Civ. App.), 122 S. W. 67.

The term "rental value," as applied to lands covered with a growing crop, means not what the lands may be rented for in the vicinity for ordinary purposes, but the value of the use of the lands for the purposes of maturing and harvesting the crop; and, of necessity, the value of the crop in the condition in which it exists at the time of the injury is the prime factor in the ascertainment of the value of the use. It is said that this rule of rental value must govern in cases presenting no more than an injury to growing crops; and that it would seem to be proper practice to plead in direct language the value of the crop destroyed as the basis of recoverable damage; but that if the thing destroyed, although it was a part of the realty, had a value which could be accurately measured and ascertained without reference to the soil on which it stood, or out of which it grew, the recovery may be the value of the thing thus destroyed, and not the difference in the value of the land before and after such destruction: Blunck v. Chicago etc. Ry. Co. (Iowa), 115 N. W. 1013.

In Iowa, it is the rule that where the land has been appropriated to a particular use, as by converting it into a meadow, or planting it to a crop which is already growing at the time of the injury, the loss must be determined with reference to such existing condition, but in measuring the loss a distinction is drawn between those things which can readily be replaced and those things concerning which restoration is impossible. In the former case, the cost of reproduction is regarded as a proper basis of computation; while in the latter case, it is held that the rental value must be taken as the basis: Blunck v. Chicago etc. Ry. Co. (Iowa), 115 N. W. 1013. In this case a tenant sued for an injury to a matured hay crop, and it was held competent and proper to fix the value thereof by estimating the yield in tons per acre, and by taking the market value prevailing at the time, in the vicinity, after deducting therefrom the cost of cutting and stacking.

The fundamental rules respecting damages for the destruction of growing crops, recognized in Missouri, are thus stated: Where the destruction of the thing includes but a temporary injury to the land, and the thing may be replaced in a comparatively brief period, the true measure of damages is the cost of replacing it and the rental value of the land until it is replaced; but where the destruction of the thing inflicts more than a temporary injury to the land, or the replacement would be impossible or tedious and uncertain both in cost and result, the criterion is the damage inflicted on the market value of the land; and in cases where a matured crop is destroyed, the crop is treated as personal property, and the measure of damages is its market value standing on the ground: Adam v. Chicago etc. Ry. Co., 139 Mo. App. 204, 122 S. W. 1136.

When crops planted are destroyed before coming up, the measure of damages, according to some of the cases, is the rental value of the land, the cost of the seed, and the value of the labor expended:

Ohio etc. Ry. Co. v. Nuetzel, 43 Ill. App. 108; Young v. West, 130 Ill. App. 216; Horres v. Berkely Chemical Co., 57 S. C. 189, 35 S. E. 500, 52 L. R. A. 36; but when they are somewhat mature, so that the product can be fairly determined, the value thereof when destroyed is the measure of damages: Ohio etc. Ry. Co. v. Nuetzel, 43 Ill. App. 108.

If the roots of a crop have been destroyed, the proper measure of damages is said to be the rental value of the land and the cost of reseedling: Black v. Minneapolis etc. Ry. Co., 122 Iowa, 32, 96 N. W. 984; Mattis v. St. Louis etc. Ry. Co., 138 Mo. App. 61, 119 S. W. 998; Adam v. Chicago etc. Ry. Co., 139 Mo. App. 204, 122 S. W. 1136; Crouch v. Kansas City etc. Ry. Co., 141 Mo. App. 256, 124 S. W. 1077. The measure of damages for the destruction of the roots of the grass of a meadow is the cost of reseedling and loss of rental value for the season lost in that process: Mattis v. St. Louis etc. Ry. Co., 138 Mo. App. 61, 119 S. W. 998; and for the destruction of the first and matured crop of the season of alfalfa, root and branch, the rule for measuring the damage caused by the destruction of the roots is the cost of reseedling and the rental value of the land, and the rule applicable to the matured crop is its market value standing on the ground: Adam v. Chicago etc. Ry. Co., 139 Mo. App. 204, 122 S. W. 1136.

But it is said, in some cases, that the rental value of the land is not the true rule of damages: Colorado Con. L. & W. Co. v. Hartman, 5 Colo. App. 150, 38 Pac. 62; Byrne v. Minneapolis etc. Ry. Co., 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339; Folsom v. Apple River etc. Co., 41 Wis. 602. "Suppose," said Cole, J., in Folsom v. Apple River etc. Co., 41 Wis. 602, where hay partly grown was injured by a flowage of water, "it had been a crop of wheat nearly ripe, would it be just to allow the plaintiff only the difference between the rental value of the premises uninjured by the flowage and the rental value as they were? Would that give him compensation for his damages? Would he not be entitled to recover the value of the crop standing upon the ground? It seems to us clear that he would be entitled to recover that amount." The rule that the rental value of the land, with the cost of labor and materials up to the time of destruction expended in producing the crop, with interest at the legal rate thereon, furnishes the correct method of arriving at the value of a growing crop at the time of its destruction, has more than once been criticised.

"The objection to this method," as said in Teller v. Bay & River D. Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A., N. S., 267, 12 Ann. Cas. 779, "is that it is not a determination of value at all. It is but a determination of cost, which, while always an element of value, never furnishes its exact measure. By such a method of computation nothing is allowed for the fact that the crops, simply as growing crops, and before maturity, are necessarily an expense and not a profit to the owner. They are of value to him, not as growing crops upon his own land, but because in the course of nature they will come to fruition, and so have a market value, and so will bring him profit for his disbursement and expense in their care and maintenance. Moreover, in taking cost as the measure of value, there is lost sight of the fact that, by the destruction of the crop, it cannot for that year be replaced, and that the very possibility, aside

from the reasonable expectation of future profit, is forbidden to the agriculturist, and, finally, that cost cannot be the measure of the detriment under such circumstances ought to become patent from a consideration of the fact that, if you should, upon successive years, destroy the farmers' crops, and, in full compensation therefor, pay him only the money which he had expended in their growth up to the time of their destruction, you could in a very short time starve to death every agricultural community in the United States."

With respect to depriving an owner of the use of land, when no crops have been planted thereon, the true measure of damages is held to be its fair rental value. The supposed value of what might have been raised on the same had it been cultivated, less the cost of cultivating and marketing, is held to be too remote and speculative: *City of Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626. So, under the facts in *Crow v. San Joaquin Irr. Co.*, 130 Cal. 309, 62 Pac. 562, 1058, and *Pallett v. Murphy*, 131 Cal. 192, 63 Pac. 366, it was held that the true measure of damages was the difference between the rental value of the land with and without water for irrigation; but in those cases there were no growing crops on the land thus destroyed, and the crops were never planted owing to the failure to obtain water; and, further, the plaintiffs were evidently paying rent for the land, judging from the reference of the court, although not directly stated.

c. Value of Crop at Time of Its Destruction—Prevailing Rule.—According to the great preponderance of authority, the true measure of damages for the loss or destruction of a growing crop is the value of the crop in the condition it was at the time and place of destruction. This is the generally accepted rule and is abundantly established in the following cases: *Atlanta etc. Air Line Ry. v. Brown*, 158 Ala. 607, 48 South. 73; *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 90 Pac. 942, 12 L. R. A., N. S., 267, 12 Ann. Cas. 779; *Dennis v. Crocker-Huffman L. & W. Co.*, 6 Cal App. 58, 91 Pac. 425; *Salstrom v. Orleans Bar Gold Min. Co.*, 153 Cal. 551, 96 Pac. 292; *Colorado Con. L. & W. Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. 62; *Chicago etc. R. R. Co. v. Schaffer*, 26 Ill. App. 280; *Adams v. Stadler*, 78 Ill. App. 432; *Gripton v. Thompson*, 32 Kan. 367, 4 Pac. 698; *St. Louis etc. Ry. Co. v. Ritz*, 33 Kan. 404, 6 Pac. 533; *Lommelund v. St. Paul etc. Ry. Co.*, 35 Minn. 412, 29 N. W. 119; *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668; *Ward v. Chicago etc. Ry. Co.*, 61 Minn. 449, 63 N. W. 1104; *Burnett v. Great Northern Ry. Co.*, 76 Minn. 461, 79 N. W. 523; *Hunt v. St. Louis etc. R. R. Co.*, 126 Mo. App. 261, 103 S. W. 133; *Thompson v. St. Louis etc. R. R. Co. (Mo. App.)*, 103 S. W. 135; *Carter v. Wabash R. R. Co.*, 128 Mo. App. 57, 106 S. W. 611; *Anderson v. St. Louis etc. Ry. Co.*, 129 Mo. App. 384, 108 S. W. 605; *Deal v. St. Louis etc. Ry. Co.*, 144 Mo. App. 684, 129 S. W. 50; *Deal v. St. Louis etc. Ry. Co.*, 144 Mo. App. 691, 129 S. W. 52; *Carron v. Wood*, 10 Mont. 500, 26 Pac. 388; *Fremont etc. R. R. Co. v. Marley*, 25 Neb. 138, 13 Am. St. Rep. 482, 40 N. W. 948; *Chicago etc. R. R. Co. v. Mitchell*, 74 Neb. 563, 104 N. W. 1144; *Smith v. Chicago etc. R. R. Co.*, 81 Neb. 186, 115 N. W. 755; *Morse v. Chicago etc. Ry. Co.*, 81 Neb. 745, 116 N. W. 859; *Candler v. Washoe Lake etc. Co.*, 28 Nev. 151, 80 Pac. 751, 6 Ann. Cas. 946; *Richardson v. Northrup*, 66 Barb. 85; *Chicago etc. Ry. Co. v. Johnson*, 25 Okl. 760,

107 Pac. 662, 27 L. R. A., N. S., 879; Ducktown etc. Iron Co. v. Barnes (Tenn.), 60 S. W. 593; Texas & St. Louis R. R. Co. v. Young, 60 Tex. 201; Texas & Pac. Ry. Co. v. Bayliss, 62 Tex. 570; Gulf etc. Ry. Co. v. Hedrick (Tex.), 7 S. W. 353; Sabine etc. Ry. Co. v. Smith, 73 Tex. 1, 11 S. W. 123; Wamble v. Graves, 1 White & W. Civ. Cas. Ct. App., sec. 481; International etc. Ry. Co. v. Saul, 2 Wills. Civ. Cas. Ct. App., sec. 698; Gulf etc. Ry. Co. v. Carter (Tex. Civ. App.), 25 S. W. 1023; Gulf etc. Ry. Co. v. Nicholson (Tex. Civ. App.), 25 S. W. 54; Receivers of Missouri etc. Ry. v. Pfuger (Tex. Civ. App.), 25 S. W. 792; Galveston etc. Ry. Co. v. Rheiner (Tex. Civ. App.), 25 S. W. 971; Galveston etc. Ry. Co. v. Parr, 8 Tex. Civ. App. 280, 28 S. W. 264; Missouri etc. Ry. Co. v. Couch (Tex. Civ. App.), 122 S. W. 67; Lester v. Highland Boy Gold Min. Co., 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341, 1 Ann. Cas. 761; Evans v. Highland Boy Gold Min. Co., 27 Utah, 475, 76 Pac. 1135; Folsom v. Apple River etc. Co., 41 Wis. 602.

This rule permits proof of the probable yield as shown in V, subd. c, *infra*.

In *Hughes v. City of Austin*, 12 Tex. Civ. App. 178, 33 S. W. 607, an action for damages caused by the overflow of plaintiff's land, fronting on a stream, which overflow forced the land owner, in order to preserve his stock, to remove them to more expensive pasturage, the measure of damages was said to be the difference between the costs and expenses of keeping the stock where they were before the overflow, and the costs and expenses of keeping them on the more expensive pasture. The practice of the courts in admitting evidence to establish the measure of damages according to the value of the crop at the time of its destruction is discussed *infra*, IV, subd. c, of this note.

d. Value of Crop at Time of Its Destruction, With Interest.—In some cases, where the damages resulting from the destruction of or injury to growing crops have an ascertainable value, it has been held proper to instruct the jury to add to the damages ascertained interest from the date when the injury was done. In other words, the damages recoverable for the destruction of or injury to growing crops are the actual value of the crops destroyed or injured with interest from the date of the injury: *Atlantic etc. Air Line Ry. v. Brown*, 158 Ala. 607, 48 South. 73; *St. Louis etc. Ry. Co. v. Yarbrough*, 56 Ark. 612, 20 S. W. 515; *St. Louis etc. Ry. Co. v. Lyman*, 57 Ark. 512, 22 S. W. 170; *St. Louis etc. Ry. Co. v. Paup* (Ark.), 22 S. W. 213; *Kansas City etc. R. R. Co. v. Pirtle*, 67 Ark. 617, 55 S. W. 940; *Little Rock etc. Ry. Co. v. Wallis*, 82 Ark. 447, 102 S. W. 390; *Clark v. Banks*, 2 Houst. (Del.) 584; *Gulf etc. Ry. Co. v. Holliday*, 65 Tex. 512; *Galveston etc. Ry. Co. v. Horne*, 68 Tex. 643, 9 S. W. 440; *Receivers of Missouri etc. Ry. v. Pfuger* (Tex. Civ. App.), 25 S. W. 792; *Texas etc. R. R. Co. v. Reid*, 1 White & W. Civ. Cas. Ct. App., sec. 296; *Missouri Pac. Ry. Co. v. Wise*, 3 Wills. Civ. Cas. Ct. App., sec. 386.

Where crops have been injured or destroyed through negligence, the injured party, so far as money can do it, ought to be put in the same condition in which he would have been if the tort had not been committed, and "interest is as necessary to the complete indemnity as the value itself": *Gulf etc. Ry. Co. v. Holliday*, 65 Tex. 512.

e. **In Cases of Partial Destruction.**—When a crop is injured or partially destroyed, it has been held that the measure of damage is the depreciation in value of that portion which has not been wholly destroyed, resulting from the injury: *Folsom v. Apple River etc. Co.*, 41 Wis. 602; but, in other cases, the rule laid down is, when the crop is injured or partially destroyed, the measure of damage is the difference between the value of the crop immediately before and its value immediately after the injury: *Louisville etc. R. R. Co. v. Beeler*, 31 Ky. Law Rep. 750, 103 S. W. 300; *Chicago etc. R. R. Co. v. Mitchell*, 74 Neb. 563, 104 N. W. 1144; *Gulf etc. Ry. Co. v. Nicholson* (Tex. Civ. App.), 25 S. W. 54.

In Kansas the plaintiff is entitled, not only to compensation for that part of the crop actually destroyed, but also to a reasonable compensation for the time and labor necessarily expended in an ordinary and reasonable effort to protect his crop and to prevent further injury thereto, but he will not be allowed compensation beyond the amount of the injury or loss that might have been occasioned had no such effort been made: *St. Louis etc. Ry. Co. v. Ritz*, 33 Kan. 404, 6 Pac. 533.

The better opinion seems to be, in accordance with the views of the Texas supreme court, in *Gulf etc. Ry. Co. v. McGowan*, 73 Tex. 355, 11 S. W. 336, and *International etc. R. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526, that the only correct criterion for ascertaining the value of a growing crop "at any period of its existence," is to prove what that character of crop was worth at or near the place where it was grown when matured, and to make proper estimate and allowances from ascertained and ascertainable facts for the contingencies and expenses attending its further cultivation and care. The measure of the plaintiff's damages, in case of a partial destruction of his crop, would therefore be, as in the case of a total destruction of the crop, the difference between the value of the probable crop in the market and the expense of maturing, preparing and marketing the same: *Northern Colorado Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. 423; *Candler v. Washoe Lake etc. Ditch Co.*, 28 Nev. 151, 80 Pac. 751, 6 Ann. Cas. 946; *Smith v. Hicks*, 14 N. M. 560, 98 Pac. 138, 19 L. R. A., N. S., 938; *San Antonio etc. R. R. Co.* (Tex. Civ. App.), 81 S. W. 1045.

The case of *Northern Colorado Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. 423, was a case involving a partial destruction of growing crops, and the measure of damages adopted by the court was "the difference between the amount realized from the crops and the amount that would have been realized had water been furnished, less the cost of raising, harvesting and marketing." For other cases, from irrigation states, involving substantially the same measure of damages, see *Carron v. Wood*, 10 Mont. 500, 26 Pac. 388; *Candler v. Washoe Lake etc. Ditch Co.*, 28 Nev. 151, 80 Pac. 751, 6 Ann. Cas. 946; *Smith v. Hicks*, 14 N. M. 560, 98 Pac. 138, 19 L. R. A., N. S., 938.

In *Candler v. Washoe Lake etc. Ditch Co.*, 28 Nev. 151, 80 Pac. 751, 6 Ann. Cas. 946, the court found that, because of the failure of the defendant to furnish water as agreed, the stand of alfalfa and timothy was in the main killed out. The seed had not been planted for the purpose of producing a single crop, but to obtain a stand which would produce, ordinarily, two crops per year for many

years without further seeding, and the court considered that the value of the seed was an element of damage for the wrongful destruction or nearly total destruction of the crops, though the value of wheat seed would not be an element of damage for the destruction, or nearly total destruction, of the wheat crop while growing, because wheat seed is a necessary expense of producing a crop of wheat.

III. Injury to Land as Well as to Crops.

a. In General.—It has been shown that if the crops destroyed, although they were a part of the realty, had a value which could be accurately measured and ascertained without reference to the soil on which they stood, or out of which they grew, a recovery may be had of the value of the crops thus destroyed; but these are cases in which an injury to crops is also an injury to the inheritance, as where grass roots, turf, and grass sod have been destroyed. In such cases, where the action is by the owner of the fee, and damages are claimed for an injury thereto caused by flooding, fire, or otherwise, as well as for an injury to his crops, the proper measure of damages is held to be the difference between the market value of the land as it was immediately before the injury and its fair market value immediately after such injury, together with the value of the crops destroyed, exclusive of the injury to the land: *Missouri etc. R. R. Co. v. Phillips* (Ark.), 133 S. W. 190; *Bullock v. Porter* (Del.), 77 Atl. 943; *Baltimore etc. R. R. Co. v. Perryman*, 95 Ill. App. 199; *Baltimore etc. R. R. Co. v. Irwin*, 97 Ill. App. 337; *Bradley v. Iowa Cent. Ry. Co.*, 111 Iowa, 562, 82 N. W. 996; *Blunck v. Chicago etc. Ry. Co.* (Iowa), 115 N. W. 1013; *Jefferis v. Chicago etc. Ry. Co.*, 147 Iowa, 124, 124 N. W. 367; *Wichita etc. L. & P. Co. v. Wright*, 9 Kan. App. 730, 59 Pac. 1085; *Wiggins v. St. Louis etc. Ry. Co.*, 119 Mo. App. 492, 95 S. W. 311; *Doty v. Quincy etc. R. R. Co.*, 136 Mo. App. 254, 116 S. W. 1129; *Thompson v. Chicago etc. R. R. Co.*, 84 Neb. 482, 121 N. W. 447, 23 L. R. A., N. S., 310; *Mahaffey v. New York Cent. etc. R. R. Co.*, 229 Pa. 285, post, p. 730, 78 Atl. 143; *Gulf etc. Ry. Co. v. Pool*, 70 Tex. 713, 8 S. W. 535; *Missouri Pac. Ry. Co. v. Ayers* (Tex.), 8 S. W. 538; *Texas etc. Ry. Co. v. Land*, 3 Wills. Civ. Cas. Ct. App., sec. 50; *Missouri etc. Ry. Co. v. Goode*, 7 Tex. Civ. App. 245, 26 S. W. 441; *International etc. R. R. Co. v. McIver* (Tex. Civ. App.), 40 S. W. 438; *Texas etc. Ry. Co. v. Rice*, 24 Tex. Civ. App. 374, 59 S. W. 833; *Galveston etc. Ry. Co. v. Chittim*, 31 Tex. Civ. App. 40, 71 S. W. 294; *Jackson v. Missouri etc. Ry. Co.* (Tex. Civ. App.), 78 S. W. 724; *Texas etc. Ry. Co. v. Prude*, 39 Tex. Civ. App. 144, 86 S. W. 1046; *Missouri etc. Ry. Co. v. Neiser* (Tex. Civ. App.), 118 S. W. 166; *Texas Cent. R. R. Co. v. Qualls* (Tex. Civ. App.), 124 S. W. 140; *Gulf Pipe Line Co. v. Brymer* (Tex. Civ. App.), 124 S. W. 1007; *Missouri etc. Ry. Co. v. Malone* (Tex. Civ. App.), 126 S. W. 936.

An injury to the roots of alfalfa, destroyed by water, fire or other agency, is of a permanent, though not of a perpetual, character, and the owner may recover the difference between the value of the land before and after the recovery. The measure of recovery of damages in such a case is the injury to the crops, and the permanent injury to the land by reason of the destruction of the plant itself: *Missouri etc. Ry. Co. v. Malone* (Tex. Civ. App.), 126 S. W. 936. Ordinarily, the measure of damages for the destruction of crops

is their value at the time and place of destruction, but, in case of the destruction of a permanent or perennial crop, such as alfalfa, the measure of damages is the difference between the value of the land before and after the destruction of the crop: *Thompson v. Chicago etc. R. R. Co.*, 84 Neb. 482, 121 N. W. 447, 23 L. R. A., N. S., 310.

Another distinction is made, in some of the cases, between a temporary injury to the land and a permanent injury to it: *Adam v. Chicago etc. Ry. Co.*, 139 Mo. App. 201, 122 S. W. 1136; and see *Blunck v. Chicago etc. Ry. Co. (Iowa)*, 115 N. W. 1013. If the destruction of the crop, as of a meadow, includes but a temporary injury to the land, and the meadow may be replaced in a comparatively brief period, the true measure of damages is said to be the cost of replacing it and the rental value of the land until it is replaced: *Bradley v. Iowa Cent. Ry. Co.*, 111 Iowa, 562, 82 N. W. 996; *Krejci v. Chicago etc. Ry. Co.*, 117 Iowa, 344, 90 N. W. 708; *Mattis v. St. Louis etc. Ry. Co.*, 138 Mo. App. 61, 119 S. W. 998; *Adam v. Chicago etc. Ry. Co.*, 139 Mo. App. 201, 122 S. W. 1136.

With respect to determining the amount of injury to land upon the basis of the availability of the land for the most valuable use for which it can be used, the elements determining the measure of damages have been laid down in the syllabus to a California case, the statements of which are borne out by the opinion. They are as follows: Where land, a portion of which is available exclusively for hydraulic mining purposes, and the remainder of which is available for such purposes and is also available and used for agricultural purposes, is injured by being covered with mining debris, the rule as to the measure of damages is this: (1) The value of the growing crop destroyed; (2) As to the land available exclusively for mining purposes, if the cost of repairing the injury by removing the debris would amount to less than the value of the property as it was prior to the injury, such cost would be the proper measure of damages, but if such cost would exceed such value, then the value of the property would be the proper measure; (3) As to the land used for agricultural purposes, if such land had a greater value for mining purposes than agricultural purposes, the same rule would apply as in the case of other land, but if more valuable for agricultural purposes, and it was absolutely destroyed for such purposes, the value of the land is the proper measure: *Salstrom v. Orleans Bar Min. Co.*, 153 Cal. 551, 96 Pac. 292.

b. *Injury to Orchards.*—In awarding damages where fruit trees and vines have been destroyed, several different rules exist. The owner may sue for the injury caused to the land by the loss of the trees, or he may sue for the value of the trees. If he sues for the injury caused to the land by the loss of the trees, the measure of damages is the difference between the value of the land before and after the injury: *Rowe v. Chicago etc. Ry. Co.*, 102 Iowa, 286, 71 N. W. 409; *Missouri etc. Ry. Co. v. Lycan*, 57 Kan. 635, 47 Pac. 526; *Atchison etc. R. R. Co. v. Hamilton (Kan.)*, 50 Pac. 102; *Atchison etc. Ry. Co. v. Geiser*, 68 Kan. 281, 75 Pac. 68, 1 Ann. Cas. 812; *Galveston etc. Ry. Co. v. Warnecke*, 43 Tex. Civ. App. 83, 95 S. W. 600; *Texas etc. Ry. Co. v. Graffeo (Tex. Civ. App.)*, 118 S. W. 873; *Missouri etc. R. R. Co. v. Phillips (Ark.)*, 133 S. W. 191; or, as sometimes expressed, the damage is the depreciation in the value of the

realty: *Cleveland etc. Ry. Co. v. Stephens*, 74 Ill. App. 586, affirmed 173 Ill. 430, 51 N. E. 69; *Chicago etc. R. R. Co. v. Davis*, 74 Ill. App. 595; *Illinois Cent. R. R. Co. v. Almon*, 100 Ill. App. 530.

The value of fruit trees, it is said, cannot be accurately measured without reference to the soil on which they stand, and therefore, when damages are sought to be recovered for their destruction, the question is not what they were worth disconnected from the soil, but, how much has the value of the realty been depreciated by such destruction: *Dwight v. Elmira etc. R. R. Co.*, 132 N. Y. 199, 30 N. E. 398, 28 Am. St. Rep. 563, 15 L. R. A. 612. Of course, if fruit trees destroyed have no value independently of the soil, damages for their destruction can be recovered only in a suit for damages for injury to the realty: *Galveston etc. Ry. Co. v. Warnecke*, 43 Tex. Civ. App. 83, 95 S. W. 600; and the measure of damages in such a case would be the difference in value between the value of the real estate before, and its value after, the injury: *Rowe v. Chicago etc. Ry. Co.*, 102 Iowa, 286, 71 N. W. 409.

If the owner of land on which growing trees have been destroyed sues for the value of the trees, the measure of damages has been variously stated. In *Atchison etc. Ry. Co. v. Geiser*, 68 Kan. 281, 75 Pac. 68, 1 Ann. Cas. 812, it is the value of the trees as a distinct part of the land, if susceptible of such measurement; in *Galveston etc. Ry. Co. v. Warnecke*, 43 Tex. Civ. App. 83, 95 S. W. 600, it is the value of the trees when detached from the soil; and in other cases the difference in the value of the fruit trees as standing immediately before and after the injury complained of: *Missouri Pac. R. R. Co. v. Tipton*, 61 Neb. 49, 84 N. W. 416; *Putnam v. St. Louis etc. Ry. Co.*, 43 Tex. Civ. App. 448, 94 S. W. 1102. In *Louisville etc. R. R. Co. v. Beeler*, 31 Ky. Law Rep. 750, 103 S. W. 300, the measure of damages is held to be the reasonable value of the trees destroyed and the difference in value of those injured before and after the injury, and not the difference in value of the whole farm before and after the injury. In *Doty v. Quincy etc. R. R. Co.*, 136 Mo. App. 254, 116 S. W. 1126, it was held that matured apples should not be treated as a part of the realty, but as personalty; and that for destroying apple trees and apples thereon, the measure of damages is the difference between the market value of the apples just before and after the fire, added to the difference between the market value of the land immediately before and after the injury, treating the apples as personal property. So, in an action for damages for the injury and destruction of fruit trees in an orchard, it has been held that the measure of the plaintiff's recovery is the amount and value of the damage to the thing injured, and the value of the thing destroyed as an appurtenance to and part of the realty: *Kansas City etc. R. R. Co. v. Perry*, 65 Kan. 792, 70 Pac. 876.

IV. Pleading.

Where a petition, in an action to recover damages for an injury to apple trees and the fruit thereof, says nothing of windfalls in special terms, but the evident purpose of the allegations of the petition is to include the ungarnered fruit of the trees in the property charged to have been injured, which fruit would necessarily consist of the apples on the ground under the trees, as well as those on the trees, evidence is admissible to show the destruction of apples which

have fallen on the ground: Doty v. Quincy etc. R. R. Co., 136 Mo. App. 254, 116 S. W. 1126. So in an action to recover damages for injury to a corn crop, allegations in the petition that the crop was in fine condition during certain months, that during that period it was destroyed through the negligence of the defendant, and that it would have made a specified amount per acre, and was worth a specified sum per acre, simply show what the crop would produce at maturity, and not what the immature crop was worth at the time it was destroyed. A demurrer to such a petition should therefore be sustained: Texas & P. Ry. Co. v. Bayliss, 62 Tex. 570.

V. Evidence Admissible.

a. Relative to Market Value.—In estimating damages for the loss or destruction of a crop, by the act of defendant, evidence of the value of matured crops of like kind planted in the same neighborhood is competent to show the value of the crop, at the closest market, less the cost of labor and attention that would have been necessary to raise and market it there: Smith v. Hicks, 14 N. M. 560, 98 Pac. 138, 19 L. R. A., N. S., 938. Where the plaintiff seeks to recover for injuries caused by flooding, to crops grown on his own land as well as to those grown by him on the land of another, but makes no claim for injury to his land, he may properly testify as to the difference in value between the crops as they stood before the flooding of the land and their value afterward, taking into account the right of the plaintiff to mature and harvest them on the land, so far as they were not destroyed; and, if he is entitled to some damage, it is proper in estimating it to determine what the value of the crop would have been in the course of ordinary events, had the flood not occurred. If the testimony shows that the season was favorable to such crops, it is also permissible to prove the usual yield and the usual market value in the locality, though other contingencies might have affected the value of the crops. But it would not be necessary nor proper to go into the question of the possible chances of loss or injury incident to the maturing and harvesting of the crops. "The courts will assume that, in the due and ordinary course, a growing crop will mature and be harvested without loss, just as they will assume that the ordinary man will live to fill the period of his expectancy": Jefferis v. Chicago etc. Ry. Co., 147 Iowa, 124, 124 N. W. 367.

In determining the market value of a crop immediately before and immediately after it was injured or destroyed, the court is authorized to consider evidence showing the probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation, as well as the cost of preparation and transportation to market: Missouri etc. Ry. Co. v. Riverhead Farm, 53 Tex. Civ. App. 643, 117 S. W. 1049. And when ascertaining the difference in the market value of real property immediately before and its value immediately after the injury of a crop of growing grass thereon, by fire, where the sole question before the court is the proper measure of damages for the destruction of the grass, evidence that another crop of some character and value may be grown on the land in the same growing period, and of the average yield of like crops, of the average market price, the ordinary expense of harvesting and marketing such crops, the condition of

that particular crop before the injury, and any other fact existing at the time of the loss tending to show how and to what extent the injury decreased and diminished the value of the farm, may be considered; but evidence of matters occurring subsequently to the injury is not competent: *Ward v. Chicago etc. Ry. Co.*, 61 Minn. 449, 63 N. W. 1104.

In an action against a railway company for the destruction by fire of grass for pasturage, and where the petition alleges that the pasturage had both a market and real value, evidence that the grass used for pasturage had a real value, though no market value, is competent. And a witness is competent to testify as to the reasonable market value of the land before and after the fire, where it is shown that he has always lived in the immediate vicinity of the land injured, and knows the injury resulting from the fire, and the market value of the land in the community. And a person who has had experience in putting up hay, who knows how much a tract of land would be likely to produce, the cost of bailing it, and who knows what the hay would be worth after it is bailed, is a competent witness to testify as to the value of grass for hay: *Missouri etc. Ry. Co. v. Neiser* (Tex. Civ. App.), 118 S. W. 166. If a tenant brings an action for an injury to a matured hay crop, the damages must be ascertained by determining the value of the crop as follows: By estimating the yield in tons per acre, and by taking the market value prevailing at the time in the vicinity, after deducting the cost of cutting and stacking the hay: *Blunck v. Chicago etc. Ry. Co.* (Iowa), 115 N. W. 1013.

b. Relative to Rental Value.—Where a part of meadow-land has been burned, the rental value of the land is not the general rental value of land in that vicinity: *Black v. Minneapolis etc. Ry. Co.*, 122 Iowa, 32, 96 N. W. 984; *Blunck v. Chicago etc. Ry. Co.* (Iowa), 115 N. W. 1013; but its rental value during the time it was rendered unproductive for the purpose for which it was being used, as shown by evidence of what portions of the land not burned actually produced: *Black v. Minneapolis etc. Ry. Co.*, 122 Iowa, 32, 96 N. W. 984. In considering the value of a crop, the cost of reseeding, and the rental value of land, where the first and matured crop of the season of alfalfa has been destroyed, the value of three other possible crops that might have been grown the same season cannot be considered and added to the value of the crop destroyed, because they are an element too contingent and speculative to afford a basis for the assessment of damages in such a case: *Adam v. Chicago etc. Ry. Co.*, 139 Mo. App. 204, 122 S. W. 1136.

c. As to Value of Crop at Time of Its Destruction.—"It seems to us," said Gaines, J., rendering the opinion of the court in *International etc. R. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526, "that, as a general rule, the most satisfactory means of arriving at the value of a growing crop is to prove its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation, as well as the cost of its preparation and transportation to market. The difference between the value of the probable crop in the market and the expense of maturing, preparing, and placing it there, will, in most cases, give the value of the growing crop with as much certainty as may be obtained by any other method." "From an examination of many authorities,"

said Norcross, J., in *Candler v. Washoe Lake etc. D. Co.*, 28 Nev. 153, 80 Pac. 751, 6 Ann. Cas. 946, "we are convinced that a just and reasonable rule for the measure of damages for the loss of growing crops in cases like the one before the court, where it appears that the crops have been entirely destroyed, or nearly so, and where there appears to have been a reasonable certainty that they would have matured but for the wrongful act of the defendant, would be to allow to the plaintiffs the probable yield of the crops under cultivation, the value of the yield when matured and ready for market, and deducting therefrom the estimated expenses of producing, harvesting, and marketing them, and also deducting the value of any portion of the crops that may have been saved." See, also, *Malmstrom v. People's D. D. Co.* (Nev.), 107 Pac. 98, in which case it is said that the expense of necessary irrigation should be included. In a case where the plaintiff claimed the right to a flow of water for irrigation, and the same was obstructed, whereby his crop became damaged, the measure of damages was held to be the difference between the amount realized from the crops and the amount that would have been realized had water been furnished, less the cost of raising, harvesting, marketing it, etc.: *Tubbs v. Roberts*, 40 Colo. 498, 92 Pac. 220. In Texas, where a crop has been destroyed by burning, its value may be recovered, though another crop is raised on the land during the same season, and in testifying as to the value of a growing crop, a witness may give in detail the cost of planting, cultivating, harvesting and marketing, as well as the probable yield and its market value: *Galveston etc. Ry. Co. v. Parr*, 8 Tex. Civ. App. 280, 28 S. W. 264.

If a growing crop is negligently destroyed, the owner is not limited to nominal damages, but the value of the crop may be shown by proving what the matured crop would have been worth and deducting from that value the cost of bringing it to maturity, harvesting and marketing; but against this may be shown the value of a second crop planted and marketed after the loss of the first. If the action for damages is tried after the growing season has passed, so that there is a foundation for an estimate of the value of the crop, but the crop in its growing condition was without market value, opinion evidence is admissible to show its value: *Deal v. St. Louis etc. Ry. Co.* 144 Mo. App. 684, 129 S. W. 50.

The rule as thus announced in Texas and Nevada, approving the reception of evidence as to the value of the probable yield at the time the crop would have matured, is supported, in whole or in part, by *Jonesboro etc. Ry. Co. v. Cable*, 89 Ark. 518, 117 S. W. 550; *Teller v. Bay & River D. Co.*, 151 Cal. 209, 90 Pac. 942, 12 L. R. A., N. S. 267, 12 Ann. Cas. 779; *Tubbs v. Roberts*, 40 Colo. 498, 92 Pac. 220; *Chicago etc. R. R. Co. v. Schaffer*, 26 Ill. App. 280; *Adams v. Stadler*, 78 Ill. App. 432; *Hunt v. St. Louis etc. R. R. Co.*, 126 Mo. App. 261, 103 S. W. 133; *Deal v. St. Louis etc. Ry. Co.*, 144 Mo. App. 684, 129 S. W. 50; *Anderson v. St. Louis etc. Ry. Co.*, 129 Mo. App. 384, 103 S. W. 605; *Malmstrom v. People's Drain Ditch Co.* (Nev.), 107 Pac. 98; *Chicago etc. Ry. Co. v. Johnson*, 25 Okl. 760, 107 Pac. 662, 27 L. R. A., N. S., 879; *Galveston etc. Ry. Co. v. Borsky*, 2 Tex. Civ. App. 545, 21 S. W. 1011; *Galveston etc. Ry. Co. v. Ryan* (Tex. Civ. App.), 21 S. W. 1013; *Gulf etc. Ry. Co. v. Haskell*, 4 Tex. Civ. App. 550, 21 S. W. 546; *Gulf etc. Ry. Co. v. Nicholson* (Tex. Civ. App.), 25 S. W. 54; *Galveston etc. Ry. Co. v. Parr*, 8 Tex. Civ. App. 280, 28 S. W.

264; Chicago etc. Ry. Co. v. Longbottom (Tex. Civ. App.), 80 S. W. 542; San Antonio etc. R. R. Co. v. Kiersey (Tex. Civ. App.), 81 S. W. 1045; City of Paris v. Tucker (Tex. Civ. App.), 93 S. W. 233; Putnam v. St. Louis etc. Ry. Co., 43 Tex. Civ. App. 448, 94 S. W. 1102; Texas Co. v. Lacour (Tex. Civ. App.), 122 S. W. 424; Missouri etc. Ry. v. Gilbert (Tex. Civ. App.), 124 S. W. 434; Freeman v. Field (Tex. Civ. App.), 135 S. W. 1073.

An examination of these cases will show that no controlling distinction between crops entirely destroyed and crops partly destroyed is made in permitting evidence to be given as to the probable yield of the crops, for the reason, apparently, that there seems to be no room for one. What the crops would have been, if not injured or destroyed, seems to be as susceptible of such proof in the one case as in the other. And evidence of the probable yield in such cases is admissible, though the plaintiff's measure of damages is stated to be the difference between the value of the crop immediately before and its value immediately after the injury: Putnam v. St. Louis etc. Ry. Co., 43 Tex. Civ. App. 448, 94 S. W. 1102.

The courts have admitted evidence of the probable yield, at the time the crops would have matured, under a variety of circumstances. Thus, in an action by a tenant, entitled to three-fourths of a crop, to recover for the total destruction of the crop while growing, the court, in arriving at the value of the crops as they stood at the time of their destruction, and in the condition in which they were, allowed proof of the yield, deducting therefrom the cost of producing and marketing the crops, and deducting therefrom the one-fourth of such value as the landlord's share. The remaining three-fourths were held properly awarded to the plaintiff: Teller v. Bay & River D. Co., 151 Cal. 209, 90 Pac. 242, 12 L. R. A., N. S., 267, 12 Ann. Cas. 779.

It has been denied, however, in some cases, that the value of the probable yield of a crop at the time of its maturity is the proper measure of damages: Gresham v. Taylor, 51 Ala. 505; Hays v. Crist, 4 Kan. 350; International etc. Ry. Co. v. Benitos, 59 Tex. 326; Texas etc. R. R. Co. v. Young, 60 Tex. 201; Taul v. Shanklin, 1 White & W. Civ. Cas. Ct. App., sec. 1139. "That the value of the proper yield," said Stayton, Associate Justice, in Texas & P. R. R. Co. v. Young, 60 Tex. 201, "at the time the crop would have matured is not the true measure is evident, for at any stage in the growth of a crop it requires labor to cultivate and gather it, more or less, as the crop may be advanced, and these elements go into the makeup of the value at maturity. If the crop is destroyed before maturity, the labor of the farmer is not further directed to it, and he is free to embark in other profitable employment. To take the value of a matured and gathered crop would be to give compensation for labor never performed, and for an injury never received." "While, in cases of destruction of growing crops, it is proper and important," said Barch, J., in Lester v. Highland Boy M. Co., 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341, 1 Ann. Cas. 761, "to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land in dispute, and on other similar lands in the immediate neighborhood cultivated in like manner, the stage of growth of the crops at the time of injury or destruction, the expenses of cultivating, harvesting, and marketing the crops, and the market value at the time

of maturity, or within a reasonable time after the injury or destruction of the crops, and while all such evidence may be considered by the jury in determining the amount of damages, if any, still the true measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction, and not the market value at the time of maturity or during the market season."

In arriving at the measure of damages to crops caused by their injury or destruction, the value of the crops and the expense of maturing, reaping, threshing and moving them to market are competent facts to be considered: *Hopkins v. Butte & M. C. Co.*, 16 Mont. 356, 40 Pac. 865. The question as to the value of a growing crop is one always difficult to accurately ascertain, because such value depends upon the probability of the subsequent maturity of the crop: *Chicago etc. R. R. Co. v. Mitchell*, 74 Neb. 563, 104 N. W. 1144. In estimating such value, however, it is proper to take into consideration the fact that the land was very fertile and productive, and that it had produced, for a series of years, crops which were larger and brought better prices than the average: *Economy Light & Power Co. v. Cutting*, 49 Ill. App. 422.

The value of a growing crop is a matter or conclusion of the mind to be arrived at from a consideration of all the facts which would affect it: *Economy L. & P. Co. v. Cutting*, 49 Ill. App. 422. Finding the value of a growing crop as it actually stands upon the ground is not a conjectural method of estimating damages when it has been destroyed or lost through the negligent act of one other than the owner: *Folsom v. Apple River etc. Co.*, 41 Wis. 602.

Where grass has been destroyed, evidence of its value for grazing purposes is admissible: *Galveston etc. Ry. Co. v. Rheiner* (Tex. Civ. App.), 25 S. W. 971; but it is competent for the defendant to prove that the grass destroyed was in a diseased condition and valueless: *Missouri Pac. Ry. Co. v. Wise*, 3 Wills. Civ. Cas. Ct. App., sec. 386. Where the planting of a perennial crop like alfalfa increases the value of the land, it is proper to show the damage done by the destruction of a stand thereof by proving the value of the land with and without such stand: *Morse v. Chicago etc. Ry. Co.*, 81 Neb. 745, 116 N. W. 859.

In determining the value of a crop of corn at the time it was destroyed, the evidence must be confined to its value at the time of such destruction or loss, and the damages are to be established by testimony that at the time it was destroyed or lost it was worth a specified sum per bushel in the field, and that there was a specified number of acres in the field which would yield a definite number of bushels per acre: *Anderson v. St. Louis etc. Ry. Co.*, 129 Mo. App. 384, 108 S. W. 605.

A plaintiff suing for an injury to a growing crop does not prove his loss by merely showing what the crop would have afterward brought in the market. This is not enough to enable the jury to ascertain the loss. He must furnish the jury with sufficient evidence to determine what would legally compensate him: *Texas Co. v. Lacour* (Tex. Civ. App.), 122 S. W. 424.

It is held in *Atlanta etc. Air Line Ry. v. Brown*, 158 Ala. 607, 48 South. 73, that a witness cannot give his opinion as to the amount of damage caused by the loss or destruction of a growing crop. But in such a case the prevailing opinion seems to be that a witness,

especially if he is qualified as an expert farmer, may give his opinion to prove the value of a growing crop, and that it is proper to permit him to state facts from which his conclusion is arrived at, in order to aid the jury in determining whether or not his estimate is correct: *Lommeland v. St. Paul etc. Ry. Co.*, 35 Minn. 412, 29 N. W. 119; *Texas & P. R. R. Co. v. Young*, 60 Tex. 201; *Chicago etc. Ry. Co. v. Johnson*, 25 Okl. 760, 107 Pac. 662, 27 L. R. A., N. S., 879.

In such cases the damage is to be determined from a consideration of the circumstances existing at the time of the destruction or loss of the crops, favoring or rendering doubtful the conclusion that they would have attained to a more valuable condition, and from a consideration of the hazard and expense incident to the process of supposed growth and appreciation: *Kansas City etc. R. R. Co. v. Pirtle*, 67 Ark. 617, 55 S. W. 940. If, but for the act which caused the destruction or loss of the crop, it would have inevitably been destroyed by other impending causes, it is error for the jury, in assessing damages, to value the crop as if it would have matured but for the wrong which proximately caused such destruction or loss: *St. Louis etc. Ry. Co. v. Yarborough*, 56 Ark. 612, 20 S. W. 515.

In estimating the damages caused by the destruction or loss of a growing crop, it is proper to admit evidence as to the crops gathered from the same land for several years before the injury: *Dennis v. Crocker-Huffman L. Co.*, 6 Cal. App. 58, 91 Pac. 425; *Colorado Con. L. & W. Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. 62; *Economy L. & P. Co. v. Cutting*, 49 Ill. App. 422. Thus, in an action to recover damages for the negligent flooding of plaintiff's land, and the destruction of his hay thereby, evidence of the amount of hay gathered from the land the year previous to the injury complained of is admissible to show the capacity of the land for producing hay: *Witherall v. Muskegon B. Co.*, 68 Mich. 48, 13 Am. St. Rep. 325, 35 N. W. 758. Evidence is admissible to show that the plaintiff's land was peculiarly adapted for a particular crop, such as sweet potatoes, and that it had been planted for such crop several years before the loss occurred. An objection to such evidence that it is too remote goes simply to its weight, and not to its admissibility: *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 58, 91 Pac. 425.

Upon the issue as to the destruction of plaintiff's crops, evidence is admissible to show what crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land not destroyed and on similar lands in the immediate neighborhood, cultivated in like manner, the stage of growth of the crops at the time of destruction, the expense of cultivating, harvesting and marketing the crops, and the market value thereof at maturity, at or within a reasonable time after the injury: *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 58, 91 Pac. 425.

In estimating the damages for the loss or destruction of a growing crop, the market value of crops of the same kind planted and cared for in the same manner, less the cost of maturing, harvesting and marketing, may be shown: *Dennis v. Crocker-Huffman L. Co.*, 6 Cal. App. 58, 91 Pac. 425; *Colorado Con. L. & W. Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. 62; *Deal v. St. Louis etc. Ry. Co.*, 144 Mo. App. 684, 129 S. W. 50; *International etc. Ry. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526. Opinion evidence is admissible to show market value: *Deal v. St. Louis etc. Ry. Co.*, 144 Mo. App. 684, 129 S. W. 50. In

this connection, it may be said, however, that in proving the probable yield of a crop, such, for instance, as cotton, proof simply of the additional amount of cotton which plaintiff would have made but for the injury, and the value of the crop when ready for market, without any evidence as to the expense of cultivating, gathering, preparing it for and placing it in the market, does not show the value of the crop at the time of the injury, and does not, therefore, afford a means of ascertaining the damages: *International etc. R. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526. "The value of a marketable article," said Gaines, J., in the case last cited, "is the amount for which it can be sold, but the test of market price cannot be applied to such property as is not ordinarily the subject of sale. What a particular article will bring in the market, when no other article of a like character has been sold, is necessarily a matter of conjecture."

In arriving at the value of a growing crop lost or destroyed, evidence is admissible to show what the crop would bring in its immature state at a sale: *Colorado Con. L. & W. Co. v. Hartman*, 6 Colo. App. 150, 38 Pac. 62. In estimating an injury to hay lands caused by overflow, the damage for the loss of further crops is entirely too prospective and conjectural to be taken into consideration: *Clark v. Nevada L. & M. Co.*, 6 Nev. 203; and, in such a case, what the plaintiff might have made had he planted another crop is too uncertain to base upon it any estimate as to the amount by which his damages should be reduced: *Gulf etc. Ry. Co. v. Holliday*, 65 Tex. 512.

d. In Cases of Partial Destruction.—The principles governing the admission of evidence as to the value of crops lost or destroyed in part must necessarily be the same as in the case of a total destruction thereof, at least where no distinction is made as to the criterion of proof required of the value of a growing crop, "at any period of its existence." See IV, subd. c, ante. Hence, where part of a field of growing corn has been destroyed, evidence is admissible to show the amount raised on the remainder of the field, if the field is all of the same quality and subject to the same conditions, the market value of the corn when mature, and the cost of harvesting and marketing it: *Hunt v. St. Louis etc. R. R. Co.*, 126 Mo. App. 261, 103 S. W. 133. Evidence of the value of matured crops of a like kind planted in the same neighborhood, is also competent in estimating damages where a growing crop has been rendered worthless: *Smith v. Hicks*, 14 N. M. 560, 98 Pac. 138, 19 L. R. A., N. S., 938. The value of corn and potatoes, destroyed while growing and before they have matured, may be shown by proof of the value of corn and potatoes of that year's crop in the fall after they have matured, and are ready for market: *Gulf etc. Ry. Co. v. McGowan*, 73 Tex. 355, 11 S. W. 336.

e. Where Land is Injured With Crop.

1. In General.—In an action to recover damages for an injury to a meadow, the opinion of a witness, if he has qualified himself to express an opinion, is admissible to show the effect of flames upon the meadow: *Bradley v. Iowa Cent. Ry. Co.*, 111 Iowa, 562, 82 N. W. 996; and evidence as to the value of the meadow is competent for the purpose of showing the plaintiff's damages: *Atchison etc. Ry. Co. v. Arthurs*, 63 Kan. 404, 65 Pac. 651. Where grass destroyed had no market value, the jury should consider its value for the purposes of its use to the plaintiff at the time of the injury: *San Antonio etc.*

Ry. Co. v. Stone (Tex. Civ. App.), 60 S. W. 461; Galveston etc. Ry. Co. v. Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294. Where a fire reached the plaintiff's meadow after burning another meadow near by, and it was shown that the grass on the two meadows was of equal height, it was held to be reversible error to exclude evidence, offered by the defendant, that the roots of the grass in the meadow first burned were not injured: Bradley v. Iowa Cent. Ry. Co., 111 Iowa, 562, 82 N. W. 996.

2. **Injury to Orchards.**—The value of a fruit crop destroyed by fire, overflow, or otherwise is to be arrived at by deducting from the value of the crop which might have been grown the cost of cultivating and marketing it; and the fact that, at the time of the destruction, fruit had not made its appearance will not preclude the plaintiff as a matter of law from recovering the actual value of the crop: Putnam v. St. Louis etc. Ry., 43 Tex. Civ. App. 448, 94 S. W. 1102.

Two methods, however, may be adopted, as we have shown, to ascertain the damage caused by the destruction of fruit trees. One is to show their value as a distinct part of the land, if susceptible of such measurement, and the other is to show the difference in the value of the land before and after the destruction of the trees: See III, subd. b. If both methods are resorted to in the same case, the damage must be ascertained by the jury from all the evidence: Atchison etc. Ry. Co. v. Geiser, 68 Kan. 281, 75 Pac. 68, 1 Ann. Cas. 812; Galveston etc. Ry. Co. v. Warnecke, 43 Tex. Civ. App. 83, 95 S. W. 600. If the owner sues simply to recover the value of the fruit trees destroyed, he cannot recover their value when attached to the soil, as that would be a recovery for injury to the land, for which he has not sued: Galveston etc. Ry. Co. v. Warnecke, 43 Tex. Civ. App. 83, 95 S. W. 600. But where an orchard has been destroyed by the act of a tort-feasor, the owner is entitled to recover for the injury to his realty: Galveston etc. Ry. Co. v. Warnecke, 43 Tex. Civ. App. 83, 95 S. W. 600; and, in testifying as to the value of the land before and after the injury, it is competent for the witness to testify as to the value of the trees destroyed: Missouri etc. R. R. Co. v. Phillips (Ark.), 133 S. W. 191; Missouri etc. Ry. Co. v. Lycan, 57 Kan. 635, 47 Pac. 526. Evidence of the income from the orchard, for several years before its destruction, is also admissible: Rowe v. Chicago etc. Ry. Co., 102 Iowa, 286, 71 N. W. 409; but the amount of injuries to fruit trees, just reaching the bearing age, is not determined by evidence of the amount of fruit they produce each year, but by evidence of their value as a part of the realty: Missouri etc. Ry. Co. v. Lycan, 57 Kan. 635, 47 Pac. 526; Missouri etc. Ry. Co. v. Steinberger, 6 Kan. App. 585, 51 Pac. 623, affirmed, 60 Kan. 856, 55 Pac. 1101. In such actions, the wrongdoer will not be heard to say that the land, if used for other purposes, would produce as much or more revenue than from the fruit trees, and that therefore the plaintiff has not been injured, because the owner of land is entitled to use his property for any lawful purpose he may desire, and when its value for that purpose is decreased by the wrongful act of another he is entitled to recover as damages the difference between its value for the purposes for which he desired to use it before and after the commission of the tort: Galveston etc. Ry. Co. v. Warnecke, 43 Tex. Civ. App. 83, 95 S. W. 600.

Where a particular crop attached to the soil has a distinct value such, susceptible of definite measurement, and is injured or destroyed, the evidence in an action to recover damages therefor may properly be directed to the value of such crop as a part of the land, and, in actions of this kind, is ordinarily the best and most satisfactory evidence. It is only where the damages to one part of the land affect other parts, or are incapable of some definite and direct proof, that the evidence is necessarily confined to proof of the value of the whole tract, before and after the injury, though the actual damages can never, in any case, exceed the difference between such values: *Missouri etc. Ry. Co. v. Lycan*, 57 Kan. 635, 47 Pac. 526. Where fruit trees have been destroyed by fire, and their owner is not satisfied to accept their value after their separation from the realty, the damages resulting from their destruction are to be ascertained by deducting the value of the land after the fire from the value of the land before the fire. Therefore, it is error to permit a witness, against objection, to answer the question, "What were those trees worth before they were killed?": *Dwight v. Elmira etc. R. R. Co.*, 132 N. Y. 128, 28 Am. St. Rep. 563, 30 N. E. 398, 15 L. R. A. 612.

VI. Instructions.

a. **In General.**—In suits to recover for injuries to or loss of growing crops the jury should be given a definite rule as to the measure of damages, which should be limited to the value of the crop at the time of the injury, and if the court fails to give such an instruction, the judgment should be reversed: *Gulf etc. Ry. Co. v. Hedrick (Tex.)*, 7 S. W. 353. In case a crop has been totally destroyed, an instruction directing the jury to find the value of the crop at the time of its destruction is necessary; but if evidence has been given with reference to the fair value of the crops, the omission of the word "market" from the instruction is not fatal: *Smith v. Chicago etc. Ry. Co.*, 81 Neb. 186, 115 N. W. 755. In cases in which the market value of the land is considered, it is proper, in an action against a railway company for damages to crops communicated by fire, to instruct the jury that the measure of damages is the difference between the market value of the land before and after the fire: *Missouri etc. R. R. Co. v. Phillips (Ark.)*, 133 S. W. 191. An instruction in such cases, where there is no evidence on which to predicate it, is properly refused: *Anderson v. St. Louis etc. Ry. Co.*, 129 Mo. App. 384, 108 S. W. 605.

b. **Erroneous Instructions.**—In an action to recover damages for injuries to an apple orchard, where the jury is not called upon to find the value of the trees in any other relation to the land itself than that which growing trees in an apple orchard bear to the soil which sustains them, and where the action is in effect one for damages to the realty, it is error to instruct the jury as follows: "If you find from all the evidence in this case that the trees which plaintiff alleges were destroyed by fire, negligently set out by the agents, servants and employees of the defendant, have a value separate, distinct, and apart from the land upon which they are growing, you will ascertain such value, and find for the plaintiff in such sum as you think such trees to be worth, separate, distinct, and apart from the land or soil upon which they are standing and growing. But if, on the other hand, you find from the evidence that the trees have

no value separate and apart from the soil or land upon which they are planted and growing, then find for the defendant": *Missouri etc. Ry. Co. v. Steinberger*, 6 Kan. App. 585, 51 Pac. 623.

It is error to instruct the jury, in an action for the destruction of growing crops, where the plaintiff has testified that he could not state the value of the crops at the time of their destruction, as they had no value, but only a prospective value, to award the plaintiff the reasonable value of the destroyed crops: *City of Paris v. Tucker* (Tex.), 93 S. W. 233. So, in an action for the destruction of crops by trespassing stock, where it appears that the plaintiff had leased the land to tenants for a share of the crops, and there was a conflict in the evidence as to the amount of damages, it is error to instruct the jury in such a way as to allow them to consider the damage done to the entire crops and not simply to the plaintiff's share thereof: *Atlanta etc. Air Line Ry. v. Brown*, 158 Ala. 607, 48 South. 73. It is also error to instruct the jury, in an action for an injury to an asparagus bed by fire set by a locomotive, that they can allow the reasonable value of the asparagus bed destroyed without limiting the recovery to the amount claimed in the petition, where the evidence authorizes a recovery for more than such amount: *Texas etc. Ry. Co. v. Graffeo* (Tex. Civ. App.), 118 S. W. 873. In an action for an injury to a field of timothy and clover, it is not necessarily erroneous to instruct the jury that the plaintiff may recover the value of the unsevered timothy and clover, in addition to the reasonable cost in restoring the field to its original condition: *Hayden v. Missouri etc. Ry. Co.* (Kan.), 114 Pac. 384.

In an action for the destruction of a growing crop of corn by hogs, it is error to instruct the jury that: "If you find and believe from the evidence that the plaintiffs planted two crops of corn on the land described in the petition, and that the first crop was destroyed by the hogs, and that afterward they planted a second crop on the same land, which crop was matured, then, if you find for the plaintiff, you will assess his damages at such sum as you think from the evidence the first crop destroyed was worth, standing and growing in the field at the time it was destroyed, together with the reasonable cost of planting the second crop, less the market value of the second crop, less the reasonable cost of cultivating, gathering and marketing the same; or you will assess his damage at the market value of what the first crop would have been if allowed to mature, together with the reasonable cost of planting the second crop, less the reasonable market value of the second crop and the cost of cultivating, gathering and marketing the same." The vice of this instruction is that it tells the jury that they may, in addition to what the crop was worth, give to the plaintiff the reasonable cost of planting the second crop, less the market value of the second crop, etc. "The latter part of this instruction," it is said, "must have conveyed to the minds of the jury the thought that they were entitled to allow plaintiff something more than the value of his corn at the time it was destroyed. The language used in the instruction was calculated to confuse, rather than to enlighten, the jury, and was, therefore, misleading, as well as allowing them to award the plaintiff more than he had actually suffered": *Deal v. St. Louis etc. Ry. Co.*, 144 Mo. App. 684, 129 S. W. 50.

In an action against a railway to recover for grass and fruit trees burned, where the evidence showed that while the plaintiff owned the premises, another person was in possession "cropping on shares" and was allowed to use the fruit and to let his stock graze upon the grass, it is error for the court to instruct the jury that the plaintiff is entitled to recover for the whole injury sustained by the burning of the grass, because such an instruction ignores the rights of the cropper and entitles the plaintiff to recover for injuries to the cropper. The instruction should confine the recovery to the loss sustained by the plaintiff only: *Missouri etc. Ry. Co. v. Couch* (Tex. Civ. App. 122 S. W. 67).

In an action for the destruction of a crop of alfalfa, by flooding, it is error to instruct the jury to assess the plaintiff's damages as the fair value of the alfalfa on the ground at the time of the loss, because this permits the jury to include in their assessment of damages the value of three other crops, which the evidence shows might have been grown on the land during the season, which is an element too contingent and speculative to afford a basis for the assessment of damages sustained: *Adam v. Chicago etc. Ry. Co.*, 139 Mo. App. 204, 122 S. W. 1136.

STATE v. CARSON.

[147 Iowa, 561, 126 N. W. 698.]

WORDS AND PHRASES.—The Words "Ship" and "Shipment" are used to express the idea of goods delivered to carriers for the purpose of being transported from one place to another. (p. 331.)

WORDS AND PHRASES.—The Ordinary Meaning of the Word "Shipped" is to load for transportation. (p. 331.)

GAME—Shipment Out of the State.—Where the statute prohibits the shipment of game out of the state, the delivery of game to a carrier for transportation to a point beyond the boundary of the state constitutes a violation of the statute, though the game, while still in the state, is taken from the carrier by a deputy game warden of the state, acting under the authority of a search warrant. (p. 331.)

Geo. A. Heald, for the appellant.

H. W. Byers, attorney general, and Charles W. Lyon, assistant attorney general, for the state.

⁵⁶¹ SHERWIN, J. The defendant delivered to the United States Express Company at one of its offices in this state a box of prairie chickens for transportation and delivery to a commission firm in Chicago, Illinois. The box was properly billed to the address placed thereon by the defendant and ⁵⁶² loaded on the express car of the train on the Chicago, Milwaukee and St. Paul Railway Company bound for Chicago. The box was taken from the express company and from

the train at Marion, Iowa, by a deputy game warden of the state who acted under the authority of a search warrant. There were forty-one undressed prairie chickens in the box. They were later disposed of in this state as provided by law.

The defendant was convicted under section 2555 of the Code, which provides that "no person . . . shall ship, take or carry out of this state" any game birds. He contends that, as the birds were taken from the express company while in this state, there was no shipment out of the state, and hence no violation of the law. He says, in effect, that the state authorities stepped in with a search warrant, and prevented the completion of a shipment which would have been unlawful if completed. We are of opinion that the delivery to the carrier for transportation to a point beyond the boundary of the state constituted a violation of the statute. The word "ship," as therein used, must be given its usual and ordinary meaning, for there is nothing in the law itself which indicates a different legislative intent. The words "ship" and "shipment" are now generally used to express the idea of goods delivered to carriers for the purpose of being transported from one place to another, and such signification is given to them by lexicographers generally: Webster's International Dictionary; Century Dictionary. The law dictionaries give substantially the same definitions: See Abbott's, Bouvier's, and Rapalje and Lawrence's. The adjudicated cases are in general accord on the question. In a leading case in England, *Bowes v. Shand*, L. R. 2 App. Cas. 455, the court was unanimously of the opinion that the word "shipped," according to its natural and ordinary signification and meaning, was the putting of goods on board a vessel and taking a bill of lading therefor; and it was there held that goods placed on ⁵⁶³board in the month of February were not shipped in "March or April," although the ship did not in fact sail until March. In *Ledon v. Havemeyer*, 121 N. Y. 179, 24 N. E. 297, 8 L. R. A. 245, it was held that a contract for the sale of goods calling "for shipment within thirty days" does not require a clearance of the vessel within that period, but there was a compliance if, within that time, the goods were put on board a vessel for transportation within a reasonable time. The ordinary meaning of the word "shipped" is to load for transportation: *Fisher v. Minot*, 10 Gray (Mass.), 260; *Harrison v. Fortlage*, 161 U. S. 57, 16 Sup. Ct. Rep. 488, 40 L. ed. 616; *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Schmertz v. Dwyer*, 53 Pa. 335. The defendant has not presented for our consideration any case which announces a different rule. In *Selkirk v. Stephens*, 72 Minn. 335, 75 N. W. 386, 40 L. R. A. 759, the exact point was not decided, but the language of the opinion seems to recognize the rule as herein stated. The court is not to presume that the legis-

lature intended the word "ship" to mean something different from its ordinary signification.

There is no merit in the appellant's contention, and the judgment must be, and it is, affirmed.

Game Laws are discussed in the note to *Ex parte Maier*, 42 Am. St. Rep. 138.

STEIN v. MCAULEY.

[147 Iowa, 630, 125 N. W. 336.]

APPEAL.—An Objection to the Jurisdiction of the Court to entertain an appeal must be made in printed form, stating specifically the ground thereof, and be served upon the appellant as provided by statute; otherwise, it cannot be considered. (p. 333.)

CHATTEL MORTGAGES—Levy of Attachment as Waiver of Right to Foreclose.—In a jurisdiction where a chattel mortgage creates a mere lien upon the property, leaving the legal title in the mortgagor, the mortgagor has an equity of redemption which may be levied upon and sold. Hence a mortgagee of the property may, by attachment, levy upon this equity, and, by so doing, he does not waive his mortgage lien, especially where the attachment suit is dismissed without ever having gone to trial. (p. 334.)

CHATTEL MORTGAGES—Election of Remedies—Estoppel.—There is no election of remedies where a chattel mortgagee sues out an attachment of the property, because the proceedings by attachment and to foreclose are not inconsistent; and the mortgagee is not estopped to foreclose his mortgage because the mortgagor incurred expenses in resisting the attachment, especially where other attachment suits had been commenced and the expenses were incurred as much for one as the other. (pp. 335, 336.)

Suit to foreclose a chattel mortgage upon certain household goods. The defendants, Maude McAuley and W. S. McAuley, pleaded a waiver of the mortgage and an estoppel based upon an attachment of the goods by the plaintiff. There was a decree dismissing the petition to foreclose, and the plaintiff appealed.

F. F. Keithley and John Newburn, for the appellant.

Bailey & Stipp and O. M. Slaymaker, for the appellees.

631 DEEMER, C. J. 1. Our attention upon oral argument was called to the fact that the record showed no jurisdiction in this court, for the reason that there is no showing that any decree had ever been entered in the case. This point is not raised in any of the printed matter filed in the case. There is nothing in appellee's contention, for the reason that the record shows all the orders and the judgment complained of. Moreover, it is provided by statute that: "All objection

to the jurisdiction of the court to entertain an appeal must be made in printed form stating specifically the ground thereof and served upon the appellant or his attorney of record not less than ten days before the date assigned for the submission of the cause": Acts 33d General Assembly, c. 206. This statute not having been followed, the point could not be considered, even were there anything in it as disclosed by the abstract.

2. There are two main questions in the case, and these are: First, did plaintiff waive his right to foreclose the chattel mortgage by reason of his levy upon the goods covered by the mortgage? and second, Is he estopped from foreclosing the mortgage because he caused defendant to go to expense in defending against the attachment? The facts are that, before commencing this action to foreclose the chattel mortgage, plaintiff brought suit against the defendants and others to recover judgment upon the note secured by the mortgage, and in that action caused a writ of attachment ⁶³² to be issued, which was levied upon all the mortgaged property, as well as some other goods not covered by the mortgage. Defendants were just starting to move to another town, and by reason of the attachment they were delayed somewhat, had to secure a delivery bond for the release of the property, and to employ lawyers to defend against the attachment. The original attachment suit, which was before a justice, was continued once or twice, and finally dismissed by plaintiff on the theory, as is now asserted, that the goods were exempt from attachment. This dismissal was entered without prejudice on the fifteenth day of February, 1909, and this suit to foreclose was brought on the eighteenth day of the same month. On these facts the trial court rendered judgment for the amount of the note in suit less payments, but denied the right of foreclosure, upon the theory that plaintiff had waived his mortgage, and was estopped from relying thereon.

The courts of the country do not seem to be agreed upon the first question presented for our determination, but the disagreement is more apparent than real. Upon the broad proposition it seems that the courts of Massachusetts, Maine, New Hampshire, Minnesota, Arkansas, and Oklahoma are committed to the doctrine that an attachment of the mortgaged property waives the lien of the mortgage: See *Evans v. Warren*, 122 Mass. 303; *Whitney v. Farrar*, 51 Me. 418; *Haynes v. Sanborn*, 45 N. H. 429; *Dyckman v. Sevatson*, 39 Minn. 132, 39 N. W. 73; *Cox v. Harris*, 64 Ark. 213, 62 Am. St. Rep. 187, 41 S. W. 426; *Dix v. Smith*, 9 Okl. 124, 60 Pac. 303, 50 L. R. A. 714. On the other side are the following: *Madison v. Rutten*, 16 N. D. 281, 113 N. W. 872, 13 L. R. A., N. S., 554; *Byram v. Stout*, 127 Ind. 195, 26 N. E. 687; *Barchard v. Kohn*, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803; *Howard*

v. Parks, 1 Tex. Civ. App. 603, 21 S. W. 269; State Bank v. Mottin, 47 Kan. 455, 28 Pac. 200; First Bank v. Johnson, 633 Neb. 641, 94 N. W. 837, 4 Ann. Cas. 485; Thurber v. Jewett, 3 Mich. 295. In so far as we have been able to discover, this question has never heretofore been decided by the court, so that we are free to adopt that rule which seems to be best supported by authorities and sound reason. The whole doctrine of waiver is based upon the theory that the respective liens are essentially different, and cannot coexist. See Evans v. Warran, 122 Mass. 303. When, then, a chattel mortgage conveys the legal title to the mortgagee, as in Massachusetts and some of the other states, affirming the doctrine of waiver, it is manifest that the conclusion reached in these jurisdictions is correct; for it is elementary, of course, that one may not attach his own property. But where the mortgage creates a mere lien upon the property, as in this state (see Code, section 2911), the reason for the rule does not exist and in such cases the rule itself is inapplicable. This distinction is pointed out in the cases from Illinois, Indiana and Nebraska heretofore cited. In this state the mortgagee has an equity of redemption under a chattel mortgage, which may be levied upon and sold (see Code, secs. 3905, 3979); and if this may be done, we see no reason why a mortgagee of the property may not himself levy upon this equity in the property itself without waiving his mortgage lien. In such a case he is not asserting title in himself in one proceeding and levying upon it in another. His rights, then, are simply cumulative, and in no sense inconsistent. This distinction is now generally recognized by courts and text-writers: See Jones on Mortgages, 5th ed., sec. 565; 7 Cyc. 551; Byram v. Stout, 122 Ind. 195, 26 N. E. 687; Barchard v. Kohn, 157 Ill. 579, 4 N. E. 902, 29 L. R. A. 803; First Bank v. Johnson, 68 Neb. 641, 94 N. W. 837, 4 Ann. Cas. 485. Moreover, it is quite generally held that, if the attachment suit does not go to judgment, there is no waiver: See Thurber v. Jewett, 3 Mich. 295; Ellinwood v. Holt, 60 N. H. 57; Dyer v. Cady, 20 Conn. 563; Conway v. Wilson, 44 N. J. Eq. 457, 11 Atl. 734; Macdonald v. Rutten, 16 N. D. 281, 113 N. W. 872, 13 L. R. A., N. S., 554. Even in ⁶³⁴ those states which adhere to the doctrine of waiver it is generally held that, if the title be in the mortgagor, and there be an equity of redemption subject to levy, there is no inconsistency in the two liens, and that an attachment of the property does not amount to a waiver of the mortgage lien: See Whitmore v. Tatum, 54 Ark. 457, 2 Am. St. Rep. 56, 16 S. W. 198, and, as supporting the same view, Cochrane v. Rich, 142 Mass. 15, 6 N. E. 781; Clark v. Ward, 12 Gratt. (Va.) 440. It may be said in this connection that, while we have not heretofore decided this question, we have absolutely refused to follow the doctrine announced

in the Oklahoma case of *Dix v. Smith*, 9 Okl. 124, 60 Pac. 303, 50 L. R. A. 714: See *Webster City Grocery Co. v. Losey*, 108 Iowa, 687, 78 N. W. 75. This whole matter is so thoroughly covered by the cases cited in a valuable note to *Dix v. Smith*, 9 Okl. 124, 60 Pac. 303, 50 L. R. A. 714, that nothing further need be added.

3. We do not think there was a waiver of the mortgage lien, especially in view of the fact that the attachment was dismissed and never went to trial. Had there been a sale of the property under execution growing out of the attachment proceedings, we would have a very different proposition. Appellees contend, however, that in analogous cases we have recognized a different rule; but a careful study of these will disclose that this is not correct. Of course, if a lien depends upon possession and continued possession is essential to the lien, the party holding such lien cannot surrender the possession through an attachment, and then assert his lien. This is all that is held in *Citizens' Bank v. Dows*, 68 Iowa, 460, 27 N. W. 459; *Lawrence v. McKenzie*, 88 Iowa, 432, 55 N. W. 505, and other like cases relied upon by appellee. See, in this connection, *Valley Bank v. Jackaway*, 80 Iowa, 512, 45 N. W. 881. Again, if one claims the legal title to property, his attachment thereof, being inconsistent with the claim of absolute ownership, constitutes a waiver. This is the rule of *Crawford v. Nolan*, 70 Iowa, 97, 30 N. W. 32. This ⁶³⁵ puts us in harmony with the rule in Massachusetts. And this is the rule of *Tone v. Shankland*, 110 Iowa, 525, 81 N. W. 789. It is sometimes put on the ground of waiver, and sometimes upon the principle of election of remedies; but in neither case does the rule apply unless the remedies actually exist and are inconsistent: *Moon v. Hartsuck*, 137 Iowa, 236, 114 N. W. 1043, and cases cited. A case not cited by either of the parties gives support to the doctrine already announced. It is *Patterson v. Linder*, 14 Iowa, 414. In that case it was held that a sale of real estate on execution from a judgment for the purchase price does not extinguish, discharge, or waive a vendor's lien: See, also, *Blotcky v. O'Neill*, 83 Iowa, 574, 49 N. W. 1029; *Pitkin v. Fletcher*, 47 Iowa, 53; *Rollins v. Proctor*, 56 Iowa, 326, 9 N. W. 235; *Gilcrest v. Gottschalk*, 39 Iowa, 311; *Hawley v. Warde*, 4 G. Greene, 36; *Atlantic T. Co. v. Carbondale C. Co.*, 99 Iowa, 234, 68 N. W. 697. Our conclusion is that, in so far as our cases bear upon the subject, they are in accord with the rules announced.

4. As already suggested, there was no election of remedies in the case, for the reason that the proceedings were not inconsistent, and for the further reason that no such election was pleaded.

5. The claim of estoppel has no support in the testimony, for the reason that plaintiff is not taking inconsistent posi-

tions, and for the further reason that the expenses incurred by defendants in the attachment suit do not constitute a bar for an estoppel: *Bull v. Keenan*, 100 Iowa, 144, 69 N. W. 482; *Dorris v. Miller*, 105 Iowa, 564, 75 N. W. 482. If plaintiff sued out the attachment wrongfully, doubtless defendants would have their remedy, but the mere fact that they made a defense to that suit, and were successful in securing a new suit, even at some expense to themselves, will not serve as a basis for an estoppel: *Warder v. Baker*, 54 Wis. 49, 11 N. W. 342; *Wallis v. Truesdell*, 6 Pick. (Mass.) 455; *Henderson v. McMahill*, 75 Iowa, 217, 9 Am. St. Rep. 472, 39 N. W. 217; *Brown v. Holden*, 120 Iowa, 191, 94 N. W. 482. Again it appears from the record that two other attachment suits were commenced against defendants, and levies made upon the property, before plaintiff commenced his attachment suit, and that he procured delivery bonds and was delayed in the shipment of goods, and that his expenses were incurred much for one attachment suit as the other. Surely under such a state of facts there was no estoppel.

The trial court was in error in denying the decree of foreclosure under the testimony and the issues joined, and the case must be reversed and remanded for a decree in harmony with this opinion.

That a Chattel Mortgage Creates a Lien Only, and does not pass title from the mortgagor to the mortgagee, see Demers v. Graham, Mont. 402, 122 Am. St. Rep. 384; Ayre v. Hixson, 53 Or. 19, 9 Am. St. Rep. 819.

As to When a Levy of Attachment on Mortgaged Chattels is not Valid, see Hibbard v. Zenor, 75 Iowa, 471, 9 Am. St. Rep. 497.

SMITH v. SANBORN STATE BANK.

[147 Iowa, 640, 126 N. W. 779.]

CONTRACT—Damages for Breach—Mental Anguish.—Damages for mental anguish, because of the violation of a contract, are confined almost entirely to that class of contracts upon the breach of which the injured party may, if he so elect, bring an action sounding in tort. (p. 338.)

CONTRACT TO PAY MONEY—Damages for Breach—Mental Anguish.—Damages for mental anguish growing out of the violation of a contract for the payment of money are not recoverable. (p. 338.)

CONTRACT TO PAY MONEY.—Damages for Breach of Contract.—Damages for breach of contract in failing to pay or deliver money according to agreement are generally confined to the sum wrongfully withheld, with interest during the time payment is delayed. Special circumstances may

sometimes justify the recovery of special damages, but these do not include compensation for mental suffering. (p. 339.)

BANKS AND BANKING—Application of Deposit to Debt.—

A bank to whom a depositor is owing a matured indebtedness may appropriate the general deposit of its debtor to the discharge of the obligation, but a deposit made for a special purpose, or under a special agreement, cannot rightfully be so appropriated. (p. 339.)

C. A. Babcock, for the appellant.

No appearance for the appellee.

⁶⁴¹ WEAVER, J. Stated as briefly as practicable, the plaintiff's petition alleges that in October, 1908, he became the owner of a certain check or bill of exchange payable to himself for the sum of two hundred dollars, and took the paper to the plaintiff's bank, and sought to obtain the money thereon. In so doing he expressly informed the officer in charge that he desired to use the money in paying a rent claim of forty dollars held by said bank for collection and the remainder in defraying the expenses of immediate medical and surgical treatment of his wife, whom he expected to remove to a hospital in the city of St. Paul, in the state of Minnesota, on the following day, and that the money represented by said check was necessary to enable him to do so. Thereupon said bank officer told plaintiff that the safe in which the ⁶⁴² funds of the bank were kept had been locked for the night, but that plaintiff could leave the draft as a deposit, together with a check for forty-three dollars, to cover both the rent claimed and an item of three dollars which he was owing the bank, and the remainder could be drawn by him as the money might be needed in the treatment of his sick wife. On the following day, having given checks to others to an amount which reduced the deposit to one hundred and one dollars and fifty cents, he called at the bank to obtain the same for the purpose of taking his wife to the hospital, but defendant refused to pay it over, informing him that it had applied the deposit upon a promissory note which it held against him. Upon this showing plaintiff asks to recover judgment for the sum of money so withheld, without interest. In a second count of the petition the same facts are set forth, and it is further alleged that the money represented by said check constituted the only means he had with which to secure the necessary treatment of his sick wife, and that, being poor and without property on which to secure a loan, he was delayed several days in obtaining the necessary assistance to aid him in carrying out his purpose to take his wife to the hospital, and that as a result thereof he was put to great labor and trouble and made to suffer great humiliation, anxiety and distress of mind, for which he asks damages in the sum of five hundred dollars. The defendant admits the receipt of the check for two hundred

dollars, alleges that it paid therefrom on plaintiff's check the sum of ninety-eight dollars and fifty cents, and that it applied and now asserts the right to retain the remainder in payment of a promissory note which it then held against the plaintiff. The evidence fairly tends to sustain the allegations of the petition.

At the close of plaintiff's case, defendant moved for a directed verdict in its favor on the grounds: (1) That it is shown without controversy that plaintiff's deposit being an open account subject to check, the bank had the legal right and authority to apply it in payment of plaintiff's ⁶⁴³ note. (2) That the law allows no recovery of damages for mental suffering occasioned by breach of contract, and that the damages which plaintiff seeks to recover are too remote, indirect and speculative to sustain a verdict in his favor on the second count of the petition. This motion was sustained by the court. Verdict returned as ordered, and judgment for costs entered against plaintiff, who appeals.

Actuated perhaps by the same spirit of saving which led it to violate its agreement with plaintiff to receive and hold the money for his use in the treatment of his sick wife, the appellee has employed no counsel to represent it in this court and we are therefore deprived of the benefit of a brief in support of the judgment which it obtained below, and there is nothing in the record to equitably incline this court to seek for reasons to sustain it. We may assume, perhaps, that the appellee's view of the law governing the cause, as well as the view of the trial court thereon, is epitomized in the grounds of the motion for a directed verdict to which we have already called attention.

Referring first to the second proposition of the motion, we are obliged to hold that the damages for which recovery is demanded in the second count of the petition are too remote and that the trial court correctly held that no case for the jury had been made on this branch of the case. That such damages have been held recoverable in certain cases growing out of contract rights and relations must be admitted, but these are to be found almost entirely in that class of contracts upon breach of which the injured party may, if he so elect, bring an action sounding in tort. Familiar examples of this nature are found in cases upholding the recovery of such damages for negligence in the transmission and delivery of telegrams: *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, 57 Am. St. Rep. 294, 62 N. W. 1, 28 L. R. A. 72; *Cowan v. Western Union Tel. Co.*, 122 Iowa, 379, 101 Am. St. Rep. 268, 98 N. W. 281, 64 L. R. A. 545. Of the same character ⁶⁴⁴ are certain cases against common carriers: *Brown v. Chicago etc. R. R. Co.*, 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911; *Sloane v. Southern Cal. R. R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193. But no case has been called to our attention, nor do we think

one can be found, which holds that damages are recoverable for mental anguish growing out of the violation of a contract for the payment of money. To so hold would be to open the door to a ruinous flood of litigation. Occasions will arise when it would seem that such a recovery is demanded in the interests of justice, but it is better that the exceptional wrong should sometimes go unrequited than to abrogate a rule which in the vast majority of cases had a salutary effect. Generally speaking, failure to pay or deliver money according to agreement gives rise to no recoverable damages beyond the sum wrongfully withheld with interest during the time payment is delayed. Special circumstances may sometimes justify the recovery of special damages, but these do not include compensation for mental suffering.

As to the first ground of the motion for the directed verdict which is in substance that under the undisputed facts of the case the defendant bank had the right to apply the deposit to the payment of the note, we are of the opinion that it cannot be sustained, and that the trial court erred in directing a verdict against plaintiff thereon. Of the general rule that a bank to whom a depositor is owing a matured indebtedness may appropriate the general deposit of its debtor to the discharge of the obligation there can be no doubt: *Aetna Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Knapp v. Cowell*, 77 Iowa, 528, 42 N. W. 434. But it is no less certain that a deposit made for a special purpose or under a special agreement cannot rightfully be so appropriated: *Wilson v. Dawson*, 52 Ind. 513; *Strauss v. Tradesmen's Nat. Bank*, 36 Hun (N. Y.), 451, 122 N. Y. 379, 25 N. E. 372; *Judy v. Farmers' & Traders' Bank*, 81 Mo. 645 404; *Bank of United States v. Macalester*, 9 Pa. 475; *Masonic Sav. Bank v. Bangs' Admr.*, 84 Ky. 135, 4 Am. St. Rep. 197. Indeed, the proposition that a bank enjoys no exemption from the general rule by which every party to a business transaction or agreement is legally bound to respect the obligation of his contract is one which ought to require neither argument nor citation of authority. The evidence shows without dispute that the check for two hundred dollars was placed with the defendant upon the express agreement and understanding that, after paying certain specifically named debts, the remainder would be repaid to the plaintiff on the following day, or whenever called for to enable him to take his wife to the hospital for needed treatment. Upon money so received, no lien attached in favor of the bank, and its attempt to appropriate the same was wholly without right or authority. Upon such a record plaintiff was clearly entitled to recover.

It follows that the direction of a verdict in defendant's favor upon the first count of the petition cannot be sustained, and the judgment of the trial court is therefore reversed.

Mental Suffering as an Element of Damage: See notes to Wyman v. Leavitt, 38 Am. Rep. 306; West v. Western Union Tel. Co., 7 Am. St. Rep. 534; Ewing v. Pittsburgh etc. Ry. Co., 30 Am. St. Rep. 711.

The Measure of Damages for the Breach of a Contract to Pay Money: no matter what amount of inconvenience is sustained by the plaintiff has been held to be only the interest on the money: Bethel v. Sales Imp. Co., 93 Va. 354, 57 Am. St. Rep. 808. See, on this question Bixby-Thiersen Co. v. Evans, 167 Ala. 431, ante, p. 47.

The Right of Bankers to Apply Deposits to the Indebtedness of the Depositor is discussed in the note to Garrison v. Union Trust Co., 1 Am. St. Rep. 421.

IN RE WILL OF VAN HOUTEN.

[147 Iowa, 725, 124 N. W. 886.]

WILL CONTEST—Testamentary Capacity—Review.—In considering whether a verdict should have been rendered in favor of the proponents of a will, the court on appeal will assume the truth of the contestant's evidence that there was a want of testamentary capacity. (p. 342.)

WILL CONTEST—Mental Capacity and Undue Influence—Review.—In a will contest, where the questions of mental incompetency and undue influence are both submitted to the jury, and both are determined affirmatively, the fact that the finding upon one of them is without support in the evidence does not entitle the proponent to a reversal if there is evidence on which the other finding can be upheld. (p. 343.)

WITNESS—Transaction With Decedent.—An heir who is contesting a will, and who took part or participated in a transaction in which the testator gave or renewed a promissory note, is incompetent to testify concerning it. (p. 343.)

WILL CONTEST—Offer of Judgment in Evidence—Review.—If the abstract shows that the proponents of a will identified and offered in evidence, separately, the notice, petition, and answer in proceedings to have the testator adjudged mentally incompetent and to appoint a guardian for his estate and to appoint a guardian for that purpose, and the record of the proceedings was also offered, among such proceedings being a judgment dismissing the petition on the merits, it must be held that there was a sufficient offer of the judgment to permit a review of the ruling excluding it. (p. 344.)

WILL CONTEST—Mental Capacity—Judgment in Guardianship as Evidence.—Where proceedings were instituted for the appointment of a guardian of the estate of a testator, on the ground of mental incompetency, a judgment dismissing the proceedings is admissible on a contest of the testator's will, made before such proceedings, as bearing upon his mental condition at the time of the execution of the will. (p. 344.)

Proceedings for probate of will, and contest by certain heirs. From a judgment for contestants proponents appeal.

Hayes & Amos and George G. Gaass, for the appellants.

S. A. Reynolds, John N. McCoy and F. H. Peterson, for the appellees.

ER, J. The objections to the probate of the will upon the alleged mental incompetency of the testator, and the alleged undue influence under which it was executed. Van Houten was a native of Holland, who emigrated to Iowa after arriving at years of maturity. He was educated, had been a teacher, and until he came to Iowa and settled in Iowa had not been engaged in any other business. He was born in the year 1812, and was twice married. In his first marriage he had several children. His first wife was a widow and brought to the family several children from her first marriage and one child born to her and Van Houten. After tarrying awhile in the Eastern states he came to Iowa in 1853, and founded a home in a Dutch town in the central part of the state. Here he resided until his death at the advanced age of about ninety-six years. He owned a farm of some three hundred to four hundred acres, which was paid for, and he enjoyed a fair degree of comfort and prosperity. Not being reared as a farmer, he did but a little of the actual work of cultivating and improving his land, but for many years relied very largely on his children and stepchildren, most of whom continued to live on the farm, assisting in working and caring for the farm, and in the years after reaching their majority. In time, all of his children, save a daughter who remained with him, and of his life, went out to their own homes, or engaged in their own enterprises. Among the children of Van Houten's marriage were two sons Elko and William, who were the contestants herein. The two sons had both gone into business on their own account, met with success, and their father was compelled to pay debts of a considerable amount contracted by them, and on which he acted as their surety. After this occurrence the father and sons became for a time at least estranged, and he was wont to refer to his financial loss and the consequent bitterness. With advancing years he became more and more extent debilitated, physically, and, as concluded, mentally as well. In 1904, or perhaps a year or two before that date, he called upon Mr. Neyenesch, a Dutchman and fellow countryman, to prepare his will. Mr. Neyenesch drew the will, as he says, according to the oral dictation of Van Houten, and it was then duly signed by him. By this instrument he gave to his son Elko one dollar only. To his minor grandson, William, he gave a half interest in fifty acres of land, and certain books, but made no provision for William, or for the property given the grandson until he reached his majority. The bulk of the remainder of his estate, both real and personal, he gave to Syke Van Houten, his daughter who had remained with him and cared

for him. On January 20, 1906, he called Mr. Neyenesch to his ⁷²⁸ home, and procured him to prepare a new will which was executed, and the first instrument destroyed. The principal change made by the later will in the disposition of his estate was the withdrawal of a small bequest made to his daughter Neeltje Van der Tunk, living in Holland. As to his sons Elko and William, the second will was a copy or repetition of the first. In 1908, two and one-half years after the execution of the second will, and four years at least after the date of the first one, William Van Houten filed petition in the district court, alleging that his father Henry Van Houten was of unsound mind and incompetent to manage and care for his property, and was wasting the same, for which reasons he asked the court to appoint guardian to care for and preserve the estate. The deceased appeared to this proceeding, and joined issue upon the allegation of the petition, and alleged his perfect competence to manage and control his own property and business. The cause was tried to the court, which found the allegations of the petition had not been sustained, and entered judgment for the defendant. Among other things put in evidence upon said trial was the deposition of Henry Van Houten, which has been introduced into the present record.

The foregoing statement of some of the salient features of the history of this controversy has seemed necessary in order to make entirely clear the point and bearing of appellant's exceptions to certain rulings of the trial court. As has already been stated, the contestants allege, first, that at the date of the will the testator was of unsound mind, and without testamentary capacity; and, second, that the execution of the will was procured by undue influence exercised by the daughter Syke Van Houten and others. The jury found for the contestants on both propositions.

1. It is contended for the appellants that there is no evidence upon which the finding against the testamentary ⁷²⁹ capacity of the deceased can be sustained, and that the court should have directed a verdict thereon in favor of the proponents. As a new trial must be awarded for reasons hereinafter stated, it is proper that we refrain from an discussion of the evidence further than to say that, while the testator is shown to have been a man of much more than ordinary intelligence, and appears to have retained his faculties in a remarkable degree to an age beyond the year allotted to an average person, yet if we assume the truth of all the evidence offered in support of the contestant's claim (and we must so assume in considering whether a verdict should have been directed), we cannot say as a matter of law that it did not present a question of fact for the jury.

ul examination of the record discloses an entire evidence on which to base a finding of undue influence in our judgment this question should have been from the jury. But the court is committed to t, where the questions of mental incompetency influence are both submitted to the jury, and ermined affirmatively, the fact that the finding them is without support in the evidence does he proponent to a reversal if there is evidence e other finding can be upheld: Will of Sellick, 8, 101 N. W. 453; Betts v. Betts, 113 Iowa, 111, 5; Wharton's Estate, 132 Iowa, 714, 109 N. W. question were one of first impression, the be strongly inclined to the opposite conclusion, that manifest error in the submission of either d particularly where the finding of the jury so manifestly erroneous, is ground for reversal; as stated has been too often followed to be now thout introducing unfortunate confusion in our

testant William Van Houten, as a witness in lf, was permitted, over the objection 730 to his to testify to a transaction in which his father 1905 gave or renewed a promissory note to one o detail the conversation had and other incidents ion. It is the claim of the appellants that this part or participated in the transaction referred therefore incompetent to testify concerning it. ecord presented we think the objection should stained. According to the showing of the wit- he was there at the suggestion of Tilma to see hing was done straight," or, as we understand n, to protect the interests of his father, and see ntage was taken of him. He further says there here but himself to act for his father, and that the note for his father's signature. That he ne it at the request or suggestion of Tilma in- father is immaterial. He was a factor in that and clearly within the prohibition of the statute. ponents offered in evidence the original notice, wer and judgment in the proceedings to which e referred as having been instituted by William to have his father adjudged mentally incom- re for his estate and to appoint a guardian for . The court sustained the contestants' objec- offer, but after the case had been closed, and been submitted to the jury, changed the ruling admitted in evidence the original notice, petition Error is assigned upon the exclusion from the

jury of the judgment dismissing said proceedings. Appellees contend that the record does not show any offer of the judgment in evidence, but we think it sufficiently appears. It is shown by the abstract, and not denied, that the proponents identified and offered separately the notice, the petition, and the ⁷³¹ answer. It is also shown that the record-book was produced, the record of the proceedings in said case was also offered, and that among such proceedings is a judgment dismissing the petition on the merits. To hold with appellee that this does not show a sufficient offer of the evidence to permit a review of the ruling excluding it would be to demand a technical precision to which very few abstracts submitted to this court ever attain.

We have therefore to consider whether the judgment in testator's favor in 1908, upon the question of his mental incompetency, was competent and admissible in evidence as to his mental condition in 1906 at the date of the will in controversy. From the fact that sanity or insanity exists at a given time it does not necessarily follow that the same condition existed at a date two years earlier, though in certain forms of mental unsoundness inferences may be drawn as to the period of its development and the probability or improbability of its continuance. In this case, if the testator's mind was unsound at the date of the will, it is entirely certain that such unsoundness was of the kind usually called "senile dementia" or senile decay, a decay of mental power resulting from old age. It is progressive and incurable. While the process of deterioration may sometimes be delayed, the ground lost is never recovered. There are no periods of convalescence, no lucid intervals, and when once a condition of incompetency is reached, it is, in the very nature of the case, permanent. It follows inevitably that if the proponents of a will made in 1906 can establish to the satisfaction of the jury that the testator was mentally competent to transact business in 1908, he was not a senile incompetent at the date of the will made in 1906, and if judgment in the guardianship proceedings has any probative force or value on that proposition, its offer in evidence should have been sustained. The question is one which has been quite frequently considered in other states, but ⁷³² so far as we have been able to discover has never been directly ruled upon by this court.

In *Re Fenton's Will*, 97 Iowa, 192, 66 N. W. 99, the point was raised, but the decision thereof was expressly reserved. It is manifest that such record cannot be admitted as evidence of a former adjudication in the ordinary sense of that term. It is more nearly like a finding in a proceeding in rem where, as a matter of public interest and right, and for

section, the mental competency of an individual. If a person be insane, and thereby a menace to society, or, if not violent or dangerous, yet so mentally that he is liable to waste his estate and become idle, the law provides methods by which the rights of the public and of the insane person himself are preserved and protected. If it be thought desirable to restrain of his liberty or committed to a hospital, complaint may be laid before the commissioners of his county, and upon hearing the truth judicially determined and proper orders made. But if restraint be thought not necessary, he may be brought to court, and if the charge of insanity is sustained, a guardian will be appointed and authorized to take control of his property. In neither case is the insane an adversary one in the same sense that the plain defendant can be granted any relief against the defendant. A plaintiff may be a prospective heir or a creditor, and the proceedings hope to indirectly benefit himself, in such capacity or right that he is permitted to bring the proceedings. Any citizen of the jurisdiction may bring it, and in so doing he represents the insane defendant be adjudged mentally incompetent. In such case an administrator may be appointed, every person—or at least every person within that jurisdiction—is held to take notice of it, and thereafter dealing with the one under guardianship is at his peril. In New York and some ⁷³³ other jurisdictions contracts made with a person under guardianship are absolutely void, even though made with strangers having full knowledge of the ward's mental incapacity: *Wright v. Crosby*, 2 Paige (N. Y.), 422, 22 Am. Dec. 511; *North v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 511. As to contracts made before lunacy proceedings instituted, if the finding is to the effect that mental incapacity has existed from a time anterior to the making of the contracts, the inquiry is held to be prima facie evidence of incapacity at such date. But the presumption is exclusive or rebuttable, "extends to all the world, and binds all persons, whether they have notice of the insanity or not": *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 100; *St. Rep.* 386, 5 L. R. A. 637; *Hart v. Deamer*, 100 N. Y. 497; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 391. See also *Greenleaf on Evidence*, sec. 556. In most jurisdictions the rule is somewhat less rigid than in New York, and is everywhere held with almost entire unanimity that insanity, whether of soundness or unsoundness, is at all times prima facie evidence of the fact so found: See 17 Am. Ency. of Law, 2d ed., 606; 7 Ency. of Evidence, 477.

Speaking to this point, Mr. Wigmore says: "There is not and never has been, any doubt as to the admissibility of an inquisition of lunacy in any litigation whatever to prove the person's mental condition at the time. The only controversy has been whether it is conclusive": 3 Wigmore's Evidence, sec. 1671. Treating of the same subject, another author says: "An adjudication of insanity will stand thenceforward until reversed as proof of the fact, and the burden of proof will shift to the party alleging sanity. So if the finding of the former tribunal established the sanity of the party, it seems that finding, while not conclusive of sanity, is competent evidence to prove it": Buswell on Insanity, sec. 194. To say that the finding of the court that the defendant is sane is of no force or ⁷³⁴ effect, except as against the person entering the complaint, would give rise to gross injustice. If such were the rule, on the very day he is found sane in an action brought by A, he may be subjected to a second action by B. and so on indefinitely until he is exhausted in both mind and estate, or a dozen such proceedings might be pending against him at the same time, and none be subject to a plea in abatement on the ground of another action pending. Surely such cannot be the intent of the law, and an adjudication once had in an action regularly brought and prosecuted must be given some force and effect against the world at large, and it is well within the bounds of reason and precedent to say that it affords at least prima facie proof of his status as there found: *Den v. Clark*, 10 N. J. L. 217, 18 Am. Dec. 417. It follows that the record of the adjudication in the guardianship proceedings should have been admitted in evidence.

Other questions argued are not likely to arise on another trial, and need not be further considered.

For the reasons stated, the judgment of the district court is reversed, and cause remanded for further proceedings not inconsistent with the foregoing opinion. Costs of this court will be taxed to the contestants.

ADJUDICATION OF INSANITY, OR EXISTENCE OF GUARDIANSHIP, AS SHOWING WANT OF CAPACITY TO EXECUTE CONTRACTS, MAKE WILLS, AND THE LIKE.

I. Adjudication of Insanity.

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Reliability of Record as Evidence, 357.

I. Adjudication of Insanity.

Observations.—At common law, the king's right to control lunatics and their estates did not commence until royal authority was given to the lord chancellor to issue a commission to inquire as to the fact of idiocy or lunacy, and the procedure was by petition suggesting the lunacy. A finding of lunacy was an inquiry made by a jury before a justice of the peace or other government officer, or by a commission appointed, concerning any matter that entitled the king to the possession of lands or tenements, goods or chattels, or to the escheat, forfeiture, idiocy, and the like: *Hughes v. Hughes*, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. Rep. 386, 5 L. R. A. 637. A finding of lunacy cannot determine anything, except the fact of the alleged lunatic. It cannot settle any question of the validity of the finding by a jury that a lunatic had, at the time, or that the lands, is of no force whatever as against one claiming under the deed: *Hughes v. Jones*, 116 N. Y. 67, 15 Am. St. Rep. 386, 5 L. R. A. 637.

A finding of the mind of a person is shown to have been of such a character for a considerable period of time, an adjudication as to the fact of lunacy at one date during the period is competent evidence to establish the fact claimed to have been affected by such condition at any other date, upon the theory that it is reasonable to say that the mind was determined at one time during the period to indicate incompetency indicate the same at other times during the period whether before or subsequent to the adjudication: *Small v. Small*, 102 Wis. 61, 78 N. W. 407.

All acts done by a lunatic during a lucid interval are considered as done by a person perfectly capable of contracting, and disposing of his affairs, at that period. This is especially true in cases involving wills. A multitude of cases have been raised upon the execution of a will during a lucid interval, and, that being proved, the will has been held valid for all intents and purposes for the conveyance of real estate, as if the testator had never been deranged. It is the same as to contract, or any disposition of property. An act done, made in a lucid interval, would be good: *Hall v. Hall*, 102 Wis. 605, 32 Eng. Reprint, 738.

There is no distinction between mental incapacity whether caused by insanity, sickness or disease, and it therefore follows that a finding of insanity does not necessarily disqualify a testator from making a will: *In re Ayers' Estate*, 84 Neb. 16, 120 N. W. 491. Courts have even gone so far as to say that, when there is no finding of insanity on the face of the will by one habitually insane, the will is presumed to have been made in a lucid interval: *Kingsbury v. Kingsbury*, 32 La. Ann. 1055, 36 Am. Rep. 278. "The medical evidence," said Calkins, Commissioner, in *Re Ayers' Estate*, 120 N. W. 491, "as given by Dr. Hammond in his

work on Diseases of the Nervous System, page 332, is a manifestation of disease of the brain characterized by a general or partial derangement of one or more of the faculties of the mind, in which while consciousness is not abolished, mental freedom is perverted, weakened, or destroyed." Continuing, the learned commissioner said: "The older view regarded the human mind as a single indivisible potency not comprising distinct functions, and consequently that a impairment thereof must be absolute, and not partial. But modern medical science recognizes, as shown by the definition above quoted, that there may be a partial derangement of one or more of the faculties of the mind, leaving others practically unimpaired, and hence arises what is called partial insanity. This court has laid down the rule that where the insanity is not general, the question to be determined is whether the subject was the victim of such delusions controlled his actions and rendered him insensible to the ties of blood and kindred. In the case cited, *In re Ayers' Estate*, 84 Neb. 120 N. W. 491, it was shown that the testator had, on various occasions, been temporarily confined in a hospital for the insane, but that in the intervals he was competent to transact his ordinary business with judgment and discretion, and the application for the probate of the will was granted, it appearing that his mind was not so diseased that mental freedom was perverted, nor his understanding so destroyed that he was incapable of knowing and comprehending in a general way the natural objects of his bounty, the nature and extent of his estate, and the distribution he wished to make of

b. Presumptions and Burden of Proof.

1. *In General.*—An adjudication of mental unsoundness per se is evidence only of the mental condition of the subject at the time of such adjudication and thereafter, upon the theory that a condition of mind once shown to exist is presumed to continue: *Smith v. Champeny*, 102 Wis. 61, 78 N. W. 407. Contracts with lunatics and other persons of unsound mind made before office found, but within the period overreached by the finding of the jury, are not void, although they are presumed invalid until capacity to contract is shown by satisfactory evidence: *Hughes v. Jones*, 116 N. Y. 615 Am. St. Rep. 386, 22 N. E. 446, 5 L. R. A. 637. In the case of a purchase from a lunatic, the finding of the inquest is evidence of lunacy for the jury. Such finding is not limited merely to shifting the burden to the purchaser of showing a lucid interval; but the burden of showing a lucid interval, or sanity, is upon the purchaser after satisfactory proof of insanity: *Rogers v. Walker*, 6 Pa. 374 47 Am. Dec. 470.

The presumption of continued insanity arising from an adjudication thereof may be overcome by evidence other than an adjudication of restoration. For instance, where a married man residing in this state, and adjudged insane, went to another state, and resided there for several years, being always considered as sane, and there procured a divorce on service by publication without actual notice to the wife, which divorce he set up as a bar to a subsequent action for divorce brought by her, he must be regarded as sane: *Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779.

2. *Respecting Testamentary Capacity.*—The fact that a person has been found insane by a commission of lunacy does not of itself

incompetency of the subject to make a will. The question-
ary capacity is still open for inquiry; but the
of insanity, particularly in view of the fact that the
insane, throws the burden of proving testamentary
e one who propounds for probate a will executed by
ween the date of such adjudication and the date of his
Taylor's Will, 1 Edm. Sel. Cas. 375. See, also, In re
174 Pa. 373, 34 Atl. 603.

presumption of sanity after a judicial determination against a testator in his lifetime, prior to the execution, or within the period covered by the finding of the burden is on the proponents to show that reason had not at the will was executed during a lucid interval: *Wills*, 19 Misc. Rep. 71, 44 N. Y. Supp. 90; *In re Will*, 34 Misc. Rep. 439, 69 N. Y. Supp. 1014, affirmed, 136, 77 N. Y. Supp. 663. A finding of lunacy casts the burden of mental capacity on those propounding the will as lunatic, whether such finding was with or without *Titlow v. Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *In re Titlow*, 174 Pa. 373, 34 Atl. 603.

on Between Wills and Contracts.—Insanity, when once
 med to continue: In re Hoopes' Estate, 174 Pa. 373, 34
 notwithstanding the finding of the jury, in lunacy
 at a person is insane, he may nevertheless make a will
 aff evidence that he has testamentary capacity. As to
 ver, of a legally declared lunatic, a distinction is
 fferent rule invoked. After a final determination as
 y, he is unable to enter into any contract, and the
 ny contract which he has endeavored to make is in-
 ux v. Crosby, 2 Paige, 422, 22 Am. Dec. 655; Wadsworth
 8 N. Y. 388, 59 Am. Dec. 499; Hughes v. Jones, 116
 n. St. Rep. 386, 22 N. E. 446, 5 L. R. A. 637.

tion of the continuance of the lunacy is conclusive con-
 clings with the lunatic after the inquisition and until
 perseded: *Carter v. Beckwith*, 128 N. Y. 312, 28 N. E.
 n *Hughes v. Jones*, 116 N. Y. 67, 15 Am. St. Rep. 386,
 5 L. R. A. 637, all contracts of a lunatic, habitual
 erson of unsound mind, made after an inquisition and
 ereof, are void until, by permission of the court, he is
 me control of his property. Contracts with lunatics and
 f unsound mind made before office found, but within
 rreached by the finding of the jury, are not utterly
 they are presumed invalid until capacity to contract
 atisfactory evidence. That the findings of the jury
 cases last referred to are only presumptive and not
 ence of insanity, see, also, *Van Deusen v. Sweet*, 51
 may be said here that a petitioner for an inquisition
 t a party thereto in any different sense than any other
 not personally estopped by the findings of the jury,
 he world is estopped. He may, therefore, show that
 y the alleged lunatic at any time prior to the filing
 a was made by him while he was of sound mind:
 es, 116 N. Y. 67, 22 N. Y. 446, 15 Am. St. Rep. 386,

c. Admissibility of Record and Other Evidence.

1. **In General.**—An inquisition of lunacy, finding one to be of unsound mind, etc., is admissible in evidence, by way of showing incompetency to convey lands: *Osterhout v. Shoemaker*, 3 Hill (1845), 513. It has been admitted to show the mental capacity of the obligor of a bond, the defendant's intestate: *Faulder v. Silk*, 3 Cam. 125; to prove the lunacy of an obligor in an action of debt on a bond: *Hart v. Demer*, 6 Wend. 497; and to prove the mental capacity of an ancestor, found to be a lunatic, at the time of a purchase made by him: *Sergeson v. Sealey*, 2 Atk. 412, 26 Eng. Reprint, 64. In fact, there is no doubt of the admissibility of an inquisition of lunacy, in any litigation whatever, to prove the person's mental condition at the time, but there is some difference of opinion as to its conclusiveness, and also upon the question whether the person's mental condition at the time of the inquisition is evidence of his condition at the time in issue. After a finding of lunacy or habitual drunkenness, the record of the inquisition with the finding is admissible in evidence, but, if the inquisition is traversed, and the respondent has given evidence in answer to the inquisition, the record may give evidence in rebuttal to establish the finding: *McGinnis v. Commonwealth*, 74 Pa. 245.

It is sufficient, in an analogous proceeding, such as one to establish habitual drunkenness, to find that fact; the law then establishes incapacity and the jury on a traverse need not determine the respondent's ability to transact business. They decide only the habit of drunkenness: *McGinnis v. Commonwealth*, 74 Pa. 245.

An inquisition of lunacy may be impugned by a third person by any competent evidence tending to show that the alleged lunatic was of sound mind at the period embraced in the inquisition; and the procedure, technically called a traverse of the inquisition, need not be first pursued: *Den v. Clark*, 10 N. J. L. 217, 18 Am. Dec. 41. But, on the trial of the traverse of an inquisition in lunacy, it is competent to admit, as prima facie evidence only, the finding of the sheriff's jury to make a formal completion of the plaintiff's case: *Commonwealth v. Harrold*, 204 Pa. 154, 53 Atl. 760. Statements, however, made by a lunatic after the committee was appointed, are inadmissible in an action brought by the committee, where there was no offer to prove that such statements were made in a lucid interval: *Hottle v. Weaver*, 206 Pa. 87, 55 Atl. 838.

The general rule is, that an adjudication as to mental soundness is direct evidence of the fact at the time of the adjudication, and presumptive evidence of the condition of the subject at a subsequent time, upon the theory that a condition of mind once shown to exist is presumed to continue. It is not evidence of itself of the mental soundness of the subject at any time prior to the adjudication. In the absence of independent evidence showing that the same condition of mind existed at the prior time as at the time of the adjudication and had been continuous in the meantime, it is not admissible to call in a controversy as to such condition at such prior time: *Small v. Champeny*, 102 Wis. 61, 78 N. W. 407. In a suit to set aside an exchange of land on the ground of plaintiff's insanity, an inquest held some twenty years subsequently to the exchange of the properties is inadmissible to affect the defendant's rights at the time the trade was consummated: *Rhoades v. Fuller*, 139 Mo. 179, 40 S. W. 76.

non law, an inquisition finding one a lunatic upon the
matico inquirendo was prima facie, and sometimes con-
ce of his lunacy as to anyone and in collateral proceed-
mere finding of a judge, in this country, committing
ital for the insane does not have that effect, because
o commit one as insane is simply to ascertain whether
erson alleged to be insane is a fit subject for custody
in the hospital. It does not pretend to declare the
ted to the hospital to be incapable of transacting busi-
not take from him the care and management of his
ords a justification for the restraint of his person,
signed to fix his status: *Leggett v. Clark*, 111 Mass.
Haug, 48 Minn. 58, 50 N. W. 934; *Dewey v. Algire*,
Am. St. Rep. 468, 55 N. W. 276.

It is being held that proceedings for the commitment of a person alleged to be insane are not evidence of mental incapacity, and that a person committed to a hospital for the insane, to make a deed, *Ex v. Haug*, 48 Minn. 58, 50 N. W. 934; that the record of such proceedings is not admissible for the purpose of proving insanity in an action brought to avoid a conveyance made by such person, *Ex v. Algire*, 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 100; that a writ of entry by a woman to recover land from her husband and her husband had given a deed therefor, on the ground of the husband's insanity at the time he joined in the deed, is not valid, and that a judge of the probate court committing the husband to a hospital is inadmissible to prove his insanity: *Leggate v. Leggate*, 101 Mass. 308.

Final Cases.—A proceeding for the commitment of a person to be insane being a creature of the statute and intended to determine only whether the person alleged to be insane is a proper subject to be admitted as a patient, for treatment in an insane hospital, the record of the proceeding, as well as in civil cases, is not evidence, or, at most, only prima facie evidence of the fact of insanity: *State v. State*, 46 Neb. 493, 64 N. W. 1094. An improperly certified copy of the records of a state insane hospital have been held not to show hereditary insanity of a defendant charged with murder: *Naanes v. State*, 143 Ind. 299, 42 N. E. 609. The proceedings of an examination by a commission as to the sanity of a defendant in a criminal case, made a short time before trial, and showing that he was not insane, but at times incompetent to escape criminal prosecution, is not admissible to prove insanity, offered in defense to a charge of grand larceny: *Naanes v. State*, 143 Ind. 299, 42 N. E. 609. And in a criminal case for murder, the defense of insanity at the time of the crime, if relied upon, an order previously made by the proper court finding the accused to be a fit subject for treatment in an insane hospital for the insane, is at most evidence of the defense relied upon, and creates no conclusive presumption that the accused was at the time insane, in the sense that he is not accountable for his acts: *Pfueger v. State*, 46 Neb. 493, 64 N. W. 1094. A commitment to an asylum for the insane was not conclusive evidence, in *Wheeler v. State*, 34 Ohio St. 394, 32 N. E. 100, for the defendant, charged with burglary and larceny, to prove insanity at the time of the crime.

where he interposed the defense of insanity, but the court did not consider that it had the weight even of *prima facie* evidence. The order of a commission, declaring a person insane and ordering him to be committed to the hospital for the insane, was considered, in a Nebraska case, to have been improperly admitted in evidence, but "even if competent evidence at all," said the court, upon a charge of murder against such person, it was not conclusive upon the question of the defendant's sanity, and it was competent for the state to introduce evidence tending to show his mental condition before and after the proceeding for his commitment as an insane person: *Goodwin v. State*, 96 Ind. 550. It has also been held that the proceedings of an examination by a commission as to the sanity of a person afterward introduced as a witness on behalf of the state are not admissible in evidence to discredit him as a witness: *Hicks v. State*, 165 Ind. 440, 75 N. E. 641.

3. As to Testamentary Capacity.—The general rule is that an inquisition of lunacy is admissible in evidence on the question of the testamentary capacity of the person: *Mileham v. Montague* (Iowa), 125 N. W. 664; *Hawkins v. Grimes*, 52 Ky. (13 B. Mon.) 257; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Brady v. McBride*, 39 N. J. Eq. 495; *In re Pendleton's Will*, 5 N. Y. Supp. 849; *In re Widmayer's Will*, 34 Misc. Rep. 439, 69 N. Y. Supp. 1014, affirmed, 74 App. Div. 336, 77 N. Y. Supp. 663; *Wheeler v. State*, 34 Ohio St. 394, 32 Am. Rep. 372; *Titlow v. Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

In the trial of an issue *devisavit vel non*, it is not improper for the proponents to offer the will, and the evidence of its due execution and the competency of the testator at the time it was executed, and thus having made a *prima facie* case to rest; and after the contestants have offered their evidence against the validity of the will, to permit the proponents to offer other evidence to sustain the will, as well as evidence in rebuttal. Upon the trial of such an issue, the record of an inquisition *de lunatico inquirendo* is admissible, but it is not error for the court to refuse to permit to be read such portion of the order of adjudication as instructed the committee appointed with respect to its duties, as this is properly no part of the inquisition: *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

In an action to set aside the probate of a will, it is admissible to show that, several years before the making of the will, the testator had been found to be of unsound mind; that he had been committed to a hospital for the insane; and that he was subsequently discharged from the hospital as sane. What occurred while he was being taken to the hospital is also admissible: *Mileham v. Montague* (Iowa), 125 N. W. 664. In a feigned issue on a will made by a testator after he was found to be a lunatic with lucid intervals, instructions given by him, for another will, a short time before he was found to be a lunatic, which will was drawn accordingly, and which differed from the one in dispute, were held admissible on the question of testamentary capacity: *Titlow v. Titlow*, 54 Pa. 216, 93 Am. Dec. 691. An inquisition by which a testator was found to be a lunatic some time before his death is admissible to determine his capacity to make an alteration in his will, but it is for the jury to decide whether

was made before or after the inquisition: *Hawkins v. .* (13 B. Mon.) 257.

mental condition at the time of the making of the s as to his testamentary capacity; but evidence of his re and afterward may be admitted to throw light on at the time of execution. Evidence of his incapacity after the making of the will is, by itself, inadmissible is will; but such evidence is admissible after proof tion at such subsequent time was the same as at the will; but a judgment of lunacy against a testator five e making of the will is, it has been said, inadmissible e will, even though there is independent proof that the tal condition at the date of the inquisition was the e date of the will. "The strongest objection, perhaps, bility of this judgment of lunacy," said the court, "is inter alios acta. The record does not disclose that the f the will were parties or privies to that proceeding": gton, 11 Ga. 337, 56 Am. Dec. 423.

ase, where the probate of a will was contested on the amentary incapacity, it was considered error to admit oceedings had six months after the execution of the esulted in a finding that the testator was mentally o manage his estate by reason of infirmity and age. as made on the ground that "it takes less mental ake a will than to transact business generally": *Wat- Watson*, 137 Ky. 25, 121 S. W. 626. See, also, *Spiers v. 142 Iowa*, 446, 120 N. W. 1058. It is not reversible ill contest, to exclude the record of a divorce suit estator and his wife, offered by the caveator and tend- hat, for thirty years before the making of the will n controversy, the testator was subject to an insane rary to the fact, as shown in that suit, respecting the ity of his wife to contract marriage: *Turner v. Amer- & T. Co.*, 29 App. D. C. 460.

at a jury found that a testatrix was not of sound e executed a will does not conclude a jury in determin- former will made by her was valid, though there was ange in the mental condition of the testatrix between of the two instruments. Although the evidence is the cases, the jury, in passing upon the validity of the as the right to find the issue before it according to n the evidence presented: *Sewall v. Robbins*, 139 Mass. 650.

a of an inquisition finding that a testator was incom- re than a year prior to the time it was taken is not evidence in a will contest: *In re Preston's Will*, 113 App. Y. Supp. 312.

Validity of Inquisition as Evidence.—Contracts with ual drunkards, and other persons of unsound mind, ffice found but within the period overreached by the jury, are not, as we have seen, void, although they invalid until capacity to contract is shown by satis- nce. Under such circumstances, the proceedings in

lunacy are presumptive, but not conclusive, evidence of a want of capacity. The presumption, whether conclusive or only prima facie, extends to all the world, and includes all persons, whether they have notice of the inquisition or not: *Hughes v. Jones*, 116 N. Y. 67, 15 Am. St. Rep. 386, 22 N. E. 446, 5 L. R. A. 637; *L'Amoreux v. Crosby*, 2 Paige, 422, 22 Am. Dec. 655; and see *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Wadsworth v. Sherman*, 1 Barb. 169; *Den v. Clark*, 10 N. J. L. 217, 18 Am. Dec. 417.

But while an inquest and finding of habitual drunkenness suspends the capacity of the subject of them to make contracts and transact business, as toward all persons, whether they have actual notice of the proceedings or not, until such subject is permitted to resume control of his property: *L'Amoreux v. Crosby*, 2 Paige, 422, 22 Am. Dec. 655; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499, the law is different in its operation when the purpose is simply to establish a condition of the mind: *Leckey v. Cunningham*, 56 Pa. 370. Thus, an habitual drunkard, while subject to a commission, may make a valid will, if of sufficient mental capacity, notwithstanding the commission. The existence of the commission is only prima facie evidence of incapacity, and may be rebutted by proof: *Lewis v. Jones*, 50 Barb. 645; and see *Estate of Johnson*, 5 Cal. 529.

While an inquisition in lunacy may be read in evidence, it is at most only prima facie evidence, for it may be rebutted. It is not conclusive evidence: *Estate of Johnson*, 57 Cal. 529; *Hart v. Deamer*, 6 Wend. 497; *Demelt v. Leonard*, 19 How. Pr. 140, 11 Abb. Pr. 253; *Hottle v. Weaver*, 206 Pa. 87, 55 Atl. 838; *Sergeson v. Sealey*, 2 Atl. 26 Eng. Reprint, 648. It is only presumptive and not conclusive evidence of his incapacity to convey lands: *L'Amoreux v. Crosby*, Paige, 422, 22 Am. Dec. 655; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 513; *Van Deusen v. Sweet*, 51 N. Y. 378.

It was held in an early New York case that a lunatic or habitual drunkard could not make a valid will without permission of the court; and that the existence of the commission was conclusive against the validity of the will: *In re Patterson*, 4 How. Pr. 34; but this is contrary to later decisions in that state, and to the weight of authority in other states. The prevailing rule is that, upon the question of testamentary capacity, an inquisition of lunacy, made before the execution of the will, is not conclusive evidence, but at most only presumptive or prima facie evidence of incapacity: *Estate of Johnson*, 57 Cal. 529; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *In re Widmayer's Will*, 69 N. Y. Supp. 1014, 34 Misc. Rep. 439, affirmed, 77 N. Y. Supp. 663, 74 App. Div. 336; *Titlow v. Titlow*, 54 Pa. 216, 93 Am. Dec. 691.

In *Van Guysling v. Van Kuren*, 35 N. Y. 70, a will was upheld as having been made in a lucid interval; and in the case of *In re Pendleton's Will*, 5 N. Y. Supp. 849, the testatrix was declared competent, and the will valid, though she was at the time under the control of a committee in lunacy. So, where a will was made in February, 1876, and an inquisition in lunacy, made in November, 1878, found that the lunacy had existed for three years, such finding was held not to be conclusive, but merely had the effect of raising a presumption which could be rebutted by proof that the testatrix had

capacity at the time of the making of the will: *Brady v. N. J. Eq.* 495.

Lunacy and a commitment to an asylum for the insane are simply as prima facie evidence of insanity, not conclusive. *Wheeler v. State*, 96 Ind. 550; *Mileham v. Montague* (Iowa), 125 N. W. 664; *Phillips*, 10 Okl. 302, 61 Pac. 1057. Thus, a finding of the commitment of a testator to a hospital for the several years before the execution of his will, and his discharge from the hospital as sane, are not conclusive evidence on the question of insanity in an action to set aside the will for mental incapacity. *Mileham v. Montague* (Iowa), 125 N. W. 664. And an order of insanity adjudging one to be insane has no effect on his legal mental status. The effect of such an order is to commit the person to the asylum for treatment; and it is not entitled to the same credit of a judgment of a court, as the members of the board do not act as judicial officers, but as a special board, with special powers only: *Maass v. Phillips*, 10 Okl. 302, 61

In some cases, it has been said that an inquisition in lunacy is as good as even prima facie evidence. "A person who is committed to an insane asylum," it is said, "does not have immunity from punishment for crime; and the difference between confinement in the asylum and the commission of a crime charged, the nature of the crime, and other facts, make such inquisition of little weight as evidence; but it is the jury in each case": *Wheeler v. State*, 34 Ohio St. Rep. 372.

II. Existence of Guardianship.

Observations.—An inquisition founded upon a commission to inquire into, resulting in an adjudication of insanity, is analogous to statutory proceedings in this country whereby a guardian is appointed for persons insane. Such statutes give the management of the person and estate of an insane person to the guardian and take from him the capacity to make contracts and dispose of his property. The necessary effect of the decree is that the person is in law, what the law declares him to be, incapable of himself, as to all the world. Otherwise the object of the inquisition would be entirely defeated: *Leggate v. Clark*, 111 Minn. 109, 125 N. W. 934; *Dewey v. Haug*, 48 Minn. 58, 50 N. W. 934; *Dewey v. Haug*, 40 Am. St. Rep. 468, 55 N. W. 276. The appointment of a guardian for insanity is, prima facie, not qualified to set aside a will: *In re Fenton's Will*, 97 Iowa, 192, 66 N. W. 115; *In re Wheelock's Will*, 35 Mass. (18 Pick.) 115; *In re Cowdry's Will*, 77 Vt. 359, 60 Atl. 70. But the appointment of the guardian does not show that the ward's testamentary capacity is lost: *Leggate v. Clark*, 111 Minn. 109, 125 N. W. 934; *Dewey v. Haug*, 40 Or. 495, 67 Pac. 737.

Actual feebleness must, however, be distinguished from mental incapacity. It is a well-known fact that many persons, especially the elderly, are willing to have a guardian, but are not willing to submit to an adjudication that would class them as insane. This fact prompted an amendment to the Vermont statute,

which amendment recognizes a difference between a non compos, and his class, and a person who merely lacks the mental capacity to take care of himself or his property. While the mind of a non compos is to be taken *prima facie* as insane and nondisposing, the mere adjudication of a person's mental incapacity to take care of himself and his property, and the appointment of a guardian thereunder, does not render him *prima facie* mentally incapable of making a will. In *re* Cowdry's Will, 77 Vt. 359, 60 Atl. 141, 3 Ann. Cas. 70.

The incapacity of guardianship is simply a fact, which may be proved like any other fact tending to establish mental incapacity but it does not work an estoppel upon the proponent of a will: In *re* American Board etc. for Foreign Missions, 102 Me. 72, 66 Atl. 215; *Breed v. Pratt*, 35 Mass. (18 Pick.) 115.

It seems to be clear, then, that one's mental powers may be so far impaired as to incapacitate him from the active conduct of his estate, and to justify the appointment of a guardian for that purpose and yet have such capacity as will enable him to direct a just and fair disposition of his property by will; and that one who has been adjudged to be of unsound mind and placed under guardianship is not necessarily incompetent to make a will, though such adjudication has never been set aside: *Harrison v. Bishop*, 131 Ind. 161, 31 Am. St. Rep. 422, 30 N. E. 1069; but he must in fact be of sound mind at the time of its execution: *Breed v. Pratt*, 35 Mass. (18 Pick.) 115; it being observed, however, that the requirements of a "sound and disposing mind" do not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease. In *re* American Board etc. for Foreign Missions, 102 Me. 72, 66 Atl. 215.

Even where a person under guardianship as non compos mentis makes a will appointing his guardian executor, and giving him a legacy, the fact of guardianship does not estop the executor from showing that the testator, at the time of making his will, was of sound and disposing mind and memory: *Breed v. Pratt*, 35 Mass. (18 Pick.) 115.

A will may also be made by a lunatic under guardianship, who has been restored to his reason, although the letters of guardianship have not been repealed: *Stone v. Damon*, 12 Mass. 488.

b. Presumptions and Burden of Proof.—Where one is placed under guardianship as a person of unsound mind, there ordinarily arises a presumption, which is rebuttable, that he lacks testamentary capacity; so that if a person, after having been adjudged mentally unsound and placed under guardianship, executes a will, the burden is upon those who seek to uphold it to show by satisfactory evidence that at the time of its execution he possessed the requisite degree of mental capacity: *Lucas v. Parsons*, 27 Ga. 593; *Stevens v. Stevens*, 127 Ind. 560, 26 N. E. 1078; *Harrison v. Bishop*, 131 Ind. 161, 30 N. E. 1069, 31 Am. St. Rep. 422; *Pepper v. Martin* (Ind.), 92 N. E. 777; *Breed v. Pratt*, 35 Mass. (18 Pick.) 115; *Crowninshield v. Crowninshield*, 68 Mass. (2 Gray) 524; *King v. Gilson*, 191 Mo. 307, 90 S. W. 367; *Estate of Hoffman*, 209 Pa. 357, 53 Atl. 665.

It has been affirmed, however, that an adjudication merely of mental incapacity to care for property, and the appointment of a guardian for that reason, do not raise a presumption of testamentary incapacity: *Cowdry's Will*, 77 Vt. 359, 60 Atl. 141, 3 Ann. Cas. 70.

the probate court in guardianship proceedings determining more than that a man is unfit to manage his property inconsistent with testamentary capacity: *Rice v. Rice*, 5 N. W. 545.

Operation of testamentary incapacity does operate retroactively if a will was made prior to the appointment of a person as insane, there was a presumption of mental incapacity at the time of the appointment, and the proceeding for appointment was admissible to show mental incapacity at that time. The presumption could not relate back to the time when the will was made: *Spiers v. Hendershott*, 142 Iowa, 446, 120 N. W. 1058. A guardian is the beneficiary under the will of his ward, and the appointment of a guardian for mental incapacity to take care of the ward's property, the presumption of undue influence raised is more than to take the burden of proof from the contestant to place it upon the guardian. It establishes *prima facie* evidence of such influence, and is sufficient to defeat the will unless it is overcome by counterproof: *In re Cowdry's Will*, 141 Atl. 141, 3 Ann. Cas. 70.

Weight of Record and Other Evidence.—Where there is evidence of insanity or of any incapacity except weakness and mental decline, or the gradual decay of the mental faculties of a person of great age, the record of the probate court, upon an appointment of a guardian for such person is not admissible to contest his will upon the ground of mental incapacity: *In re Pinney's Will*, 27 Minn. 101, 7 N. W. 144. But mere intellectual feebleness must be distinguished from unsoundness of mind: *In re American Board of Christian Missions*, 102 Me. 72, 66 Atl. 215; and where a person is appointed guardian as a person of unsound mind, the record of such appointment is admissible, in a proceeding to contest the will or in a will contest, to show mental incapacity at the time of such guardianship proceedings: *Spiers v. Hendershott*, 142 Iowa, 446, 120 N. W. 1058; *Stone v. Damon*, 12 Mass. 488; *Rice v. Rice*, 5 N. W. 545; *Wadsworth v. Sharpsteen*, 8 N. W. 499. And where it is shown, in such a case, that the testator was under such guardianship at the time of the execution of his will and at the time of his death, the record of the appointment is admissible on an inquiry into the mental capacity of the testator at the time of the execution of the will, which record shows that a new jury was impaneled and that the verdict of the first jury was that the testator was of sound mind, is admissible in evidence: *King v. Gilson*, 10 S. W. 367. But it is not error, in a suit to set aside a will, where the issue is mental capacity, to exclude evidence of the appointment of a conservator of the testator's estate, made many years after the execution of the will: *Entwistle v. Loring*, 9, 54 N. E. 217. And in a contest over the validity of a will made on January 22, 1898, a judgment adjudicating the sanity of the testatrix at the time of the execution of the will made on February 23, 1898, was held to be properly admitted: *Spiers v. Hendershott*, 142 Iowa, 446, 120 N. W. 1058.

Weight of Record as Evidence.—The fact that a testator was appointed guardian as an insane person at the time of the execution of his will is not conclusive evidence of insanity. The appoint-

ment of a guardian of a person alleged to be non compos mentis by a court having jurisdiction, must necessarily create a presumption of the mental infirmity of the ward; but such decree does not conclusively show that the testamentary capacity of the person under guardianship is entirely destroyed, and the presumption thus created may be overcome by evidence proving that such person at the time he executed a will was in fact of sound and disposing mind and memory: *Stone v. Damon*, 12 Mass. 488; *Breed v. Pratt*, 35 Mass. (18 Pick.) 115; *Will of Slinger*, 72 Wis. 22, 37 N. W. 236; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Ames v. Ames*, 40 Or. 495, 67 Pac. 737; *In re Wheelock's Will*, 76 Vt. 235, 56 Atl. 1013.

In a proceeding for the probate of a will, contested on the ground of undue influence, and because the testator was alleged to be of unsound mind, the question as to whether an adjudication in proceedings setting aside a guardianship over the testatrix, and declaring her to be of sound mind, is conclusive evidence of mental capacity up to the date of the entry of such adjudication, is a question bearing a close relation to adjudications resulting in judicial determinations of insanity or unsoundness of mind, and it has been held that such adjudication is not so conclusive: *In re Fenton's Will*, 97 Iowa 192, 66 N. W. 99.

While the fact that one is under guardianship as a person non compos mentis, is not conclusive evidence of his incapacity to make a will, a different rule prevails respecting the making of contracts by the ward. All contracts of a lunatic, habitual drunkard, or person of unsound mind, made after an inquisition and confirmation thereof, are said to be void, until, by permission of the court, he is allowed to assume control of his property. In such cases, the lunacy record, as long as it remains in force, is conclusive evidence of incapacity: *Hughes v. Jones*, 116 N. Y. 67, 15 Am. St. Rep. 386, 22 N. E. 446, 1 L. R. A. 637; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *L'Amoureux v. Crosby*, 2 Paige, 422, 22 Am. Dec. 655. Thus, a decree of the probate court declaring a person non compos mentis and putting him under guardianship is held to be conclusive evidence of the disability of the ward against a person dealing with him during his guardianship: *Leonard v. Leonard*, 31 Mass. (14 Pick.) 280. But where a leasehold interest was assigned, and the assignor was declared, a few months after the conveyance, to be a lunatic, the finding of lunacy is, in a suit to set aside the assignment on the ground of the assignor's mental incapacity, only prima facie evidence of his incompetency at the time of the assignment: *Sbarbero v. Miller* (N. J. Eq. 65 Atl. 472).

CASES

IN THE

COURT OF APPEALS

OF

KENTUCKY.

KATZMAN v. COMMONWEALTH.

[140 Ky. 124, 130 S. W. 990.]

ISTS—Statute Regulating Sales of Poisons—Certainty. Prohibiting the sale at retail of any poisons without the seller satisfying himself that the poison is to be used for legitimate purposes is not void for uncertainty in failing to define the terms "retail" and "legitimate purposes." (pp. 361, 362.)

ISTS—Statute Regulating Sales of Poisons—Discrimination—Process.—A statute prohibiting the sale of poisons at retail on certain conditions, but excluding from its operation wholesale chemists and druggists selling at wholesale, does not constitute an arbitrary and unreasonable discrimination against druggists and does not deprive them of liberty or property without due process of law. (pp. 361, 362.)

ISTS.—Regulation of the Sale of Drugs and Poisons—The exercise of police power of the state. (pp. 361, 362.)

IAL STATUTES—Certainty Required.—A Penal Statute defining an offense must be sufficiently plain and exact to enable a person of ordinary intelligence to understand its provisions; to determine what they may and what they may not do under the statute. (p. 362.)

IAL STATUTES—Certainty of Meaning of Words and—The fact that different trial courts and juries may not reach uniform conclusions in the conclusions reached upon the meaning of words used in a statute, or that there may be occasional differences of opinion on that subject, will not invalidate the statute. (p. 362.)

IAL STATUTES—Reasonable Construction.—Every statute should be given a reasonable construction; one that will effectuate the legislative intent in its enactment. The established rule of construction does not require that the sufficiency of penal statutes be measured by a technical standard that would impede their enforcement and make their enforcement difficult, if not impossible. A penal statute need not be so elaborate in its detail as to meet every possible state of fact that may arise under the statute. (p. 362.)

AND PHRASES—"Retail," as Used in a Statute regulating the sale of drugs and poisons, is used in its ordinary sense; it refers to sales in small quantities or parcels. (p. 364.)

DRUGGISTS—Statute Regulating Sales of Poisons—"Legitimate Purpose."—Under a statute requiring a druggist who sells certain poisons without a physician's prescription to satisfy himself that the poison is to be used for legitimate purposes, the druggist must, when selling without a prescription, in good faith use reasonable care to satisfy himself the article is to be used for a legitimate purpose, and whether or not this degree of care is used is a question of fact. (pp. 364, 365.)

EVIDENCE—Expert Testimony—Legitimate Use of Drugs. Whether the sale of opium for smoking purposes by a druggist to a confirmed user of the drug is for a legitimate purpose is the subject of expert testimony of physicians and druggists. (p. 365.)

DRUGGISTS—Statute Regulating Sale of Poisons—"Legitimate Purpose."—In a statute prohibiting the sale of poisons without a physician's prescription, unless the druggist satisfy himself that it is to be used for a legitimate purpose, the term "legitimate purpose" is used in a technical sense and should be given the technical meaning given it by physicians and druggists. (p. 365.)

STATUTES—Construction—When Province of Jury.—If it is shown by the evidence that words and phrases used in a statute are susceptible of two meanings, depending on the state of facts it is attempted to apply them to, the court may instruct the jury in the words of the statute and leave them to find from the evidence whether it has been violated. (p. 365.)

DRUGGISTS—Regulating Sale of Poisons—Class Legislation. A statute prohibiting, except upon certain conditions, the sale of certain drugs and poisons at retail, but not laying a like prohibition on the sale of the same at wholesale, is not void as discriminatory, arbitrary or unreasonable, as there is a well-defined distinction between the sale of goods at wholesale and at retail. (p. 366.)

Alfred G. Krieger, for the appellant.

James Breathitt, attorney general, Tom B. McGregor, assistant attorney general, Loraine Mix, assistant commonwealth attorney, and Edward Bloomfield, for the appellee.

125 CARROLL, J. The information filed by the commonwealth against the appellant, who is a druggist, charged that he unlawfully sold at retail, not on a physician's prescription, to Will Frazier a certain quantity of poison, to wit: opium, without satisfying himself that such poison was to be used for legitimate purposes, and with the knowledge that it was intended for smoking purposes or for habitual use. The case was returned under section 2630 of the Kentucky Statutes and reads in part:

"No person shall sell at retail any poisons except as hereinafter provided, without affixing to the bottle, box, ¹²⁶ vessel or package containing same, a label printed or plainly written containing the name of the article, the word "poison" and the name and place of business of the seller, with the common name of two or more readily accessible antidotes; nor shall he deliver poison to any person without satisfying himself that such poison is to be used for legitimate purposes. Any poison, in the meaning of this act, shall be any drug, chemical

in which, according to standard works of *medicaria medica*, is liable to be destructive to adult quantities of sixty grains or less. It shall be the duty of anyone selling or dispensing poisons, known to be destructive to adult human life in five grains or less, before delivering them, to book kept for that purpose the name of the seller, the residence of the buyer, the name of the article, sold or disposed of, and the purpose for which it was intended. . . . The provisions of this section apply only to the dispensing of poisons in not unusual doses, on physicians' prescriptions, nor to the agriculturists or horticulturists of such articles as are used by them as insecticides. . . ."

It is shown that the appellant is a retail druggist; that he was charged in the information to the purchaser with the use of allowing the purchaser to smoke the same; that before making the sale that the purchaser was warned of the use of opium; that it was not sold on a physician's prescription; that it is a poison, destructive to adult quantities of five grains or less. It is further shown that there was affixed to the bottle or package containing the poison a printed label, giving the name of the article, "poison," and the name and place of the seller, with the name of two readily accessible antidotes; and that when the poison appellant entered in a book kept for that purpose as required by the statute the name of the buyer and residence of the buyer, the name of the quantity sold, and the purpose for which it was intended.

It is to be observed that the offense charged against the appellant consisted in selling the drug by retail without warning to a person addicted to the use of it; and this sale was not made for a legitimate purpose.

The law and facts were submitted to the court without the aid of a jury, and the appellant was found guilty under the statute.

The appellant is asked upon the ground that the statute is uncertain because it does not define as it should the words "retail" and "legitimate purposes," and that it makes an arbitrary and unreasonable discriminating from its provisions manufacturing chemists selling by wholesale, and has the effect of depriving the appellant of his liberty and property without due process of law.

It is competent for the legislature to impose reasonable regulations upon the sale of drugs and poisons there is no doubt. It has been so often held that laws concerning the sale of these articles come within

the police power of the state that we do not deem it necessary to do more than cite the case of the Kentucky Board of Pharmacy v. Cassidy, 115 Ky. 690, 74 S. W. 730, and call attention to the numerous authorities therein cited. Indeed, counsel for the appellant does not attack the statute upon the ground that it was not within the power of the legislature to enact a law regulating the sale of opium or other drugs or poisons, but upon the theory that this power was not properly exercised. If this statute is so uncertain and indefinite in describing what will constitute the offense denounced by the statute that persons of ordinary understanding cannot comprehend its meaning or determine when they have violated its provisions, then it is open to the objection urged against it. The law is well settled that a penal statute creating an offense must be sufficiently plain and exact to enable persons of ordinary intelligence to understand its provision. As said by Justice Brewer, in *Chicago & N. W. R. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744: "No penal law can be sustained unless its mandates are so clearly expressed that an ordinary person can determine in advance what he may and what he may not do under it."

And this principle, which was fully approved by this court in *Louisville & N. R. Co. v. Commonwealth*, 99 Ky. 132, 5 Am. St. Rep. 457, 35 S. W. 129, 33 L. R. A. 209, we have no disposition to modify or depart from.

In the argument in support of the objection mentioned, it is said that the legislature should have defined the meaning of the words "retail" and "legitimate purposes," so that a druggist might know what quantity would constitute a sale by retail and what would or ¹²⁸ would not be considered a sale for legitimate purposes; and so, that there could not be two opinions as to what these words mean when different courts or juries came to pass upon questions involving a violation of the statute. It may be admitted that although the meaning of the words "retail" and "legitimate purposes," as used in the statute are reasonably well understood, it is nevertheless possible that there might be difference of opinion as to whether in a given state of case the sale of a drug was by retail or for a legitimate purpose, and it is possible that in administering this statute it may occasionally happen that a druggist will be accused who claims not to know what constitutes a sale by retail or what is a legitimate use of opium, and it is also possible that different trial courts and juries may not always be harmonious in the conclusions reached upon this point. But the fact that there may be occasional doubt or want of agreement on this question cannot be allowed to invalidate the statute. If this rule obtained, many penal statutes that have stood unquestioned for years and have been often enforced would be held invalid. There are numerous

existence creating and describing offenses the end which often brings into prominent notice a question of the meaning of words in the law about which different persons might reach a different conclusion. In the criminal cases there are of necessity submitted to the court or jury, as the case may be, issues involving the meaning of certain words which depend the guilt or innocence of the accused; and the court or jury, as the case may be, is left to determine whether or not the law under which the prosecution has been violated. It would, of course, be desirable if every penal statute could be made so certain that there would be no doubt as to its meaning, and so that every person could by reading it at once know what he might with safety do under it. But this ideal is not attainable. It would not be at all practicable to require every statute the meaning of controlling words in which there may be difference of opinion concerning when they are to be applied to a given state of facts. To require that every statute extend to unreasonable length almost every statute creates and describes an offense, and would also tend to confuse the administration of the criminal law. Definitions would often be as uncertain as the thing defined. Every penal statute should be given a reasonable ¹²⁹ construction that will effectuate the legislative intent; and if it describes the offense in language which is not understood by persons of ordinary intelligence, it should be declared invalid on the ground of uncertainty. The established rules of construction do not require that the meaning of penal statutes should be measured by a technical construction that would impair their efficiency and make their application difficult, if not impossible. A little common sense and legal learning, must be used in the practical application of the law; and it is not essential that a statute should elaborate in its detail as to attempt to meet every possible state of fact that may arise under it. As said in *Ex parte Trent*, 117 Ky. 34, 77 S. W. 390, 4 Ann.

Statutes must be construed as other statutes, with a view to carry out the intention of the legislature. . . . The intention of the legislature is to be collected from the words used, but, in construing a statute, the court will consider the whole act, and the purpose of its makers in its enactment. The court cannot depart from the plain meaning of the words in a penal act, and adjudge that punishable conduct is a crime which its language does not fairly cover. In determining what may be punished under the words of a statute the court must apply the rule that every statute is to be construed literally, with a view to carry out the intention of the legislature and promote its objects, taking all

ordinary words and phrases according to the common and approved use of language."

The purpose of the statute, in so far as it refers to opium and kindred drugs, was to prevent, without a physician's prescription, their sale in small quantities to persons who intend to use them, not for medical or legitimate purposes, but to satisfy a depraved habit; and its purpose ought not to be weakened by an interpretation that would impair if not destroy its usefulness.

The word "retail" is defined by Webster to be "the sale of commodities in small quantities or parcels." This is the definition given by Bouvier in his law dictionary, and the one recognized as correct by law-writers generally: 24 Cyc. p. 1684; 24 Am. & Eng. Ency. of Law, p. 875. There are a few persons of ordinary intelligence who do not understand the meaning of the word "retail," or who would not be able to decide with reasonable certainty whether the sale of a given article or commodity was a sale by retail or wholesale. In the common ¹³⁰ every-day affairs of life people are constantly buying and selling things by wholesale and retail, and it would be absurd to say that a person who had intelligence enough to conduct a drug store did not know when he was selling a drug by retail, or did not know that the purchase of a small quantity of opium was a retail transaction; and there ought not to be any difficulty in the mind of a druggist in understanding the meaning of the words "legitimate purpose" as used in the statute. It is provided that the druggist who sells by retail without a prescription the poisons mentioned must first satisfy himself that it is for a legitimate purpose, and it is to be presumed that the druggist knows the legitimate purposes for which these poisons may be used; but if he does not know or has doubt about it, then he must in good faith exercise reasonable care to find out the purposes for which the drug or poison is bought.

The statute does not impose any harsh or unreasonable duty on druggists, because if the person desiring to purchase has not a prescription, the druggist can save himself from violating its provisions by in good faith exercising reasonable care to satisfy himself that it is intended for a legitimate purpose. But if he makes a sale by retail in the absence of a prescription, without first in good faith exercising reasonable care to satisfy himself that the purchaser intends to use the drug for a legitimate purpose, and it appears in the prosecution against him that the purchase was not made for a legitimate purpose, he subjects himself to the penalty denounced by the statute. In other words, whenever a druggist sells by retail the poisons mentioned, without being protected by the prescription of a physician, he takes the risk of violating the law, unless before making the sale he in good faith uses rea-

to satisfy himself that it is intended for legit-
imates. And whether or not this degree of care is
a question of fact to be determined if put in issue
by the evidence.

In the case of this case a number of physicians were intro-
duced into the commonwealth for the purpose of showing that
the sale of opium for smoking purposes or to an habitual user
was not a sale for legitimate purposes. These
witnesses graphically described the ruinous effect of opium,
physically and mentally and morally, when used habitually in
this way and declared in emphatic terms the habit to be
degrading and destructive that any person can ac-
quire testimony ¹³¹ was objected to, but we think
that a prosecution under the statute, if the accused should
deny the fact that the sale of opium to a person for smok-
ing or who was an habitual user of the drug was
not a sale for legitimate purposes, it would be competent to introduce as witnesses
competent physicians or druggists to give an opinion
as to whether the sale under the described circumstances
was for a legitimate purpose. The statute
is intended to regulate sales by druggists, and when it is
applied the words "legitimate purposes" to a sale
of poisons by druggists, they have a technical mean-
ing which may not be clearly known or understood by courts
and so it is permissible to allow experts to give
evidence as to what is regarded by qualified druggists and
legitimate purposes for which sales may be made,
so that the trial court and jury may be informed as to what
is intended as a legitimate purpose for which these drugs
are sold by those intrusted with their sale, and to whom,
and, as far as possible, is confined the knowledge as to what constitutes
legitimate purposes. When words are used in a
statute that have both a popular and a trade or techni-
cal meaning, and as used in the statute they have reference
to the profession, these words in construing the statute
must be given their meaning as understood by the trade or
profession to which they apply: 2 Lewis' Sutherland on Statu-
tary Construction, secs. 389-396. This is the rule given for
the construction of statutes in section 460 of the Kentucky
Constitution providing in part that: "All words and phrases
shall be construed and understood according to the common
usage of language; but technical words and
phrases, and such others as may have acquired a peculiar and
meaning in the law, shall be construed and under-
stood according to such meaning."

This opinion is further suggested that the construction of
phrases in a statute is usually for the court. Gen-
erally true. But, if it is shown by evidence that words

and phrases are susceptible of two meanings, depending on the state of facts it is attempted to apply them to, the court may instruct the jury in the words of the statute and leave them to find from the evidence whether it has been violated. To illustrate, if there should be difference of opinion on the part of witnesses as to whether or not the sale being inquired into was made for a legitimate purpose, the court should leave¹⁸² it to the jury to find the fact and make their verdict accordingly.

In reference to the criticism that the statute makes an arbitrary and unreasonable discrimination against retail dealers in drugs and in favor of wholesalers, it is sufficient to say that it was the evil of selling by retail that the legislature intended to prohibit. If a wholesaler should sell by retail in violation of the statute, he would, of course, be liable to the same extent as would the retail dealer. But there is a reasonable and well-defined distinction between the sale of goods by wholesale and by retail, and it was entirely competent for the legislature, in the exercise of the police power and to accomplish the purpose intended, to make it a penalty to sell the prohibited article by retail, without mentioning its sale in wholesale quantities. The legislature did not deem it necessary, in an effort to correct the evil following the illegitimate use of opium and other drugs to extend the law so as to embrace wholesale dealers. It is a well-known fact that persons who purchase opium for illegitimate purposes as a rule obtain it in small quantities; and to place restrictions around its sale in the quantities in which it is usually obtained was the motive in the mind of the legislature. It was dealing with a condition that existed. This legislation was not intended to reach or touch all persons or conditions but only those that the law-makers in the exercise of their wisdom and discretion deemed it necessary to regulate for the safety and protection of the unfortunate class who have acquired the drug habit. If hereafter it becomes necessary to do so, the legislature may place such restrictions as are reasonably necessary around the sale of this or other drugs by wholesale, but the failure to do so in the act we are considering does not leave it open to the objection that it is discriminatory, arbitrary or unreasonable.

The classification made by the statute is a reasonable and natural one, and all persons within its scope are treated equally alike. An offense is created and defined in appropriate words, capable of being understood and applied with reasonable certainty; and viewed from any standpoint the penalty imposed upon the appellant did not deprive him of his liberty or property without due process of law. The statute does not violate either the state or federal constitution, and as und

183 and agreed facts there can be no question
 nt's guilt, the judgment of the lower court is

Prohibiting the Sale of Opium has been held constitutional: *W.*, 16 Nev. 50, 40 Am. Rep. 488. And so has a statute
 person from having in his possession or offering for
 morphine, chloral, or cocaine without first obtaining
 the county clerk of the county in which he or she
 business, and providing that such license shall be
 regularly qualified physicians who keep a stock of
 cines for their own use in prescriptions, and regularly
 ists, and also forbidding the sale of any such drugs
 prescription of a physician, and declaring that such
 be prescribed by physicians except for the cure of
Mon Luck, 29 Or. 221, 54 Am. St. Rep. 804.

of a Statute Making It Criminal for One Person to
her Any Poisonous liquor or substance without having
 n" and the true name thereof written or printed upon
 l to or affixed upon the vial, box, or parcel containing
 negligence: *Burk v. Creamery Package Mfg. Co.*, 126
 Am. St. Rep. 377.

COX'S EXECUTOR v. WALKER.

[140 Ky. 172, 130 S. W. 984.]

OF CHECK—Revocation by Death.—The gift of a
 d by the death of the donor before the check is pre-
 sent or paid, and the donee cannot recover the amount
 estate of the donor. (p. 368.)

S OF DECEDENTS—Claims—Check Given by Deced-
 ent of a check given by the decedent for services
 out not yet presented for payment or paid at the time
 ay be recovered from his estate. (p. 368.)

odd, J. W. Crume and Barnett & Barnett, for
 a.

lley, for the appellee.

OLL, J. Mrs. Ann B. Cox, a lady in good finan-
 ances, and who died in March, 1909, gave to the
 ebruary of that year a check for one thousand
 h check was not presented at the bank upon
 drawn for payment during the life of Mrs. Cox.
 ettle the estate of the deceased, the appellee, Sue
 entered this claim, and from a judgment allowing
 is prosecuted.

ce shows that appellee is a colored woman, about
 d, who had lived with Mrs. Cox all of her life
 riage some eight years before the death of Mrs.

Cox. After her marriage she lived in different places with her husband, a Methodist minister, but every year until 1907 she visited Mrs. Cox as often as once and sometimes more frequently, remaining with her in the course of each year several months. In 1907 Mrs. Cox, then a childless widow, was taken seriously ill with an ailment that required a surgical operation. She desired the presence and attention of the appellee, who was then living in Clarksville, Tennessee, and at her request and in response to a telegram, the appellee at once left her home and came to Mrs. Cox's and remained with her continuously from that time until her death. The evidence conclusively shows that there was a strong attachment between Mrs. Cox and the appellee, and that the appellee was exceptionally kind, patient and faithful in her attention to Mrs. Cox, both day and night, giving to her from 1907 until her death, the whole of her ¹⁷³ time and rendering every service that a lady in Mrs. Cox's feeble health could desire or exact. It is not often that a record discloses such devotion as appellee exhibited in her services to Mrs. Cox, and that Mrs. Cox fully appreciated the faithful and unmitigated attention of this family servant is shown by the testimony of a number of disinterested witnesses.

The payment of this check is resisted by the executor Mrs. Cox upon the ground that it was a voluntary gift, without consideration, and therefore not a valid and enforceable claim against the estate of Mrs. Cox; while the appellee contends the check was not a gift, but was given to her in consideration of services rendered by her to Mrs. Cox.

If the check was presented to appellee as a gift, and without any consideration therefor, the death of Mrs. Cox before the check was presented for payment and paid had the effect of revoking the gift, and therefore the appellee could not recover from the estate the amount of it. This principle is fully settled in *Throckmorton v. Grigsby*, 124 Ky. 512, 99 W. 650, and *Foxworthy v. Adams*, 136 Ky. 403, 124 S. W. 381, 27 L. R. A., N. S., 308. But the fact that the check was given to the appellee not as a gift, but as compensation for services rendered by the appellee is clearly established by the evidence. There is convincing testimony to the effect that Mrs. Cox on more than one occasion said that she intended to give appellee a thousand dollars for her services and attention. Mrs. Overstreet, a near neighbor, and intimate friend of Mrs. Cox, in speaking of the service rendered by appellee said: "There was no service that she did not perform; there was nothing that could be done that she did not do; she attended to the premises, cleaned the house, gave her her medicine, made the bed, dressed her, cooked for her, and did everything that any true, faithful servant could do. She remained with her until the last breath left her body; she assisted in

the coffin, and stood at her grave." She testified that she told her at one time that no amount of money she could give to appellee would pay her for what she had done and she intended to leave all of her property to her witness told her "that would never do, as the witness was broken and Sue left penniless." That she further testified that she was going to give her a thousand dollars for her services and that after the check had been cashed, Mrs. Cox said to her that "she had given her one thousand and 174 dollars that she told her she intended

the evidence that Mrs. Cox paid appellee three thousand dollars as fixed compensation for her services, but this cannot be allowed to outweigh the positive statement of Mrs. Cox that she intended to and had given appellee one thousand dollars for her services one thousand dollars, with the fact that her services were worth this

reading of the record convinces us that the check given to appellee as compensation for services rendered is sufficient and the judgment is affirmed.

Assignment of a Fund or by Check on a bank are dispositive of money on deposit in a bank is considered in the case of *Trust & Savings Bank v. Tyler*, 161 Mich. 561, 137 Am. St. Rep. 138, 138 Cal. 169, 94 Am. St. Rep. 19, and in *100 Minn. 331*, 117 Am. St. Rep. 694.

Transfer of a Deposit in a Savings Bank may be accomplished by delivery of the bank-book without any written assignment. See *Abington Savings Bank*, 196 Mass. 254, 124 Am. St. Rep. 902; *Johnson v. Colley*, 99 Am. St. Rep. 814. Mere delivery of an undorsed certificate of deposit, payable to order, does not vest title so as to constitute a gift, especially where for a valuable consideration: *Shugart v. Shugart*, 102 Am. St. Rep. 777.

Notes and Checks, see, also, *Picksley v. Starr*, 149 N. Y. St. Rep. 740; *School District v. Sheidley*, 138 Mo. 672, 1576; *Mader v. Cool*, 14 Ind. App. 299, 56 Am. St. Rep. 242. *Western College*, 177 Ill. 280, 69 Am. St. Rep. 242. *Portis* are discussed at length in the note to *Johnson v. Peterson*, 202 Mass. St. Rep. 890, and see *Nelson v. Peterson*, 202 Mass. St. Rep. 503.

Per Vivos two things are necessary: A delivery of possession and an intent that with the possession the title shall pass: *Organized Charities Assn. v. Mansfield*, 82 Am. St. Rep. 285, and see cases cited in the cross-reference.

STAR MILLS v. BAILEY.

[140 Ky. 194, 130 S. W. 1077.]

CORPORATIONS—Power to Borrow Money.—A trading corporation may borrow money when not interdicted by its charter, may execute its note to evidence the debt so made. (p. 372.)

A CORPORATION Acts Only Through Its Officers actually powered to do so, or by the acts of those permitted by it to do thing in question. The former is the strictly legal way in which corporation acts. The latter may bind it, not because the officers empowered to do so, but because, having been held out or suffered to act in such capacity, the corporation is estopped to deny the legal authority. (p. 372.)

CORPORATIONS—Power of President to Borrow Money.—A president of a corporation has not the inherent power to borrow money for it, or to execute a note on its behalf. Such power may be delegated to him either by the by-laws or resolutions of its governing body, or by its charter, or by its custom of dealing. (p. 372.)

CORPORATIONS—Directors must Act as a Board.—A corporate board of directors must act as a board, in order to bind a corporation. When a board can delegate a power and intends to do so, it should act in an official meeting and by its records. A corporation, being artificial, can act only in the manner allowed by law, and the acts of its directors are not its acts unless they act in the manner required by law. (p. 372.)

CORPORATIONS—Promissory Note—Presumptions of Authority to Sign.—In addition to showing the signature of the corporation, the name of a corporation by its president to a promissory note, the authority of the president must be shown. Without this proof the note imports nothing—raises no presumption of consideration and does not shift the burden to the maker to prove lack of consideration. (pp. 373, 374.)

EVIDENCE—Weight and Sufficiency—Interest of Witness.—There are other tests of veracity than that of reputation or probability. The interest of the witness in the result of the trial, his bias and self-interest should be considered. (p. 374.)

CORPORATIONS.—Pledge of Its Own Stock cannot be made by a corporation. (p. 374.)

EVIDENCE—Refreshing Memory.—Reference to a Diary by a witness may be made by him to refresh his recollection as to where he was on a certain day, and if, when so refreshed, he can remember and say that he was not at the place testified to by an adverse witness, the testimony is not only relevant, but the circumstance indicates a carefulness of habit, and a ready and generally reliable means of refreshing the recollection. (p. 374.)

EVIDENCE—Failure to Call Witness—Presumption.—The failure of one to call a witness who participated with him in a transaction in litigation, or to explain his failure, is a circumstance from which it is allowed to infer that such witness would not sustain the party. (p. 375.)

CORPORATIONS.—A Director of a Corporation may Loan Money and take its binding obligation to repay it, but as in so doing he acts in a dual capacity, the presumption is unfavorable to him and when his act is called in question by the corporation the burden is imposed on him to show by a preponderance of proof that he acted bona fide, and that the corporation got the benefit of the act to the extent charged. (pp. 375, 376.)

RECORDS—Failure to Keep Record—Presumption.—To keep a record by an officer of a corporation whose duty it is to keep such record ought to stand against him when he attempts to deny the record against the corporation which should appear by such record in the absence of some other convincing evidence. (p. 376.)

PRESUMPTION—Burden of Proof—Effect of Presumptions.—Presumptions of law must be given weight as evidence, and some evidence to overcome them is required, for if the evidence is otherwise sufficient to establish the fact and the presumptions are against the party having the burden of proof, he must lose. (p. 376.)

PRECEDENTS—Custom and Usage cannot arise out of a single act, nor can a custom be established by the acts of a single person, where it is shown that the corporation in each case had acted on the act as it was discovered. (p. 377.)

Wells and W. Foster Hays, for the appellant.

W. B. Birkhead, for the appellee.

STAR MILLS, J. Appellant is a manufacturing and trading corporation. Appellee was a stockholder, as well as secretary and treasurer of the corporation, and in March of 1906 was its president. At that time it was needing money, and had, as it was empowered by its charter to do, authorized the issuance and sale of two thousand dollars of preferred stock at par. Newton offered for the company to sell five shares of the preferred stock at par.

On June 1, 1906, paid on account of the corporation \$10,000 and dollars of its debts. One Vanarsdall had succeeded to the presidency. A note for five hundred dollars was executed by Vanarsdall to Bailey for five hundred dollars secured by a pledge of five shares of the preferred stock of the corporation. The order of the board of directors authorized the sale of the preferred stock, and the charter of the corporation, provided that such stock should bear six per cent per annum interest, which should be paid before any dividend was paid on the common stock, and upon liquidation of the corporation the holders of the preferred stock should be paid in full, with six per cent per annum interest thereon, before holders of common stock received any dividends. The certificates of the preferred stock also contained a similar provision.

Appellant brought suit against appellant upon the note of \$500 and dollars. The answer was a plea of non est, and also set out what was claimed to be the real transaction. To wit: that appellant sold appellee the five shares of preferred stock in March of 1906, the certificate being signed and left in the stock-book until paid for, and then delivered to appellee. The reply was a traverse of the affirmative plea. Upon this issue two witnesses only

One was appellee Bailey. The other was Newton, the president. The action was in equity, owing

to the allegations and prayer of the petition seeking a sale of the alleged collateral. The judgment was in favor of appellee Bailey upon the note, subject to certain credits which will again be adverted to, and canceled the stock certificate. This appeal is from that judgment.

The question for decision is mainly one of fact. The chancellor's finding on the facts, treated as cases in equity always is given the weight which is accorded from his superior opportunity for knowing the witnesses and their credibility. Still, if the burden was so that even that consideration would not be enough to preponderate in appellant's behalf the judgment ought not to stand.

A trading corporation may borrow money when not interdicted by its charter. It may execute its note to evidence the debt so made. A corporation, even a trading corporation, acts only through its officers actually empowered to do so, and by the acts of those permitted by it to do the thing in question. The former is the strictly legal way in which the corporation acts. The latter may bind it, not because they are empowered to do so, but because having been held out or suffered to act in such capacity on the corporation's behalf so that those dealing with it are misled into the belief that the officers are so empowered in fact, the corporation is estopped to deny their legal authority.

The power of this corporation to borrow the five hundred dollars (\$500), and to execute its note for it is beyond a dispute. Whether it did borrow the money and execute its note is the question of fact to be decided. The president of a corporation has not the inherent power to borrow money for it, and to execute a note on its behalf. Such power must be delegated to him either by the by-laws or resolutions of its governing body, or by its charter, or by its custom of dealing. There is nothing in the charter or by-laws of appellant authorizing its president to act in that behalf. Nor was there resolution of record to that effect made by its governing body, which is its board of directors. The transaction ¹⁹⁷ according to the testimony of appellee, was that Newton, Vanarsdale and Bailey (appellee), constituting the board of directors met on June 1, 1906, at the company's place of business, discussed the need of five hundred dollars for the corporation's use, and borrowed that sum from appellee Bailey, for which the note sued on was executed, and the stock put up as collateral. No record was made of the meeting, although the corporation kept a book in which was recorded the acts of its board. A corporate board of directors must act as a board, in order to bind the corporation. When a board can delegate a power and intends to, it should act in an official meeting, and by its records. If this were not so, unofficial casual meetings of the men who constituted the board, and

ments thereat, would be the warrant on which
toward the stockholders whom they represented.
might have been done by a copartnership. But
this is a different thing from a copartnership. The
law distinguishes between the two in several par-
ticulars, being the manner of acting. The corporation
being legal, it can act only in the manner allowed by law.
Not from its directors, their acts are not its acts
but in the manner required by law. Therefore in
reference to an officer, strictly it speaks by its record.
But it may by custom become estopped, as already
said and may be held for acts of its officers ultra vires
subsequently ratified them, or has accepted the
the unauthorized act. But as that latter feature
in action is not raised in this case, it need not be
considered. This transaction was not with a stranger
but with the corporation's records, and not knowing
its officers. It was just the contrary. Appellee
was the official to make and keep the records, as well
as the board of directors and a stockholder. Hence, if
he be again asserted that a corporation should act
by its officers, and speak by its record, this is the
way to say it. So there was not a record of the
note and none of the authority of president Vanars-
dall on the note.

In the view just advanced, Newton testified that
at a meeting of the board of directors on June 1,
any time, in which it was proposed or agreed to
pay five hundred dollars (\$500) from appellee, at
which Newton was present. ¹⁹⁸ Vanarsdall did not
appear. This is presented the very evil which the rule re-
quires action to be generally of record was in-
vited. If it be conceded that the record was not
as merely convenient and valuable, and the fact
might be established by parol, and if it also be
that the two witnesses are equally credible, the evi-
dence. The burden was on the plaintiff, appellee.
Non est factum so placed it as to the execution
and the traverse in the answer of the allegation in
that the note was for money loaned the defendant
with respect to the alleged consideration (which
had been recovered in this action as for money had
received, notwithstanding the invalidity of the note).
It is proved that Vanarsdall signed the note, that
his signature. But more is needed to make a
note of a corporation than the signature of the
president by its president—his authority must also be
shown. Lacking in this case, the proof of the execution
of a valid promissory note fails. The note, then,

imports nothing—raises no presumption of consideration, and would a valid note, shifting the burden to the maker to prove lack of consideration.

Conceding that the trial court had such acquaintance with the witnesses as to give greater weight to the testimony of Bailey than to that of Newton, that is only a weight arising from character, and not because of the matters testified to. Though Bailey be believed to possess the greater probity, it does not necessarily follow that Newton's testimony is not true. For there are other tests of veracity than that of reputation or probity. Bailey's interest in the result of the trial is greater than is that of Newton. If Bailey loses he loses five hundred dollars, should the corporation prove to be insolvent. If the corporation loses, Newton loses about half of that sum in any event, and if the corporation is insolvent perhaps nothing. Bailey's bias is probably greater. Everybody knows the effect of the bias of self-interest on even honest men's understanding.

The stock certificate is dated March 26, 1906. Newton was then president of the company. His name is signed to the certificate as president. He testified that it was filled out and signed on the day it bears date, and left in the stock-book to be delivered when paid for; that Bailey told him that he could not pay for it until he collected ¹⁰⁰ a time certificate of deposit not then due; that the stub shows that it was detached and delivered on June 1, 1906, Bailey's receipt of that date being thereon; that on that day Bailey told him that he had paid in the five hundred dollars, and the certificate was accordingly torn out of the book and delivered to him. Bailey testified that the stock certificate was signed and left blank as to number of shares and the person to whom issued, that there was but the one certificate in the book, and on June 1st, when he, Vanarsdall and Newton agreed to the loan, it was agreed to place the stock as collateral, and that certificate was then used, its blanks being then filled in. While it is true that a corporation cannot pledge its own stock to secure its own debt, and that it would be a wholly useless and worthless proceeding if it could, Bailey testified that he was not aware of that fact. But Newton's knowledge of law and business seems to have been better. Bailey was paid two dividends on this stock by the corporation. The payments are not indorsed as interest paid on the note, indicating that Bailey when he received the dividends regarded that he owned the stock.

Newton kept a diary. With it before him he was enabled to say that he was not in Owensboro the 1st of June, 1906, the day the note is dated, and when appellee says the transaction occurred. While the diary is not evidence, it may be referred to by the witness to refresh his recollection.

was on a certain day, and if when so refreshed
ember and say that he was not at the place
the adversary witness, the testimony is not only
the circumstance indicates a carefulness of habit,
and generally reliable means of refreshing the
The receipt on the stub of June 4, 1910, cor-
a measure, the statement, and seems to sustain
of the recollection of the witness Newton.

tion is extraordinary. The method pursued by
directors was crude, if it occurred as claimed by
e pledging of the shares as collateral showed an
business laws. If the stock was in fact sold
n the execution of the five hundred dollar note
he least of it, equally futile. Vanarsdall, who
of the company when the note was executed,
with his interest in the corporation and resigned
ore this trial. He could have explained the
But he was not called, nor was the failure to
ained at the ²⁰⁰ trial. If he was accessible it
terest of Bailey to produce him as a witness to
et, if he could sustain it. The failure of one
rden to call a witness who participated with him
ction in litigation, or to explain his failure, is
e from which it is allowed to infer that such
not sustain the party. It was presumably
's knowledge what his coadjutor knew. The
it occurred as appellee claims, is so extraordi-
rary to the course that business men of ordinary
lly pursue, that some explanation of it con-
his present claim was in order. His own ex-
sustained and contradicted, leaves it as it ap-
beginning.

er hand, Newton's version is not improbable.
's course in borrowing money and executing
have a resolution of the board duly entered,
ne act. This transaction, if appellee's version
pted, was a departure from the usual course.
g a director of the corporation, could not alone
own behalf, nor could he and one other—there
directors—constitute a quorum of the board for
on. Hence, it was necessary for him to show
all was present and acting. In that he failed.
ctor of the corporation, he might nevertheless
t money, and have taken its binding obligation
But when he asserts that such was the fact,
what purports to be the company's note to him-
n as he was acting in a dual capacity, repre-
self against himself as trustee as it were, the
is unfavorable to him, and upon his act being

called in question by the corporation, the burden is imposed on him to show by a preponderance of proof that he acted bona fide, and that the corporation got the benefit of his act to the extent charged. This rule of the law is not to prevent directors of a corporation from dealing with it, but to prevent them from claiming to have done so when they had not, as well as to prevent their overreaching the trust which they had essayed to protect. Being so easy to act in accordance with the law so as to preserve every necessary record to establish the good faith and consideration in the transaction, a failure to keep such record by one whose duty it is to keep it, ought to stand as evidence against him when he attempts to assert a claim against the corporation ²⁰¹ in the absence of some other convincing evidence.

There appears of record no reason for discrediting Newton save such bias as he might have owing to his interest as a majority stockholder in the appellant corporation. His manner of testifying, so far as the deposition can show that fact, and it shows it to us the same way as was done to the trial court, is frank, and his statements clear and consistent. His story is sustained in so many particulars, each small it is true, that the probability of his story, its naturalness, appears greater than that of the other witness. Besides, the presumptions and burdens of the law imposed upon the latter because of his attitude as party in the record, and as director dealing with himself in the corporation, must be given weight against him, or they are worthless as presumptions of law. When given their proper legal effect, some evidence to overcome them is required, for if the evidence otherwise is equally balanced, the party against whom is the burden of the case loses. Whether the evidence was so applied we cannot know. The trial court did not indicate the ground upon which its judgment was rendered. In argument, appellee's counsel invoke the familiar rule that the chancellor's finding of fact will not be disturbed unless contrary to the weight of the evidence. If the chancellor found the fact to be that the note was executed at a meeting of the board when the three directors named were present, or that the transaction was a loan of five hundred dollars to the corporation, instead of a payment to it of five hundred dollars in consideration of appellee's purchase of the five shares of preferred stock, then it was, in our opinion, contrary to the weight of evidence.

It was attempted to be shown that appellant was authorized to issue its notes by its president and without action of its board of directors. While Newton was president the note was done once, in settlement of a small debt for wheat about which there was a controversy. While Vanarsdall was president two or three notes were executed in that manner, but all were contested by the corporation. Not only must it ha

ustom of the company to issue its notes by its president, but the company must have ratified his act after knowledge of the fact, or by confirming the question. Custom cannot arise out of a single instance, nor can it be said that the corporation was in the habit of issuing its notes by the act of the president. In each instance shown it repudiated his act as unauthorized, and contested its liability on that account. It is for appellee that appellant received his money, and the benefit of it, therefore that it should repay the money, although the note was not executed in a legal manner, although Vanarsdall was not authorized to act as president. If the issue had been solely whether the act of the corporation, and the consideration for it, would be ample authority to grant the relief, the issue would be ample authority to grant the relief. But the issue was also whether the five hundred dollars paid as consideration for the stock. Upon that issue, the stock issued, receipted for by appellee, authorized by the act of the directors and the company's charter, two hundred dollars declared on it, and paid to appellee, and by him to the shareholders. If this were a suit to enforce against the corporation the shareholder's liability and he was defending upon the issue, we would have little hesitancy in saying that he was bound. Meager as the evidence is, his defense is for want of proof, and there being some evidence on the other side, we are left no alternative but to say that he bought the stock, although it must be admitted that the contract is not free from doubt. But such is the state of the evidence.

reversed, and remanded for judgment in con-
with.

Power of Corporations to Borrow Money and to give evidence and security therefor, is the subject of a note *East Co. v. Louisville Gas Co.*, 111 Am. St. Rep. 309.

Power of the President of a Corporation to execute negotiable instrument. See *Chesnut St. etc. Co. v. Record Pub. Co.*, 227 Pa. 101, 74 Pa. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908

Validity of Transactions Between a Director and his corporation. *Barnes v. Spencer*, 139 Am. St. Rep. 598. While an officer of a corporation may have authority to make notes in the name of the company's business, he has no authority to execute a company's note to himself to be used in paying his own salary, and where a bank accepted a note so executed, the bank is not protected on the face of the paper being sufficient to put it on the basis of a bona fide purchaser without notice: *Kenyon Realty Co. v. Deposit Bank*, 140 Ky. 133, 130 S. W. 965, 31 L. R. A., 101.

Pertaining to the Corporate Affairs and within the gen-
the corporation, executed by its president on behalf
tion, is presumed, it is said, to have been executed by

authority of the corporation: *Lloyd v. Matthews*, 223 Ill. 477, 190 Am. St. Rep. 346. If an executed contract is under the seal and bears the signature of the corporation and its officers, it will be presumed not only that the contract was in fact made and executed by the corporation, but also that its officers had power to make it: *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 127 Iowa, 350, 109 Am. St. Rep. 387.

TURPIN v. COMMONWEALTH.

[140 Ky. 294, 130 S. W. 1086.]

CRIMINAL TRIAL—Evidence.—If the Accused Flees, or attempts to Bribe a witness or a juror, or to fabricate evidence, such conduct is receivable as evidence of his guilt of the main fact charged. It is in the nature of an admission. (p. 380.)

CRIMINAL TRIAL—Misconduct of Prosecuting Attorney.—The statement to the jury by the prosecuting attorney that the defendant had attempted to bribe a juror, or that a juror had been "fixed" by or in the interest of the defendant, and that the judge knew such to be the fact, which the court upon objection refuses to strike out, is in the nature of evidence against the defendant without the presence of the witness, highly prejudicial, and ground for reversal of a judgment of conviction. (p. 381.)

CRIMINAL TRIAL—Argument of Counsel—Scope and Limitation.—A counsel's argument is in its purpose a connected presentation of the facts supposed to have been proved by evidence tending in favor of his client. Any representation of fact by him in argument must not be an assertion made upon his own credit; it must be based solely upon those matters of facts of which evidence has already been introduced, or those judicially noticed. (p. 382.)

CRIMINAL TRIAL—Tampering With Jury—Practice.—Where, during the trial of a criminal case, knowledge of an attempt to tamper with a juror comes to the judge, he should inform counsel and leave it to them to introduce evidence of the fact, by competent means, before the jury. If the evidence connects the prisoner with the matter, it is relevant in his case. If he was not connected with it, he is entitled to have the jury know that fact. (p. 384.)

CRIMINAL TRIAL—Tampering With Juror—Practice.—Where, during the trial of a criminal case, knowledge of an attempt to tamper with a juror comes to the judge, and it is not brought before the jury by evidence in the case, he may issue a rule against the alleged offenders, and try them, letting it have such effect upon the trial of the principal case as it may, controlling its application by appropriate instructions to the jury. (p. 384.)

CRIMINAL TRIAL—Misconduct of Prosecuting Attorney—Removal of Prejudice.—Improper and prejudicial argument of the prosecuting attorney should be withdrawn in such manner as to leave no doubt that its evil effect is removed, or, upon consent of the accused, the court should set aside the swearing of the jury. (p. 384.)

J. W. Brown and C. C. Williams, for the appellant.

James Breathitt, attorney general, and Tom B. McGregor,
assistant attorney general, for the appellee.

AR, J. Appellant was convicted of the crime of manslaughter. He has had two trials, each resulting in a verdict of guilty. The verdict upon the first trial was reversed and a new trial granted by the circuit court upon the ground of newly discovered evidence. There appeared to have been some difficulty in obtaining a qualified jury for a second trial. While the jury was being impaneled, the veniremen notified the court that he had been selected by a son in law of appellant, who sought to interdict, should he be selected. The court, upon the objection of the party charged, found him guilty of contempt and fined him. The jury was finally selected and the trial lasted for several days. Toward the close of the trial and at the noon adjournment, while the jury was in the custody of the sheriff under admonition to be kept together and not suffer anyone to approach them on the trial, they were taken to the public water-closet house by the sheriff. One of the jury, necessitated by the pretense of necessity, went into the closet, and the sheriff remaining outside. A son of appellant came up and went into the closet also. He did not know that it was occupied, did not enter, and said nothing to him; which the juror did not know. While they were in the closet the presiding judge had occasion to use it, and not knowing it was occupied, went in there also, when he found the parties in an apparently confidential conversation. When they appeared confused and hurriedly withdrew. Appellant had been put in charge of the sheriff by the court. The juror had knowledge of the court, and as the judge certainly did not know, they had been turned over to a sheriff, who was related to the accused. The judge did not know that he had seen to the commonwealth's attorney, who had ruled against appellant's son and the juror to be held in contempt, but the rule was not tried or executed in the trial of the principal case. There was no evidence introduced before the jury at the trial of this case of the circumstances. In the concluding argument of the commonwealth's attorney, he used this language which was directed to by the accused, but the court overruled his objection and refused to admonish the attorney, or to withdraw the remarks:

One man on this jury who has been 'fixed' in this fact is known by the judge on the bench. The other eleven have not been 'fixed.' Eleven of you know who I will expect that juror to be for an acquittal, the other eleven of you to be for a conviction. Finley, while circuit judge and while presiding in the trial of a case, and knowing that one of the jurors had

been 'fixed' to find for the defendant, peremptorily instruct the jury to find the defendant guilty, and afterward set the verdict aside. I appeal to the 'fixed' juror to look at the emblem of justice here on the judge's stand, the beautiful figure of a woman, blindfolded, with the scales of justice equally poised in her hand. She administers justice without fear and without knowing any man. She is blindfolded as shown by this figure."

The defendant then moved the court to discharge the jury, which was also overruled.

Another attorney for the commonwealth in his argument of the case to the jury said: "A great and outraged population is appealing to you to do your duty in this case."

That remark was objected to. The court sustained the objection and admonished the jury not to consider the statement. These arguments of counsel are the only grounds urged for a reversal.

The matter last quoted, irregular and improper as it was, was probably cured by the admonition of the court. Whether we would have reversed for it alone is not necessary to decide. But the other matter is more serious. It contained a statement of fact, not in evidence before the jury, of a most damaging character as affecting the guilt of the accused. It charged that the fact was within the personal knowledge of the presiding ²⁹⁷ judge of the court. When the accused objected to the character of the argument, and his objection was overruled by the judge, it tended to confirm the attorney's statement that the fact existed, and was within the judge's knowledge. It also indicated to the jury that the argument was not improper, which is to say not illegal, and that therefore it was a matter which they were at liberty to, perhaps under the duty to, consider. The statement of the attorney was evidence of a clearly incriminatory nature. If one accused of crime flees, or attempts to bribe a witness or a juror, or to fabricate evidence, all such conduct is receivable as evidence of his guilt of the main fact charged. It is in the nature of an admission. For it is not to be supposed that one who is innocent and conscious of the fact would flee, or would feel the necessity for fabricating evidence: *Moriarty v. Lou. C. & D. Ry. Co.*, L. R. 5 Q. B. 314; *Winchell v. Edwards*, 57 Ill. 41; *Commonwealth v. Webster*, 5 Cush. 29; 52 Am. Dec. 711; *Commonwealth v. Brigham*, 147 Mass. 41; 18 N. E. 167. Upon the same principle, one who is innocent would not be apt to resort to bribery, either of a witness or of a juror, to insure his acquittal. Consequently, if he resorts to that course, it is evidence from which the jury may infer guilt. At least, it is evidence corroborating the other evidence of guilt, and may tend strongly to remove any doubt left in the mind of the jury as to the prisoner's guilt.

been competent for the prosecution to have in-
ference that the prisoner had offered a bribe to a
him not guilty. The evidence is material in
and is in chief. But like all other evidence of
it is to be received guardedly. It is a fact ex-
plained, whether explained by other evidence or not,
for the jury to apply, in the light of the surround-
ing intelligence of the accused. But in any
case entitled to have the witness who testified to such
facts against him sworn, and an opportunity for
cross-examination, and for counter-evidence. In the course
of this case these rights of the accused were denied
although there was no doubt of his guilt, even if
proved, in the presence of the distinguished trial
attorney for the Commonwealth's attorney, it was nevertheless a
fact proven, if it was to be used against him, like all
other authentic documents, or out of the mouths of
witnesses confronting him at the bar of the court.
He is charged ²⁰⁸ with having tampered with a
juror, as not shown, nor attempted to be, nor is it
shown that the prisoner knew of the act, or in anywise

The young man may have done it on his
account out of his anxiety concerning a parent in great
distress under such circumstances, criminal though the act
may be, under here would be neither legally nor morally
wrong, and it would not constitute evidence of any
guilt. Yet the effect of the attorney's statement
that the prisoner had bribed a juror, or had caused it to
be so, the circumstance of itself shows the wisdom of
excluding the evidence to be heard in court from the
juror, the witness having the knowledge, and subjected
to cross-examination, to counter-evidence and to explanation.
The trial judge did not claim to have heard what
was said between the juror and young Turpin. Nor did he
allow the matter to pass. The circumstance and the con-
duct of the parties were highly suspicious. More, it was in
violation of the rule and order of the court. Nevertheless, it
was not the result of ignorance, or accident, as it was
in the case of the latter (there is doubt), but there was
no evidence of either motive or consequence. It
was explainable, and needed explanation. But op-
portunity was not afforded for refuting or explanatory evi-
dence. The Commonwealth's attorney did not claim to have
any knowledge of the transaction. His statement was pure hearsay
and that score also it was error to allow it to go

The summary of the principle under discussion is found
in Evidence, section 1806, as follows:

"A counsel's argument is in its purpose a connected presentation of the facts supposed to have been proved by evidence tending in favor of his client. He is not a witness. He may have testified as a witness; but in his argument is solely the functions and rights of counsel. Any representation of fact, therefore, which is made by him in argument, must not be an assertion made upon his own credit; it must be based solely upon those matters of fact of which evidence has already been introduced or of which no evidence need be introduced because of their notoriety or judicially noticed facts. To bring forward in argument an assertion of fact not of these two sorts is to become a witness; and to be a witness without being subject to cross-examination ²⁹⁹ is to violate the fundamental principle of the hearsay rule."

Authorities are numerous and consistent in support of this announcement. This court has had frequent occasion to consider the subject. The rule announced was applied in *Cook v. Commonwealth*, 86 Ky. 663, 7 S. W. 155; *Bates v. Commonwealth*, 13 Ky. Law Rep. 132, 16 S. W. 528; *Marshall v. Henry Coal Co. v. Sneddon*, 98 Ky. 684, 34 S. W. 228; *Hows v. Commonwealth*, 110 Ky. 356, 22 Ky. Law Rep. 1845, 17 S. W. 756.

In *Sasse v. State*, 68 Wis. 530, 32 N. W. 849, the district attorney intimated that some one on behalf of the defendant had tampered with the witness for the state, or spirited him away, and, upon objections being made, remarked that he would prove it before he got through, after which he did not even offer to prove the charge. It was held error and ground for reversal.

In *Nally v. State*, 8 Tex. App. 387, 13 S. W. 670, the prosecuting attorney stated to the jury that he expected to show by a witness that Sam Nally had induced him to leave the county so as not to testify. The court, reversing the judgment, said:

"There was no statement by the district attorney to that effect, and no pretense, that he sought to inculcate the defendant in any manner directly with this attempt to suppress the testimony. Even if the prosecuting officer could have proved what he stated, such testimony would have been clearly inadmissible against defendant, unless he has been directly connected with the matter: *Favors v. State*, 20 Tex. App. 155; *Marshall v. State*, 5 Tex. App. 273. There being no proof that these overtures to the witness were made without the authority or with the knowledge of the accused, such statement by the district attorney was illegal and unjust, and was highly calculated to prejudice the accused: *Barbee v. State*, 23 Tex. App. 199, 4 S. W. 584. Anything Sam Nally or the brother, might have done in the matter, in the absence

the knowledge of defendant, was most clearly against and could not be binding upon him, and reasonable presumption or inference pertinent to the case for which defendant was on trial, and could have so instructed the jury."

But on the part of the accused to influence witness on behalf to fabricate evidence, or to have the evidence against him suppressed, would tend, and it does, to guilt under the main charge, it is ³⁰⁰ equally an attempt to corrupt a juror trying his case. The attempt to have even more force in the minds of the jury than the former. For not only is it of equal effect, if successful, but it is contempt of the trust reposed of the jurymen. It is an affront to their integrity of their body; it is an attempt which holds them all to be held up to the scorn of the public as a miscarriage of justice at their hands. It is more likely to be visited by a harsh judgment from the public than have been so insulted. The effort to get before the jury, thus illegally, matter of such grave importance as conducing to the verdict, was in every way prejudicial to the accused. If, perchance, the juror under suspicion were in fact innocent of wrong in the matter, he would practically destroyed his independence as a juror, and if he was suspected, and thus singled out, he would not dare to act with that independence of judgment and merits of the case that is essential to a fair trial. He would be more concerned about his own standing, and about himself of any verdict he might render. The juror, not knowing who was alluded to in the remark made by the prosecuting attorney, naming the presiding judge as guilty of an unlawful effort on behalf of the accused, would pledge of an unlawful effort on behalf of the accused, would corrupt one of their number, would look with suspicion upon any one of them who in their private deliberations would express an opinion favorable to the accused. The influence of such a juror and the force of his testimony, if given, their consultation would be nullified. From this point of view the matter is viewed we cannot escape the conclusion that the remark was prejudicial and most damaging to the accused. Whatever our opinion might be as to his conduct, however this court may sympathize with the presiding judge, the learned trial judge, and applaud his zeal in his efforts to protect the trial from improper influence cannot pass over so grave an offense against the rights of the accused as well as most valuable, right of a man charged with a crime, a right equally valuable to the public, which is the right of a fair trial upon legal evidence only, and face the witnesses who constitute his accusers.

We commend the efforts of the trial judge in endeavoring to protect the jury against outside influence. The question necessarily arose in his mind, what to do ³⁰¹ in view of what he had seen, or thought he saw the evidence of, to prevent a miscarriage of justice. If he should discharge the jury, that would operate to release the defendant, he being then "in jeopardy." If he should content himself alone with punishing as for contempt those engaged in disobeying the rules of the court, that would have no effect on the trial of the principal case, and the mischief feared might be done regardless of the penalizing of the minor culprits. We are of the opinion the trial judge, upon informing counsel in the case what he had observed, should have left it to them to introduce evidence of the fact, by competent means, before the jury. If the evidence connected the prisoner with the matter, it would have been relevant in his case. If the prisoner was not connected with it, then he was entitled to have the jury know the fact, so that they might not impute to him an act for which he was in no wise responsible. The matter thus coming into the trial as evidence, given by witnesses under oath, subject to cross-examination and contradiction, and all the means by which the truth is sifted out by a trial in court, it would be then for the jury, and be open for such argument based upon it, including such inferences deducible from it, as might fairly be warranted. If the prosecuting attorney had not seen proper to introduce the matter as evidence before the jury in the case on trial, it was at the option of the trial judge to have issued a rule against the alleged offenders, and have tried them then and there, letting it have such effect on the trial of the principal case as it might, controlling its application by appropriate instructions to the jury. That such proceeding would have injected a trial into another trial is an incident of the nature of the offense. It is not unusual, rather it is usual, for the trial court to punish witnesses, attorneys, parties, jurors, or others for contempt committed in the court's presence during the trial, and inflict the punishment generally in the presence of the jury. Whether to do so depends on the circumstances of the case, and appeals to the sound discretion of the judge.

As neither course suggested was adopted, when the attorney indulged the argument complained of, it should have been withdrawn in such manner as to leave no doubt that its evil effect was removed, or the court, upon the consent of the accused, should have set aside the swearing of the jury.

³⁰² We perceive no other error in the record. Judgment reversed, and remanded for a new trial under proceedings consistent herewith.

conduct of the Prosecuting Attorney in a Criminal Case, case of O'Barr v. United States, 3 Okl. Cr. 319, 139 59, and cases cited in the cross-reference note thereto.
an Accused Person to be Confronted With the Witnesses the subject of a note to Wray v. State, 129 Am. St. Rep.

LL v. W. M. RITTER LUMBER COMPANY.

[140 Ky. 312, 131 S. W. 20.]

—Realty in Another State.—Damages for the Breach may be recovered in the courts of Kentucky, regard-
 t that land to which the contract relates is situated in
 (p. 387.)

—Land Situated in Another State.—The judgments of
 one state cannot directly act upon the title to land situ-
 r state, or in any way affect it, but judgments imposing
 obligations enforceable by attachment, execution and
 e they do not operate directly upon the property, are
 .)

ORD AND TENANT—Venue of Action for Waste.—
 be brought by a lessor against his lessee, on the lease,
 waste in violation of his contract. Such cause of action
 rson of the lessee, and he may be sued where he may
 387.)

ORD AND TENANT.—A Tenant must Take Ordinary
 mised premises, and turn them over at the end of the
 ed condition as when received, ordinary wear and tear
 r as can be done by ordinary care. (p. 387.)

ORD AND TENANT.—When a Tenant Puts His Ser-
 mised houses, it is his duty to see that they do not
 erty, and he is responsible for their use of it. (p.

Moore, for the appellant.

arman & Francis, for the appellees.

SON, J. On April 12, 1905, A. W. Campbell
 . Dotson entered into a written contract with
 Ritter Lumber Company, by which they sold it
 ling timber trees on a tract of land in Buchanan
 inia. By the written contract the lumber com-
 ven the right to use all the buildings and im-
 hen on the land that had been used by the Paw-
 Company up to that time. But it was provided
 vent were these buildings to be used for a longer
 six years from the date of the contract. After
 was made, the lumber company went upon the
 gan to remove the timber and put its servants in
 ferred to, and while so in possession of the prop-
 ed three of the houses by tearing them down and

moving them from the premises; it also destroyed the partitions, doors and windows of some of the other houses. On December 17, 1909, Campbell filed his petition in the Pike circuit court, in which he alleged the foregoing facts, and prayed judgment against the lumber company for five hundred dollars for the injury to the houses, which were his property. Dotson, who had no interest in the houses, was made a defendant to the action, as he was a party to the contract. The circuit court sustained a general demurrer to the petition upon the ground that, the land lying in Virginia, no action may be maintained here for an injury to it.

It has been held in a number of cases that an action of tort cannot be maintained in one state to recover damages for trespasses on land in another state: See ³¹⁴ Cooley on Torts, 2d ed., p. 901, and cases cited. The rule appears to have been first announced in England in *Doulson v. Matthews*, 4 Term Rep. 503, decided in 1792, and this case has been followed in a number of decisions in this country. In section 2418, Kentucky Statutes, it is provided that the decision of the courts of Great Britain rendered since July 4, 1776, shall not be binding authority in the courts of this state. By an act of the Virginia Convention of 1776, the common law of England, including all statutes made in aid of it prior to the fourth year of the reign of James I (March 24, 1607), was continued in force, except as far as it was altered by the legislature of the state. This act is in force in Kentucky by virtue of section 233 of the constitution: See *Ray v. Sweeney*, 14 Bush, 1, 29 Am. Rep. 388. As late as 1774, in *Mastyn v. Fabrigas*, 1 Cowp. 161, Lord Mansfield said:

"Can it be doubted that actions may be maintained here not only upon contracts, which follow the person, but for injuries done by subject to subject; especially for injuries where the whole that is prayed is a reparation in damages or satisfaction to be made by process against the person or his effects within the jurisdiction of the court?"

We need not consider in this case whether the rule laid down in *Doulson v. Matthews*, 4 Term Rep. 503, is in force in Kentucky. This is an action upon a contract; and undoubtedly the cause of action upon a contract follows the person, and may be brought where he may be found. Thus it has been held that an action may be brought in Kentucky for the rescission or specific execution of a contract relating to land, although the land lies in another state: *Kendrick v. Wheatley*, 3 Dana, 34; *Williams v. Carter*, 3 Dana, 198. So an action to compel a conveyance of land may be brought in Kentucky, although the land lies elsewhere: *Dicken v. King*, 3 J. J. Marsh. 591; *McQuerry v. Gilliland*, 89 Ky. 434, 1 S. W. 1037, 7 L. R. A. 454; and so an action to set aside a fraudulent conveyance of land may be brought in one state

the land lies in another: *Johnson v. Gibson*, 116 Ill. E. 205.

Adoption of the rule declared in *Doulson v. Matthews* is to be that only the courts where the land lies have jurisdiction over it or the title to it, and that where the land is involved this can best be settled in the courts of the country where it lies; so it has been held that the rule does not apply where the ³¹⁵ gravamen of the action is a breach of a contract. *Home Ins. Co. v. Pennsylvania R. R. Co.*, 11 Hun, 471; *Pay v. Burstenbinder*, 7 Lans. 210; *Nashville etc. Ry. v. Weeks*, 13 Lea, 148. The gist of the action here is a breach of a contract; and for this breach of the contract damages may be recovered in the courts of this state, regardless of the location of the land, as to which the contract was broken.

It is deducible from the decisions seems to be that where the land lies in another state, the judgment of the courts of that state does not directly act upon the title to the land or affect the rights of the parties by judgments imposing a mere personal obligation upon the defendant by attachment, execution and the like, where they operate directly upon the property, are valid: *Carroll v. Strange*, 141 U. S. 87, 11 Sup. Ct. Rep. 960, 35 L. Ed. 115; *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 15, 15 Atl. 379, 1 L. R. A. 79; *Newton v. Bronson*, 107 U. S. 37, 67 Am. Dec. 89, and notes 95-106; *Vaught v. Commonwealth*, 9 Va. 569, 86 Am. St. Rep. 908, 39 S. E. 225; *York Mfg. Co. v. York Mfg. Co.*, 204 Pa. 1, 93 Am. St. Rep. 522, 59 L. R. A. 907; 23 Cyc. 1548, 1549. While there is conflict in the decisions as to the conclusiveness of a judgment rendered in one state directing or setting aside a judgment of land lying in another state, there seems to be no conflict in the authorities on the other proposition above stated.

It cannot deny his landlord's title. No question as to the title to the land is to be settled in the action. The plaintiff is rightfully in possession. The action is not for trespasses on land. It is simply an action to recover from the lessor against the lessee on the lease to recover from the lessee in violation of his contract. Like an action for other violations of contract, it follows the defendant and may be sued on where he may be found.

The Ritter Lumber Company took possession of the property under the written contract, it held as tenant, and now imposed upon it the duty to take ordinary care of the property. It was bound to turn over the property at the end of its term in as good condition as when it received it (except ordinary wear and tear excepted), so far as this could be accomplished by ordinary care. When it put its servants in the possession of the property its servants held under it. It was its duty to see

that its servants did not injure the houses that it had rented. The servants held under it; and it was responsible for the use of the property it had rented, by those to whom it intrusted the property.

Judgment reversed and cause remanded, with directions to the circuit court to overrule the demurrer to the ³¹⁶ plaintiff's petition, and for further proceedings consistent herewith.

What Constitutes Waste, and the Right of Cancellation of a Lease for the Commission Thereof, are considered in the recent case of *Northcraft v. Blumauer*, 53 Wash. 243, 133 Am. St. Rep. 1071, and see cases cited in the cross-reference note thereto. A mortgagee is chargeable for waste committed by him while in possession, including permanent depreciation in the property resulting from failure to make proper repairs, or from reckless or improvident management: *Toole v. Weirick*, 39 Mont. 359, 133 Am. St. Rep. 576.

Foreign Judgments are discussed in the extended note to *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 532, the jurisdictional questions involved being considered at page 533.

As to the Jurisdiction of a Court to Render Judgment affecting real property situated in another state, see *Fall v. Fall*, 75 Neb. 120, 121 Am. St. Rep. 767; *Proctor v. Proctor*, 215 Ill. 275, 106 Am. St. Rep. 168; *Vaught v. Meador*, 99 Va. 569, 86 Am. St. Rep. 908. Transitory actions may be tried wherever personal service can be made on the defendant: *State v. District Court*, 40 Mont. 359, 135 Am. St. Rep. 622, and see authorities cited in the cross-reference note thereto.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILROAD COMPANY v. STEELE.

[140 Ky. 383, 131 S. W. 22.]

CARRIERS—Change of Original Contract.—It is competent for a shipper and the carrier to agree to a change of the original contract, especially where the carrier is to receive a consideration for so doing. (p. 390.)

CARRIERS—Change of Destination.—A Consignor who is also the consignee of a car has the right to alter its destination so long as it is in the carrier's custody, and the issuance of a bill of lading by the carrier does not affect the right. The right is an incident of title. (p. 390.)

CARRIERS—Change of Destination or Stoppage—Rights of Owner.—The carrier's title to goods is subordinate to that of the owner, and aside from his lien for charges for carrying them, cannot be allowed to defeat the owner's right to control their destination. He has the same right to stop them during the trip as to start them on it. (p. 390.)

CARRIERS—Stoppage of Goods.—If a Carrier Negligently Fails to deliver a message from the consignor directing its agent to stop the goods which are then in its possession, or if it agrees to use all available means to stop the goods before delivery but negligently fails to do so, it will be held liable. (p. 391.)

TEERS—Directions of the Owner-shipper of Goods must be by the carrier where the rights of a consignee do not rest in the carrier, of course, being allowed to receive its toll on the goods with the goods. (p. 391.)

vin and N. L. Bronaugh, for the appellants.

Welch, for the appellee.

EAR, J. On March 3, 1909, appellee shipped a car of wheat from Nealton, in Jessamine county, billed to be delivered at Asheville, North Carolina. The shipment was by the Louisville and Atlantic Railroad Company, on its own behalf, and that of the connecting Cincinnati, New Orleans and Texas Pacific Railroad and the Southern Railway Company. The Louisville and Atlantic Railroad Company was to carry the wheat to Louisville, Kentucky, where it was delivered to the Cincinnati, New Orleans and Texas Pacific Railroad, which was to carry it to Harriman Junction, where it was delivered to the Southern Railway Company and by it carried to Asheville.

On the 4th, or at latest on the morning of March 5, the carrier requested of the carriers Louisville and Atlantic Railroad Company, and Cincinnati, New Orleans and Texas Pacific Railroad Company, that the destination of the car be changed to Dayton, Tennessee. The agents of the companies assented to the request, and the original bill of lading was taken up and a new bill of lading issued, routing the wheat to Dayton, Tennessee. The wheat had meantime been delivered to the Cincinnati, New Orleans and Texas Pacific Railroad Company, and was en route to Harriman. The latter company's agent at Asheville agreed to telegraph orders to have the car delivered to Harriman Junction, and sent thence to Dayton as shown in the new bill of lading. He telegraphed the agent of the company at Harriman Junction, but did not send a telegram until about 10 o'clock at night of March 4. For some reason unexplained the telegram did not reach the Harriman agent until about noon the next day. He decided that the car had not arrived, but that he would wait for it and change its route when it came in. As a matter of fact, it had arrived probably an hour or so before. Owing to an omission of one of appellant's clerks in entering the fact in its appropriate place on the bill of lading by appellant showing the arrival of cars, he made the mistake mentioned. Within an hour or so he discovered his mistake and notified the agent at Nicholasville that the car had come in and had been delivered to the Southern Railway Company before the receipt of his first

message. The Southern and the Cincinnati, New Orleans and Texas Pacific companies use the same freight yard at Harriman. But appellant's agent did not make any effort to learn after he had discovered his mistake whether the car had gone out, or to stop it. The car was carried on to Asheville, and being unclaimed, it was on appellee's order brought back to Harriman and carried on to Dayton, for which extra service appellee was charged and compelled to pay an additional freight toll, two hundred and ninety-one dollars and eleven cents. Appellee brought this suit to recover the difference in freight charge.

The court instructed the jury that they should find for the defendant railway company if they believed from the evidence that the latter had agreed with appellant to only use its best endeavor to change the destination of the car, and if it used reasonable effort to do so, otherwise to find for the plaintiff.

We think the instructions were correct. It was competent for the shipper and carriers to agree to a change of the original contract, especially as the carrier was to receive consideration for so doing the additional toll for carrying the wheat on to Dayton. Whether they so agreed was best shown by the bill of lading sued on. But the court allowed evidence to the effect to contradict the bill of lading, which was in its terms a positive agreement to haul and deliver the wheat to Dayton, to a conditional agreement, which was that the carrier would endeavor to make the change requested. This was as liberal as the appellant was entitled to.

The title to the wheat remained in the shipper. He was also the consignee, it will be remembered. He therefore had the right to alter the destination of the car, so long as it was in that carrier's custody: *Missouri Pac. R. Co. v. Lau*, 57 Neb. 559, 78 N. W. 291. That the carrier had issued a bill of lading to the consignor-consignee did not change the right of the latter to control the destination, as the presumption was that he remained the owner of the goods and the bill of lading: *Dickson v. Chaffe*, 34 La. Ann. 1133. The right of control by the shipper of the destination of his goods upon the carrier's line is an incident of his title. The carrier's title is subordinate to that of the owner, and arising from his lien for charges for carrying the goods, cannot be allowed to defeat the owner's right to control their destination. He has the same right to stop them during the transit as to start them on the trip. The right of stoppage in transitu is a different matter, and is the rule of law respecting the shipment of goods to an insolvent or failing consignee, other than the shipper. Even in the latter case, the carrier upon reasonable notice must stop the goods, though

he would be entitled to his contract compensation for them: *Hause v. Judson*, 4 Dana, 7, 29 Am. Dec. If the carrier negligently fail to deliver a message or to stop the goods which are in its possession, it is liable to the owner: *Willock v. Missouri P. R. Co.*, 10 Mo. App. 76. Or if the carrier agrees to use all means to stop the goods before their delivery, it is liable in case of negligent failure to do so: *Ryer v. Penn. Co.*, 25 Misc. Rep. 289, 54 N. Y. Supp. 583. The duty of the owner-shipper must be respected where the consignee do not intervene, the carrier of course is not allowed to receive its toll before parting with the goods: *Peoria Second Nat. Bank v. Louisville etc. Ry. Co.*, 15 Ky. Law Rep. 778. It was evidently found in this case that the carrier, *New Orleans and Texas Pacific Railroad Co.*, had a reasonable opportunity to stop the car of wheat at Harriman, and that it was negligent in not having done so within the twenty-six hours after receiving notice and after having agreed to do so until it was turned over to the Southern Railway. This finding of fact is well sustained by the

verdict affirmed.

Liability of a Carrier's Liability in Bills of Lading is the subject of a note to *Chicago etc. Ry. Co. v. Calumet Stock Farm*, 88 Am. St. Rep. 524; and see *Merchants' etc. Transp. Co. v. Eichberg*, 109 Md. St. Rep. 937; *St. Louis etc. R. R. Co. v. Pearce*, 82 Ark. 353, 105 Mo. St. Rep. 75; *Fisher v. Boston etc. R. R. Co.*, 99 Me. 338, 105 Am. St. Rep. 283; *Nashville etc. Ry. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955.

Deviation from Route.—If goods can be properly cared for until the shipper can be communicated with, a carrier is not liable for deviating from the original route and selecting another: *St. Louis etc. R. R. Co. v. Odil*, 96 Tenn. 61, 54 Am. St. Rep. 820; *Peoria Second Nat. Bank v. Louisville etc. Ry. Co.*, 15 Ky. Law Rep. 778.

Stoppage in Transit is the subject of a note to *Hause v. Judson*, 4 Dana, 7, 29 Am. Dec. 384.

DUNEVANT v. RADFORD'S ADMINISTRATOR.

[140 Ky. 433, 131 S. W. 185.]

ADMINISTRATOR WITH WILL ANNEXED—Authority

General.—Administrators with the will annexed have the same power and authority, under the Kentucky Statutes, as that possessed by the executors named in the will. (p. 392.)

ADMINISTRATOR WITH WILL ANNEXED—Power of Sale

in Will.—An administrator with the will annexed may exercise the implied power to sell real property after the extinguishment of a life estate, for the purpose of dividing the proceeds among the devisees in accordance with the terms of the will. (p. 392.)

Turner & Turner, for the appellant.

Moody & Barbour, for the appellee.

⁴³⁴ **BARKER, J.** John Radford died testate, domiciled in Henry county, Kentucky. For the purposes of this case it may be stated that he devised a farm in Henry county to his wife for life, and at her death it was disposed of by the seventh provision of his will, which is as follows:

"7th: I will at the death of my wife, Laura Radford, that my estate be reduced to money and equally divided between all my nieces and nephews, except W. A. Bohannon, who shall have three hundred dollars more than the others."

Three of his neighbors and friends were appointed executors of his will. The wife, Laura Radford, is dead, as are also all of the named executors of the will. The appellees, A. M. Edwards and B. D. Spurgin, were duly and legally appointed administrators with the will annexed. They have in order to carry out the provisions of item 7 of the will of the testator, sold the farm for the purpose of dividing the proceeds among the devisees entitled to the proceeds. The purchaser is willing to take the farm, but being in doubt as to whether the appellees are duly authorized to make the sale, has refused to comply with the terms of purchase, and this suit was instituted for the purpose of specifically enforcing the contract of sale. The question is, whether the administrators with the will annexed are authorized to sell the property and convey a good title thereto.

Under the statute (Ky. Stats., sec. 3892) the administrators with the will annexed have the same power and authority as that possessed by the executors named in the will. The very question we have here arose in *Evans' Admr. v. Evans*, 134 Ky. 637, 121 S. W. 619, where it was held that the administrator with the will annexed had the implied power to sell real property after the extinguishment of the life estate for the purpose of dividing the proceeds among the devisees in accordance with the terms of the will. *T*

that case is conclusive of this: See also, McCulanders, 5 Ky. Law Rep. 517; Marratt v. Babb's Exrs., 90, 15 S. W. 4; Smith v. Courtney's Exrs., 27 Ky. Rep. 642, 85 S. W. 1101; Reynolds' Exrs. v. Boyd, 17 S. W. 572, and Rutherford's Heirs v. Clark's Exrs., 27. The judgment is affirmed.

Sale in Wills and who may execute them are discussed in the note to Crouse v. Peterson, 80 Am. St. Rep. 96. A power conferred by will in executors and trustees is a personal trust which cannot be delegated to an agent: Coleman v. Connolly, 242 Am. St. Rep. 347.

Administrator With the Will Annexed is simply an executor under the will: Kelton v. Anderson, 18 B. I. 136, 49 Am. St. Rep. 751.

Effect of the Title of an Executor or Administrator to the lands of a decedent is considered in the note to Mayor v. Kornegay, 136 Am. St. Rep. 81.

UNSELD v. COMMONWEALTH.

[140 Ky. 529, 131 S. W. 263.]

LARY—Breaking into Outhouse.—Under a Statute providing that any person . . . shall feloniously break into any dwelling-house . . . or any outhouse belonging to or used with a dwelling-house, and feloniously take away anything of value . . . he shall be confined in the penitentiary," etc., the offense is committed by breaking into a smoke-house and stealing meat therefrom, the dwelling-house being such smoke-house belonged having been burned, and the outhouse being in a school-house some two or three hundred yards distant. (S.)

LARY—Outhouses—Connection With Dwelling.—In order to constitute the offense of breaking into an outhouse "belonging to or used with a dwelling-house," it is not necessary that it be in the same lot as the dwelling-house. It is sufficient if, considering both its situation and its use, it fairly be considered as appurtenant to the dwelling-house.

Halstead, for the appellants.

Creathitt, attorney general, and Tom B. McGregor, attorney general, for the appellee.

REMARKS. J. Appellants were convicted under an indictment charging housebreaking.

Section 162, Kentucky Statutes, provides in part: "If any person shall feloniously break into any dwelling-house, or any outhouse belonging to or used with a dwelling-house, and feloniously take away anything of value thereof, though the owner or any person may not be there, he shall be confined in the penitentiary for not less than two years nor more than ten years."

In this case the house alleged to have been broken into was a meat-house. It was situated in the yard in which the owner's dwelling had been. The dwelling burned shortly before the act herein charged, and the owner had been compelled to take refuge with his family in a vacant school-house two hundred or three hundred yards distant. It was not on his land, and of course not in the same inclosure as the meat-house. In the meat-house was a quantity of bacon being cured and preserved by the owner for the use of himself and family. The meat-house was thus used, and every day or so resorted to by the owner and his family for the purposes for which it was set apart,⁵³⁰ and was so used in conjunction with his residence that burned as well as with the temporary residence which he had taken up in the nearby building. The crime fixed by the statute is of a kind with burglary, but owing to certain requisites to the latter which are frequently lacking, it was intended to extend the offense. So that now whether the breaking be in the daytime, or whether the owner or other persons be thereat, or whether the outbuildings be within the curtilage, or be part of the messuage, it is equally an offense. Doubtless the line of distinction at the common law whereby certain outbuildings were deemed part of the dwelling, in defining burglary, was intended to be observed in this statute in a measure. But it was intended to enlarge the scope of the law as to the criminal act, and bring that into its cognizance which before was without. Still the main idea, as in the beginning, was to protect the habitation from felonious invasion. Owing to the frequent isolation and unprotected condition of the dwelling, and from the lack of security in most instances, the owner is powerless to protect that class of property from thieves who break in and steal, and who thereby put in jeopardy the lives of the inmates of the home. It is deemed the most sacred spot of land and its contents the most coveted, that the owner has. It is his home. His instinct is to protect it first and at every hazard. It is the theme of his favorite song, the object of his tenderest sentiment, the subject of his most positive political declaration. In the Great Charter it was named as a place forbidden to the king or his soldiers, except by the owner's invitation. In the constitution it is similarly guarded as against the sovereign right; in the statute it is treated as a thing reverence above the power of eminent domain, exempt from debt, that spot wherein the humblest man finds a castle of safety. Consequently it is hedged about by every protection which the law can devise. Among them is the severe punishment inflicted on those who feloniously break into it. A part of the castle, or of the messuage, was necessarily those outbuildings so intimately and directly connected with the habitation, and the use of which were so essential to its enjoyment as a habit-

every reason for protecting the one applied to the other, as, therefore, held that a smoke-house is a part of the dwelling, though not physically connected with it. It is held that if it stood near enough to be used as an appurtenance to the dwelling (State v. Langford, 531 12 N. C. (1 Dev.) 253), or in the same yard as the dwelling, if the smoke went into the yard (State v. Twitty, 2 N. C. (1 Dev.) 253). And it is said in 2 East's Pleas of the Crown: "A house is adjoining to the dwelling-house, and a parcel thereof, though there is no common inclosure, if they may still be considered as parts of the mansion-house." As this court in White v. Commonwealth, 87 Ky. 303, observed, "If the place which has been entered, considering both its situation and use, be fairly considered as a part of the dwelling-house," the entry is burglary or housebreaking as the case may be: Dunn v. Commonwealth, 119 Ky. 457, 27 Ky. Law Rep. 113, 84 S. W. 2d 113. The test is the use and proximity. It is no longer, as it once was thought to be, a matter of inclosure, or fence, but a matter of title. The dwelling in this instance was a tool-house, converted into that purpose. The entry in question was without doubt being used in connection with that dwelling, as though it stood in a few feet and hedged about by the same fence. It was close to the dwelling, such use. It was within sight, within a minute's walk, and available by its situation for all the uses of the dwelling-house.

The evidence connecting the appellants with the crime, conflicting, it was of a character from which it could be found that they were guilty, and the jury, in the exercise of its province of sifting the truth from conflicting testimonies confronting them, and weighing their evidence according to interest, integrity and intelligence, pronounced a verdict of guilty. We do not feel justified in dis-

affirmed.

Elements of the Crime of Burglary and what "break-open" an indictment for that crime are considered in the case of State v. Richards, 2 Am. St. Rep. 383; State v. Vierck, 139 N. D. 1046.

House Within the Meaning of the Law of Burglary and what is considered in the note to Workman v. Insurance Co., 144. A vat six or eight feet deep and six feet in diameter, constructed of heavy oak timbers, which is partly sunk in the ground, having a hinged cover secured in place by a lock and key, and containing hides, awaiting sale, is a "storehouse" within the meaning of the word as used in the Nebraska Criminal Code: Steele v. State, 9 Neb. 9, 127 Am. St. Rep. 741. That the breaking and entering of a storehouse may constitute burglary, see Gunter v. State, 16 Am. St. Rep. 85. A railroad depot is a "warehouse" within the meaning of the statute of burglary: State v. Bishop, 51

Vt. 287, 31 Am. Rep. 690; and a tent may constitute a house: *Fa v. State*, 39 Tex. Cr. 452, 73 Am. St. Rep. 950; but a portable "head box" fourteen feet long, such as is commonly used with a grain elevator is not a house within the contemplation of a statute relating to burglary: *Williamson v. State*, 39 Tex. Cr. 60, 73 Am. St. Rep. 9

CHESAPEAKE AND OHIO RAILWAY COMPANY BORDERS.

[140 Ky. 548, 131 S. W. 388.]

CARRIERS—Injury to Passenger—Sudden Starting or Jolt.—Where a passenger has boarded a car and while in the act of finding a seat is injured by a jerk of the train, the railway company will be held responsible unless it is shown that the moving of the train was caused by an unusual and unnecessary jerk. (p. 307.)

CARRIERS—Reasonable Time to Board—Sudden Starting or Jolt.—It is the duty of a railroad company to give to passengers a reasonable opportunity to board its trains, and where the train is moved while a passenger is upon the steps, but before he has had a reasonable opportunity to reach a place of safety, the company will be held liable whether the train was moved by an unusual and unnecessary jerk or not. (p. 307.)

Worthington, Cochran & Browning, F. T. D. Wallace & M. C. Kirk, for the appellant.

Dinkle & Pritchard and O'Neal & Carter, for the appellee.

548 CLAY, C. Appellee, Wallace Borders, brought this suit against appellant, Chesapeake and Ohio Railway Company, to recover damages for injuries which he claims he has received while attempting to board one of its passenger trains at a station called Chestnut, in Lawrence county, Kentucky. The jury returned a verdict in appellee's favor for one thousand dollars, and the railway company appealed.

Two grounds are relied upon for reversal: First, the failure of the trial court to award appellant a peremptory instruction; second, error in the instructions.

Appellee testified, in substance, that on the occasion in question the train was flagged as it approached Chestnut station. Two passengers preceded him up the steps. Appellee then attempted to board the train. As he went up the steps and before he reached the platform, the train moved with a jerk and he was thrown to the ground and injured. One witness for the appellant testified that he was present on an occasion when appellee attempted to board one of appellant's passenger trains, and that he did not see appellee fall. The other witness, however, was unable to locate the exact time when the occurrence took place. Another witness for appellant

During the month of March, 1908, the train on which the brakeman stopped at Chestnut station and where the old man who was crippled. He then got down and helped the man to get on the train. The man did not fall, and never fell therefrom. To rebut this the appellee testified that the occurrence related by the plaintiff took place on a different occasion.

It was argued by appellant that it was entitled to a peremptory verdict because appellee's own evidence did not show that the train was moved by an unusual and unnecessary jerk. In support of this position appellant cites *Louisville etc. R. R. Co. v. Morris*, 23 Ky. Law. Rep. 448, 62 S. W. 2d 102 Ky. 600, 44 S. W. 213, 42 L. R. A. 293; *Bennett v. Cent. R. R. Co. v. Tandy*, 107 S. W. 715; *Bennett v. Louisville Ry. Co.*, 122 Ky. 59, 121 Am. St. Rep. 453, 44 L. R. A. 2d 4 L. R. A., N. S., 558; *Howard v. Louisville Ry. Co.*, 105 S. W. 932; *Lexington Ry. Co. v. Commonwealth*, 130 Ky. 676, 114 S. W. 295, and a number of other cases.

An examination of the cases referred to will show that the rule is that, where a passenger has boarded a train and in the act of finding a seat is injured by a jerk of the train, the railway company will not be responsible unless it is shown that the moving of the train was caused by an unusual and unnecessary jerk. The doctrine announced in these cases has no application to the case before us, because the injured party did not board the train; he was on the ground when he reached the top of the steps. The rule is that it is the duty of a railroad company to give a passenger a reasonable opportunity to board its trains. Where there is evidence tending to show that the passenger failed in this duty. The train was moved while the passenger was upon the steps of the car and before he had had a reasonable opportunity to reach a place of safety. Under these circumstances, it is immaterial whether the train is moved by an ordinary and usual jerk or an unusual and unnecessary jerk. The negligence consists in the mere act of moving the train before the passenger has had a reasonable opportunity to board the train: *Louisville etc. R. R. Co. v. Commonwealth*, 130 Ky. 676, 114 S. W. 295, and *Ky. Law Rep. 414*, 102 S. W. 322.

It was also made of the instructions because they required the jury to believe that the train was started by an unusual and unnecessary jerk before they could find the railway company responsible for the injury. For the reason pointed out, it was not necessary to submit this question to the jury.

The verdict is affirmed.

Negligence of a Railway Company to Start a Car While a Passenger is Attempting to Board or Alight from it, see Yancey v. Louisville Ry. Co., 205 Mass. 162, 137 Am. St. Rep. 431, and cases cited therein.

cited in the cross-reference note thereto. For a passenger to alight from a moving car is not negligence as a matter of law: *Birmingham Ry. Light and Power Co.*, 164 Ala. 10, 137 Am. St. Rep. 17.

NANCE v. PATTERSON BUILDING COMPANY.

[140 Ky. 564, 131 S. W. 484.]

BUILDING CONTRACT.—Under a Contract to Erect a Building and Sell it with the lot upon which it is erected, the vendee is bound to take the property when it is not finished and tender it to him as provided in the contract, but may recover the money thereunder. (p. 399.)

BUILDING CONTRACT—Departures and Imperfections.—Under an agreement to sell certain property to be improved by a certain kind of building, trivial departures in executing the work will excuse acceptance; but where the evidence is such as to leave doubt, or to be determined from conflicting evidence, the question whether the performance of the contract was substantial, and whether any departure was material or merely trivial and inconsequential, is for the jury, who determine the fact by the standard of their common sense and experience. (p. 400.)

BUILDING CONTRACT—"Material Change"—"Substantial Compliance."—The terms "material change" and "substantial compliance," when used with reference to the performance of contracts of this kind, the matter is not so marked as to not admit of dispute, are best left to the jury without further definition of the terms. They are legal terms like negligence, malice, felonious, and so forth, but expressions of such common use as that to undertake to further define them is more apt to confuse than to aid a jury. (p. 401.)

Cora Maud Nance, for the appellant.

Frank V. Benton, for the appellee.

565 O'REAR, J. Appellee contracted with appellant to build her a house on a lot in Dayton, Kentucky, owned by her former husband, and to sell the property to her completed for two thousand eight hundred dollars, one hundred dollars of which she paid in advance and the balance was to be paid in installments. The house was to be a duplicate of a certain house in Newport, Kentucky, named in the contract. The house was to be completed and possession delivered by the 1st of December, 1907. It was not completed until some time in January, 1908, and then some parts were not completed, especially certain concrete walks. Appellee tendered to appellant the property about January 8, 1908, but she declined to receive it, and demanded that her money be refunded. Appellee refused to refund the money, and sold the property for two thousand eight hundred and fifty dollars. Appellee

ht this suit against appellee to recover the money paid, and the difference between the contract price and the market value of the property if the place had been as provided in the contract. The suit was for the breach of contract, and for the damages named.

The result of the trial was a verdict for appellee.

The evidence shows, without dispute, that the house was completed by the date named in the contract; that the location of the house was different from the one taken as shown on the plat; that the arrangement of the openings, the doors and windows was different also; that the cement construction of the cellar was deficient, faulty, and inferior to that of the other house; that the new house was not provided with a sewer or drainage pipes so as to carry off the water, etc., from the bathroom and sinks; that the new house had a vault built in the back yard near the house as a result of which it overflowed. The foul water found its way into the cellar and through the cellar, running a more or less stream through the cellar; that some of the concrete work in the cellar and a passage or tunnel to the street was defective because of faulty material and workmanship; that a window in the front hall was five and one-half inches smaller than in the Newport house. There were other particulars which it was alleged by the plaintiff that the house was materially different, but upon these there was a conflict of testimony; also there was proof that the plaintiff had contracted for those changes. But upon the uncontradicted evidence there is no doubt that the house was materially different from the one in Newport. The circuit court should therefore have instructed the jury to find for the plaintiff the sum of one hundred dollars and such sum in addition as represented the difference between the contract price and the market value of the property if the house had been completed as provided by the contract, not less than fifty dollars howsoever the appellee had sold the property for fifty dollars more than the contract price. It will not be heard to say that it is worth at least that much more than the contract price. The property was not finished and tendered to the plaintiff as the contract provided, she was not bound to accept it. Because of the defendant's breach of the contract, she was entitled to recover her money paid, and the value of her contract.

The court instructed the jury that if the house was built substantially as provided in the contract, that was a sufficient defense. Which is true. But the case did not authorize such a finding. It is shown by the evidence, as stated, with a clear preponderance of the evidence, that it was not built substantially as provided in the contract. There were material and radical differences between the two houses. Although the pleadings

make an issue, unless the evidence also tends to support each side of the issue, the instruction should be regulated by the evidence, as where the evidence is all on one side, there should be a peremptory instruction upon that issue in accordance with the evidence. It is true that appellee undertook to explain the defective conditions shown to exist by saying that the concrete was put down in frosty weather, and was therefore caused to crumble and crack. But that is not material. Appellant did not undertake to bear the consequences of misadventure in the work. Appellee undertook to build the house a duplicate of the other. If one mishap or another made it materially different, the loss is appellee's, not appellant's. As a matter of law, it is a substantial failure if the foundation of a house cracks so as to leak, and crumble, immediately after its completion, whereas if it had been properly constructed it would have done neither.

⁵⁶⁷ As defining the phrase "substantial compliance" the court told the jury:

"Substantial compliance and performance as used in instructions 1 and 2 permit only such omissions or deviations from the contract as are inadvertent or unintentional, are not due to bad faith, do not impair the structure as a whole, and are remedial without doing material damages to other parts of the building in tearing down and reconstructing, and may without injustice be compensated for by deduction from the contract price."

That instruction was doubtless based upon *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309, and *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52. It may be a fair application by the court of the meaning of the phrase in a particular case. But the expression "substantial compliance," as the one "material difference," is scarcely susceptible of such a definition. The words are of common use and generally understood. It is not true that a radical departure from the contract would be excusable if it were unintentional. It might be true that the owner of a lot who contracts with another to build a house on the former's lot, would not be allowed to retain the house without paying for it, or to require the builder to tear it down and rebuild, where the defect was one remedial by repair and did not impair the stability of the structure. In such a case the owner would doubtless be compensated by deduction from the contract price. But that is not this case, and the rule there announced cannot be applied to this case. Appellee agreed to sell appellant property to be improved by a certain kind of structure. To recover the purchase price from her it must have tendered the structure as agreed. Trivial departures in executing the work would not have excused appellant from accepting. And where the evidence is such as to leave it in doubt, or to

from conflicting evidence whether the perform-contract was substantial, and whether any dematerial, or merely trivial and inconsequential, jury, who determine the fact by the standard of common sense and experience. It must always be and that neither the jury nor the court are at take a contract for the parties, or to alter the one e. Therefore, although the jury or the court at that the house as built is equivalent in value or e one contracted for, they are not at liberty to substitution on that score. The structure con-⁶⁸ must be finished as it was agreed to be. The s it the structure agreed to be furnished, allow- immaterial deviations, such as neither change the ls or general character of the workmanship? It whether the change affects the value, but whether e thing. After all "material change" and "sub- liance," where the matter is not so marked as to dispute, is best left to the jury without further the terms. They are not legal terms like negli-, felonious, and so forth, but are expressions of use as that to undertake to further define them o confuse than aid the jury.

in this case was, furthermore, flagrantly against the evidence.

and remanded for a new trial under proceedings ant herewith.

a Building Contractor to Recover for a Substantial Per- s Contract is the subject of a monographic note to Handy m. St. Rep. 678.

of the Vendee's Damages on a Breach of Contract to is the subject of a note to Arentsen v. Moreland, 106 63.

COMMONWEALTH v. MILES.

[140 Ky. 577, 131 S. W. 385.]

Y — Indictment—Statement Without Knowledge.—An rging that the defendant falsely swore a certain party certain church on a certain Sunday, when in fact the not at such church on such Sunday, and did not know he was there, is sufficient, the last pronoun evidently third party and not to the defendant. (p. 402.)

Y.—Swearing to What One Does not Know, and has ound to believe, may constitute perjury, although the be, in fact, true. (p. 403.)

MENT — Misdemeanor — Time of Commission.—It is the commonwealth, in indicting for a misdemeanor, to Rep., Vol. 140—26

charge without respect to a particular date, that the offense committed in the county within one year before the presentment of the grand jury. (p. 403.)

C. S. Hill, James Breathitt, attorney general, and Tom Gregor, assistant attorney general, for the appellant.

No brief for appellee.

578 O'REAR, J. The circuit court sustained a general demurrer to the following indictment, and the commonwealth appeals:

"The grand jury of Taylor county, in the name and by authority of the Commonwealth of Kentucky accuses Albert Miles of the crime of perjury committed as follows, viz.: said Albert Miles on the tenth day of January, 1910, within twelve months before the finding of this indictment in the county and Commonwealth did on his examination as a witness, being duly sworn by the judge of the Taylor circuit court to testify the truth, the whole truth, and nothing but the truth on the trial of the case of the Commonwealth v. Lloyd Tracenrider, in the Taylor circuit court, said judge having authority to administer such oath and said Lloyd Tracenrider being tried for unlawfully interrupting and disturbing a congregation of persons met for and engaged in the worship of God at Morton's Chapel Church on the — day of July, 1909, in Taylor county, Kentucky, by, to-wit: said Albert Miles feloniously, falsely, and corruptly testified as a witness at said trial after being duly sworn as aforesaid that Lloyd Tracenrider was not at said Morton's Chapel Church on the third Sunday in July, 1909, or any other Sunday in July, 1909, when in fact he Albert Miles was not at said church and did not know whether he was there on the third Sunday in July, 1909 or not there on said date, the matter so testified to being material and the said testimony being willfully and corruptly false and so known to be by said Albert Miles; contrary to the form of the statute in such cases made and provided, and against the peace and the dignity of the Commonwealth of Kentucky."

579 Though awkwardly expressed, we think it clear from the indictment charges with reasonable perspicuity that Miles falsely, corruptly, and knowingly testified to a fact as within his knowledge which in truth he had no knowledge of. The statement "when he, Albert Miles, was not present at said church, and did not know whether he was there on the third Sunday or not," means to charge that Miles was not at said church on that date and did not know whether Tracenrider was there or was not there. The last pronoun relates to Tracenrider, not to Miles.

fully and corruptly swears to a fact as of his own when he in truth had not the knowledge, it is per se a matter to be under judicial investigation, and the fact is material to the issue. Nor does it matter that the witness did not know it to be so: Criminal Law, sec. 1246; *People v. McKinney*, 3 N. H. 373; *State v. Gates*, 17 N. H. 373; *State v. Knox*, 312. So, in the case at bar, though it be true that the witness did not know it, yet swore that he did, and on probable ground for such belief, he is guilty of

perjury at a religious gathering is a misdemeanor in this State, sec. 1267. It is competent for the common-law to indict for that offense without respect to the date, that the offense was committed in the year within one year before the presentment of the grand jury, and then prove the act to have been done on any day within that year: Civ. Code, sec. 129; *State v. Cain*, 14 Bush, 525; *Williams v. Commonwealth*, 667, 37 S. W. 839; *Combs v. Commonwealth*, 273, 84 S. W. 753. If the common-law chooses to confine itself to a particular date or period, it may do so by so forming the charge in the indictment as was done in this instance. It was therefore not to be proven, and, a fortiori, to be disproved, that the accused of disturbing the assemblage was not present at any time during the period covered by the indictment. The testimony appears, on its face, to have been material and relevant.

The error to the indictment should have been overruled. The judgment should be affirmed, and remanded for proceedings consistent here-

Perjury of Indictments for Perjury is the subject of a note to State, 124 Am. St. Rep. 654. An indictment for perjury must set out and charge the substance of the testimony to which the perjury is assigned, and not the conclusion of the testimony: *Schoenfeld v. State*, 56 N. H. 133 Am. St. Rep. 956; and see *State v. Sargood*, 80 Vt. St. Rep. 995.

Perjury is the subject of a note to *State v. Shupe*, 85

JAMES v. DUFFY.

[140 Ky. 604, 131 S. W. 489.]

OFFICERS—Compensation, Change During Term.—Under constitutional provision that "the compensation of any city, county, town or municipal officer shall not be changed after his election or appointment or during his term of office," the compensation of such officers may be fixed after their election, if not fixed before, but when once fixed cannot be changed so as to affect the then incumbents. (p. 405.)

OFFICERS—Compensation, Change During Term—Change of Duties.—A constitutional provision that "the compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office," does not prohibit the legislature from changing the duties of public officers by either adding to or taking from them. (p. 405.)

OFFICERS.—Compensation of an Official Means pay for doing all that may be required of him. (p. 406.)

OFFICERS—Change of Compensation.—A Constitutional Provision forbidding the change of the compensation of an official during his term of office is inexorable. It admits of no exceptions. It affords no opportunity for evasion by the legislature or other body. Its purpose cannot be defeated by indirection. It is a complete barrier to change of compensation, whether salary, scale of fees or both. It operates on the office and the official, not upon his duties. (p. 406.)

OFFICERS—Compensation—Change of Duties.—A public official has not a contract with the public or the state that he may perform all the duties imposed on the office at the time of his election or appointment. He is privileged to perform only such as may be imposed on it from time to time during his incumbency. If the duties of the office are diminished, he is entitled to the same salary, if it is a salaried office, or to the same scale of fees for what he may do. If the compensation is based upon that plan. But if new duties are added he must perform them for the same salary. (p. 406.)

COUNTY ATTORNEY—Collection of Inheritance Tax—Increase of Compensation.—The statute allowing county attorneys a certain percentage of the moneys recovered by the prosecution of suits for delinquent taxes does not apply to county attorneys in office at the time of the adoption of the statute, where there is a constitutional provision prohibiting changing the salaries of officials during their terms of office. (p. 407.)

James Breathitt, attorney general, for the appellant.

James Carroll, Hazelrigg & Hazelrigg, McQuown & Beckham and J. C. Duffy, for the appellee.

605 O'REAR, J. In the revenue act of 1906, an inheritance tax was imposed for the first time in this state. The statute dealt with the whole subject of revenue and taxation. Among other features, it revised the law respecting omitted and delinquent lists. It curtailed the authority previously invested in auditor's agents, and imposed upon the county attorneys the duty of approving settlements and compromise made between auditor's agents and delinquent taxpayers before they should become effective. It also made it the duty

county attorneys to appear in the county court, and in courts to which the matter might be carried, on behalf of the counties and the commonwealth in proceedings to tax property. Appellee was elected county attorney in Christian county in 1905. In 1908 the estate of Forbes in Christian county became liable to an inheritance tax, but refused to report it, the auditor's agent began a proceeding in the county court to require its assessment. Appellant's attorney appeared for the relator. The result of the proceeding was that four thousand two hundred and fifty dollars of inheritance tax was realized and paid into the treasury. The act of 1906 allows the county attorneys fifteen per cent of the omitted taxes so assessed and collected, but they do not actually appear in the case: Ky. Stats., sec. 4260a. Appellant, auditor of state, refused to issue his warrant against appellee for the fifteen per centum claimed on this tax, whereupon this action for mandamus against the auditor was filed.

Article 161 of the constitution provides that "the compensation of any city, county, town, or municipal officer shall not be increased or decreased after his election or appointment or during his term of office. . . ."

The compensation of such officers may be fixed after their term expires, but not fixed before, but when once fixed cannot be changed as to affect the then incumbent: City of Louisville, 199 Ky. 598, 18 Ky. Law Rep. 427, 36 S. W. 944; Smith, 117 Ky. 990, 80 S. W. 201, 25 Ky. Law Rep. 103 S. W. 201; Spaulding v. Thornberry, 31 Ky. Law Rep. 103 S. W. 291. Prior to 1906 county attorneys were allowed by law as part of their compensation any recovery of taxes assessed against owners who had failed to list their property. Nevertheless, it was then the duty of county attorneys to appear for the commonwealth and to list such property, in whatever proceedings might be pending in the commonwealth such proceedings might be pending in the courts, secs. 126, 127; Coulter v. Denny, 23 Ky. Law Rep. 67 S. W. 65; Spaulding v. Thornberry, 31 Ky. Law Rep. 103 S. W. 291; Terrell v. Trimble County, 33 Ky. 364, 108 S. W. 848.

County attorney in 1905 was paid by a salary allowed by the circuit court: Ky. Stats., sec. 132. The act of 1906 (Ky. Stats., sec. 4260b) allows him in addition five per cent of omitted taxes assessed in suits to which

the question is, Is that a change of his compensation during his term of office?

It increases his compensation is beyond dispute. But it does not change it, because it is for new duties and therefore is a fixing of compensation for those

duties alone. The fact still remains that the official receives more money as compensation for his official duties than he did before. In fact we do not regard the statute of 1906 as changing or adding to the duties required of the county attorneys. But let that be as it may, it is not material. The constitution does not prohibit the legislature from changing the duties of public officers—either adding to them or taking from them—but it does forbid changing their compensation. By compensation is meant pay for doing all that may be required of the official: *Bright v. Stone*, 20 ⁶⁰⁷ Ky. Law Rep. 817, 48 S. W. 207. If the compensation is a salary, the salary must remain the same throughout that official's term, whether or not the scope of his official duties have been increased or lessened. If the compensation be fees, then the same scale of fees must prevail for the same services, and if new duties are imposed, with fees attached, the incumbent when the change is made cannot charge for the new duties. The section of the constitution is inexorable. It admits of no exceptions. It affords no opportunity for evasion by the legislature or other body. Its purpose cannot be defeated by indirection. It is a complete barrier to change of compensation, whether salary, scale of fees, or both. It operates upon the office and the official—not upon his duties. True an official who is paid fees for his services may have the services discontinued by the legislature, or by a repeal of the law requiring them, or by conferring them upon some other person or body, and in this way the officer first named may receive less than he did before. But that is not a change of compensation, because unless he performed the particular duty he would never have received the fee allowed by law for doing it, and it is not different whether the legislature repeals the law requiring him to perform the duty, or whether the necessity for his acting never arises: *Prunell v. Mann*, 105 Ky. 87, 48 S. W. 407, 49 S. W. 346, 50 S. W. 264.

A public official has not a contract with the state or county that he may perform all the duties imposed on the office at the time of his election or appointment. He is privileged to perform only such as may be imposed on it from time to time during his incumbency. If the duties of the office are diminished, for what remains he is entitled to the same salary, if it be a salaried office, or to the same scale of fees for what he may do if the compensation is based on that plan. But if new duties are added he must perform them for the same salary. He must, whilst holding a public office, discharge all of its duties even though no compensation be fixed: *Mitchell v. Henry County*, 124 Ky. 833, 30 Ky. Law Rep. 1051, 100 S. W. 220. If in the instance we are considering, the legislature had in 1906 for the first time imposed the duty on county attorneys to prosecute actions against delinquent tax

sitting to list their property, and had not pro-
 compensation for it, there can be no doubt those
 have been obliged to discharge the new duty.
 legislature has done in the act of 1906 is to set
 minutely some of the duties of county attorneys
 proceedings, and to place under them a set of offi-
 re independent of them. And the legislature
 d that for acting in those cases county attor-
 be paid fifteen per cent of the taxes recovered.
 was doubtless to stimulate these officers to a
 nce and to create an interested check upon audi-
 who had previously much power and license to
 rests of the state and county treasuries in those
 provision, nevertheless, creates a different com-
 county attorneys, and for those then in office
 change in their compensation. The act cannot
 without violating the letter and spirit of the
 Of course, as to those who have come into office
 such objection can apply.
 ent of the circuit court sustaining a demurrer
 of appellant is reversed and cause remanded,
 s to sustain the demurrer to appellee's petition.

of Officials.—A person who accepts an office with a
 ound to perform the duties of the office for the salary,
 ally claim additional compensation for the discharge
 even though the salary be very inadequate: Johnson
 a. 477, 106 Am. St. Rep. 890; and when a duty is
 which no compensation is provided, the presumption is
 e is intended to be gratuitous, or that compensation
 ed as covered by fees in other matters, or by salary,
 es v. Commissioners of Lucas Co., 57 Ohio St. 189, 63
 10. A public officer is not entitled to his salary by
 tract, express or implied. His right to such compen-
 a creature of law, and as an incident to the office:
 uis, 153 Mo. 18, 77 Am. St. Rep. 701. Where a city
 as discretion within certain limits to fix the salary
 but which has no authority to abolish the office or
 mbent without cause, attempts to do so indirectly by
 ary to an extent that no person would act, a court
 nus, order the salary to be restored to a reasonable
 City of Shreveport, 124 La. 178, 134 Am. St. Rep.

CASES

IN THE

COURT OF APPEALS

OF

MARYLAND.

PHILLIPS v. INSLEY.

[113 Md. 341, 77 Atl. 850.]

RELIGIOUS CORPORATIONS—Grant to, for Special Use, Diversion and Reverter.—Where land is granted to a religious corporation, or to trustees for its benefit, to be held for a specified term, and neither the corporation nor the trustees have a right to divert the land from such use. If they attempt to do so, the grantor, or his heirs, immediately become reinvested with the title to the land. (p. 411.)

RELIGIOUS CORPORATIONS—Adverse Possession—Land Granted for Special Use.—Where land granted to a religious corporation for a certain specified use is openly diverted from such use, and adverse possession thereof, as against the grantor and his heirs, commences at the time of such diversion, and, if continued for the requisite length of time, will ripen into a title in the corporation independently to the grant. (p. 412.)

RELIGIOUS CORPORATIONS—Title by Adverse Possession—Marketable Title.—Where a religious corporation to which a grant of property for a certain specified use was made openly diverted the property from such use and held it to another and different use for forty-five years, and then sold it after procuring a decree in equity upon service by publication against the heirs of the grantor for the sale of the land and reinvestment of the proceeds, the title thus passed is marketable. (p. 412.)

RELIGIOUS CORPORATIONS—Adoption of Seal.—Religious corporations, as well as individuals, may adopt any seal, and need not say that it is their common seal. (p. 413.)

RELIGIOUS CORPORATIONS—How Constituted.—Under the Maryland system of incorporating religious societies the trustees, and the congregation, constitute the corporation. (p. 413.)

RELIGIOUS CORPORATIONS—Necessity of Seal.—The general incorporation law authorizes trustees who have become incorporated on behalf of religious societies or congregations to adopt a corporate seal, it does not require them to adopt one. (p. 413.)

RELIGIOUS CORPORATIONS—Conveyances by—Sufficiency of Execution—Seal.—A deed by trustees of a religious corporation who declare on the face of the instrument their intention to act in their corporate capacity, signed by them as such trustees with their corporate seal affixed to each signature, must be held the deed of the corporation, it not appearing that any formal seal had ever been adopted by the corporation. (p. 413.)

C. Harrington, for the appellant.

Barton Insley, for the appellee.

MUCKER, J. The appeal in this case is from an order of the circuit court for Dorchester county finally ratifying the sale of the appellee's 343 to the appellant of a lot of ground in Cambridge.

The sale was made, under the court's decree, for purposes of the real estate of which the late William H. Mucker was seised. The regularity of the sale and of the proceedings under which it was made are conceded. Its ratification is excepted to solely upon the ground that Mr. Barton Insley has a marketable title to the tract of land out of which the lot sold to the appellant came.

There is no controversy over the facts of the case, which are fully set out in the record in a written agreement supplemented by a list of conveyances and judicial proceedings. The following facts selected from those sources will disclose the issue presented by the appeal.

On August 6, 1800, Robert Muir, by deed of that date, conveyed to the appellee for the consideration of \$145.33, a lot of land in Cambridge containing three-fifths of an acre, to seven named individuals and their successors in special trust and confidence, for the use and express purpose of erecting and keeping a house or chapel thereon for the only proper use of the Methodist Episcopal Church, and to be made use of as a preaching house or chapel by the members of the said society or church now licensed or hereafter which at any time hereafter shall be licensed to preach the gospel by the General Conference of preachers of said church or by the Bishops or Presiding Elders of the same for the time being and to be made use of in the same manner by all other preachers or exhorters of the said church who shall be licensed or authorized to preach or exhort according to the rules of said church and none others." The premises were described in the deed as the trustees for the use and preaching of the church, and provision was made in the deed for the filling of vacancies which might from time to time occur.

The congregation for whose benefit the deed was made erected a church on the lot and erected a church edifice on it, which on March 7, 1806, became duly incorporated under the laws of the state by the name of "The Trustees of the Methodist Episcopal Church in Cambridge." On April 8, 1812, the trustees of the church, Robert Muir, had originally conveyed the lot for the use of the congregation, made a deed of it to the incorporation, "to and for the uses and trusts reposed in the deed and to and for none other whatever."

The congregation continued uninterruptedly to use the building and the building thereon as its place of worship down to the year 1845, when, having acquired another lot in what was regarded as a more suitable portion of the town, it erected a new church edifice thereon which it has, ever since then, used and occupied for its church purposes. Upon the erection of a new church building, in 1845, the old one on the lot purchased from Muir was torn down and removed from the town, which was thereafter abandoned as a place for preaching and worship, and was used only as a burial place, by the congregation down to the year 1890.

On March 28, 1890, "The Trustees of Zion Chapel in Cambridge" filed its bill in the circuit court for Dorchester county alleging the facts, of which we have stated the substance, and also that since 1845 it had been in continuous exclusive and adverse possession of the lot and had used it for burial purposes, but that it was no longer eligible for that purpose and was entirely unproductive and a source of constant expense to the congregation, and that its sale and reinvestment of the proceeds of sale would be advantageous, etc. The bill further averred that Robert Muir had been in possession of the lot for very many years, and that it was unknown whether he left any heirs, or, if he left any, who they were or where they resided within the state or beyond its limits, and prayed for an order of publication against them for the better advancement of the title of a purchaser of the land, and for a decree for a sale of the land and a reinvestment of the proceeds.

³⁴⁵ After due notice by publication to the unknown heirs of Muir and a failure of anyone to appear in response thereto, a decree pro confesso was passed in the case, and in due course, after proper testimony establishing the allegations of the bill had been taken, a final decree was passed directing the sale of the lot and appointing David Straughn trustee to make the sale. At the sale, which was made in 1890, William H. Barton, then known as William H. Barton, Jr., came the purchaser of the lot, and, after the final ratification of the sale, and the payment by him of the purchase money, the lot was duly conveyed to him, by a joint deed from David Straughn trustee and the church corporation, "The Trustees of Zion Chapel in Cambridge." He continued to own and hold it until his death, and it formed part of the real estate sold thereafter in the partition suit already mentioned. The appellant Levi B. Phillips purchased a portion of the lot at the partition sale and excepted to the ratification of the sale to him because, under the facts stated, Barton's title to the lot was alleged not to be marketable.

The court, after a hearing upon the exceptions, overruled them and finally ratified the sale by the order from which the appeal was taken.

learned judge below was clearly right in treating the land required by Mr. Barton from the trustees of Zion Chapel as a marketable one.

The circumstances of the acquisition and holding by the trustees of the lot of land involved in the present case are the same as those which formed the subject of controversy in *Reed v. Reed*, 56 Md. 236, are identical in principle and in fact. In the former case the lot was conveyed by Howard to certain trustees, for the use of the incorporated congregation of German Baptists as a burial ground, in 1808. The congregation having become incorporated under the general laws of the state filed a bill in equity against the heirs at law of the trustees, who had refused to convey to it the legal title to the lot. While that suit was still pending, the heirs at law of the trustees filed a bill in the same court alleging that the lot was no longer suitable for use as a burial ground and that it would be for the advantage of all parties concerned that it be sold and the proceeds divided among

In the two cases having been consolidated, the court held that the congregation was entitled to a conveyance of the lot from the trustees upon the uses declared in the deed of 1808. Howard, but that neither the heirs of the trustees nor the congregation were entitled to divert the lot from those purposes and that upon any such diversion the terms of the deed would be violated and the heirs of the grantor would immediately become reinvested with the title to the lot.

In *Camp v. Sibley*, 76 Md. 165, 28 Atl. 977, it was held that though a deed to a church of a lot to be used as a burial ground was void for not expressing on its face the purposes for which the lot had been bought, the entry of the church into possession thereunder constituted an adverse possession which, if continued for twenty years, would perfect against all persons not under legal disabilities, and that the period of limitations began to run against the church in his lifetime it would not be suspended by his death or the supervention of infancy, coverture or other dis-

In *Union Church v. Hilken*, 84 Md. 170, 35 Atl. 9, we held that though a conveyance to trustees for the use of a religious society was void, for want of the assent of the legislature required by the Declaration of Rights, the entry into possession by the grantees under the deed caused the statute of limitations to begin to run against the grantor; and that the continuance of the possession by the grantees and those claiming under them for twenty years perfected their title against all persons not under disabilities. In *Rother v. Sharp* etc. Church, 85 Md. 528, 37 Atl. 24, where the

religious society had entered upon a lot conveyed to it for specified uses and then for much more than twenty years had openly and notoriously applied it to other uses, the title of the society to the lot was ³⁴⁷ held to be marketable and a purchaser was required to accept it in a suit for the specific performance of his contract of purchase.

The same conclusion, as to the effect of the entry by a religious society upon land conveyed to it by a deed void for want of legislative assent, and the retention of possession of it for more than twenty years in giving a marketable title to the society, was reached by us in the more recent cases of *Regents etc. v. Trustee of M. E. Calvary Church*, 104 Md. 635, 65 Atl. 398, and *Dickerson v. Kirk*, 105 Md. 638, 66 Atl. 494. In the last-mentioned case, where the possession had continued, as it has in the case at bar, for more than forty-three years, we said that there could be no doubt that the society had a good and merchantable title by adverse possession which a purchaser was bound to accept.

In the light of these precedents we have no hesitancy in holding that the statute of limitations began to run against the heirs of Muir when the trustees of Zion Chapel, in Cambridge, in 1845, openly diverted the lot of ground, whose title is now called in question, from the uses of a chapel or preaching house, and that the adverse possession of the lot then begun, ripened into a marketable title by the continuous and uninterrupted possession and application of it to the use of a burial ground by the society down to the year 1890 when it was sold and conveyed to Mr. Barton.

It is urgently contended on the appellant's brief that the circuit court of Dorchester county had no jurisdiction to set aside the lot under the bill filed by the church corporation on March 28, 1890, and that therefore the sale to Mr. Barton under the decree in that case conferred no title on him. We deem it unnecessary to enter into a consideration of the precise nature and scope of that equity proceeding, because the court had jurisdiction therein to decree the sale, Mr. Barton took title to the property under the deed from Mr. Straughn as trustee, and the joinder of the church corporation in the deed was mere surplusage. If, on the other hand, ³⁴⁸ the court had no jurisdiction, the title passed to him under the deed from the corporation.

The deed upon its face professes to be the deed not only of Straughn as trustee, but also of the trustees of Zion Chapel in Cambridge, who are named therein, acting in their corporate capacity as "an ecclesiastical corporation created under the law of Maryland." It is signed by Straughn as "trustee in equity" and by each one of the church trustees who in their signatures as well as in the body of the conveyance are described as the "Trustees of Zion Chapel, in Cam

ed.,” and the signatures are duly attested by the
e before whom it was acknowledged by all the gran-
e respective capacities in which they are described
ed.

rd “(seal)” appears on the record affixed to each

It, of course, does not appear whether on the orig-
the seals were wax impressions or mere scrolls, but
them to have been scrolls we think the deed was a
porate conveyance. In *Mill Dam Foundry v. Hovey*,
417, where the signature of each of the corporation
o a deed had affixed to it a piece of blank paper
by a wafer, without any impression on any of them
of a corporate seal, the instrument was held to be
of the corporation, the court saying in its opinion:
ration as well as an individual may adopt any seal.
d not say that it is their common seal. This law
as the hills.” See to like effect, *St. Phillips Church*
Church, 23 S. C. 297; *Taylor v. Heggie*, 83 N. C.
som v. Stonington Savings Bank, 13 N. J. Eq. 212;
ent. R. R. Co. v. Johnson, 40 Ill. 35; *Wiley v. Board*
tion, 11 Minn. 371; 7 Am. & Eng. Ency. 692; 10
, 1012.

se of *Reynolds' Heirs v. Glasgow Academy*, 6 Dana
, bears a striking resemblance to the one now under
tion. There the appellee was a corporation under
of “The Trustees of Glasgow Academy.” A deed
349 all of the trustees constituting the corporation
parate scroll appended to each signature was held
od corporate conveyance, it appearing upon the face
ed, as it does upon the face of the one now before
the trustees in making it intended to act in their
, and not in their individual, capacity and it not
g that they had a corporate seal.

the Maryland system of incorporating religious soci-
trustees and not the congregation constitute the
on: *African M. B. Church v. Carmack*, 2 Md. Ch.
bs v. Vestry of St. John's, 96 Md. 267, 53 Atl. 917.
the general incorporation law of the state author-
tees, who have become incorporated on behalf of
societies or congregations, to adopt a corporate seal,
that law nor the charter of the trustees now under
tion, a copy of which appears in the record, require
adopt one, nor does it appear that they have ever
done so. Under such circumstances and in view of
formal and technical function of a seal, we think
execution, in the manner mentioned, of the deed of
r 8, 1891, to Mr. Barton by the trustees who de-
the face of the instrument their intention to act in
porate capacity must be held to have constituted a

sufficient adoption of the scroll used by them as a corporate seal pro hac vice to make the deed a valid and effectual corporate conveyance of the lot of ground therein described.

Having already held the title of the trustees to have been a marketable one we must affirm the order appealed from.

Order affirmed with costs.

The Reversion of the Property of a Corporation or Society to the Grantor or his heirs upon the dissolution of the association is discussed in Board of Education v. Edson, 18 Ohio St. 221, 98 Am. St. Rep. 14; Wilson v. Leary, 120 N. C. 90, 58 Am. St. Rep. 778; Presbyterian Church v. Venable, 159 Ill. 215, 50 Am. St. Rep. 159; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192.

Where a Religious Society Which was the Beneficiary of a Testamentary Trust Fund is Dissolved by reason of an abandonment of its purposes and functions for many years, such funds revert to the heirs of the testator: Miller v. Riddle, 227 Ill. 53, 118 Am. St. Rep. 261.

The Diversion to a Different Use of property given or set apart to a church or religious association for a particular use is considered in Park v. Chaplin, 96 Iowa, 55, 59 Am. St. Rep. 353, and see the cases cited in the cross-reference note thereto.

The Jurisdiction of Civil Courts Over Church Controversies is the subject of a note to Morris St. Baptist Church v. Dart, 100 Am. St. Rep. 734, the diversion of property in contravention of a church trust being considered at page 748.

SCHAPIRO v. HOWARD.

[113 Md. 360, 78 Atl. 58.]

WILLS—*Intention of Testator—How Determined.*—When a court is expounding a will either at law, sitting as a jury, or in equity, the language of the testator, where plain and unambiguous, must govern, and therefore extrinsic evidence is inadmissible to show that he meant something different from what his language imports; the question is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words. The court cannot by intendment reconstruct the will. (p. 420.)

WILLS—*Construction—"Children of Wife."*—A bequest that "in the event of my said wife having any child or children at the time of her death, I devise and bequeath the whole of said estate to said child or children," is not confined to any issue of the then present marriage, but includes any children the wife might have by a second marriage. (pp. 421, 424.)

CONTINGENT REMAINDERS—*Alternative upon Life Estate—When Vest.*—A devise of a life estate with remainder to any child or children of the life tenant, or if she die without issue living then to the heirs at law of the testator, creates alternative conditional remainders, dependent upon a contingency with a double aspect, which cannot vest until the happening of the contingency. (p. 425.)

CONTINGENT REMAINDERS—*Alternative upon Life Estate—In Whom Vest.*—In case of alternative conditional remainders to a class, those only of the class who are living at the time of

the remainder take, and not those living at the creation before, a devise to the testator's wife with remainder to her children she might have, or in case she die without issue at law of the testator, vests upon the death of the testator, in the heirs living at her death, and not in those who die at the death of the testator. (pp. 424, 426.)

CONTINGENT REMAINDERS—Conveyance Before Vesting.—A contingent remainder is to a class, a voluntary conveyance of one of the class of all her property, including all the estate of the creator of the remainder "which under no otherwise, is now or may hereafter be vested" in the remainder prior to the vesting of the remainder, does not pass upon the subsequent vesting of the remainder. (p. 427.)

CONTINGENT REMAINDERS—Conveyance Before Vesting—Enforce.—Where a grantor, in return for a substantial consideration, attempts to convey property thereafter to a class in a contingent remainder, a court of equity will enforce the conveyance in a proper case; but where the consideration is inadequate, equity will not interfere. (p. 427.)

Fisher, for Margaret W. Schapiro, appellant.

Samuel H. Howard, for the Safe Deposit and Trust Co., appellee.

Whitlock & Kemp, for the appellee.

JUDGE, J. The two appeals embraced in this record are from a decree of the circuit court for Anne Arundel County, construing the will of John J. Hopkins, who was a resident of that county at the time of

the appeals presented arise upon a petition filed in a court, of Mary M. Harding v. Elizabeth W. Howard, by the Safe Deposit and Trust Company of Baltimore under the will of said John J. Hopkins, and under the will of Lavinia Hopkins, and as to the two deeds, one from Margaret W. Schapiro, and one from Samuel H. Mercer. By the decree passed March 18, 1901, in the original cause above mentioned, the Safe Deposit and Trust Company of Baltimore was appointed executor from Lewis N. Hopkins, executor of said John J. Hopkins an invested fund of about nine thousand dollars, to hold the same for the use of Elizabeth W. Howard, for her life, and for distribution after her death to those held to be entitled under his will. Since the passage of said decree the said trust has been administered in that court.

The will of John J. Hopkins is as follows, being transcribed

the will and testament of me, John J. Hopkins, of Anne Arundel County, in the State of Maryland:

I will and direct that all my just debts be paid and that my executor hereinafter named after my decease.

"Second: I will and bequeath unto Louis Hopkins, of Baltimore City, the sum of three thousand dollars, to be invested by him in such stocks or securities as in his discretion shall be most profitable, in trust, for the use and benefit of my wife and sister, Mrs. Margaret E. Warfield, wife of Lot Warfield. The issues and profits thereof to be paid to the said Margaret Warfield during her natural life, and after her death to be ³⁶³applied to the use and benefit of her children now living, John B. Warfield and Clarence Warfield, and any other children she may have born to her in wedlock, and upon the arrival at age of each of said children above named, I will and bequeath their share, respectively, of the sum of three thousand dollars, to be paid to them by my said trustee, with the right of survivorship in the event of either of them dying during their minority. And in the event of each and all of the children of said Margaret E. Warfield dying before their arrival at age, I bequeath the said sum to my heirs at law.

"Third: I will and bequeath to my nephew, John B. Warfield, my watch and chain that I now wear.

"Fourth: I will and direct that my executor hereinafter named, as soon after my decease as to him may seem practicable, sell all my real estate lying near Millersville, in Annapolis Arundel County, being the farm whereon I now reside, as well as all other estate on said farm, and invest the proceeds thereof in such securities as to him may seem most judicious, in the name of my wife, Elizabeth W. Hopkins, to be held by her, my said wife, Elizabeth, during her natural life, without impeachment of waste, or let or hindrance, from any person whomsoever, during her natural life, with power to sell and reinvest the same as she may think advisable. And I further will and devise unto the said Elizabeth W. Hopkins all other estate, real, personal and mixed, that I may die possessed of or entitled to by devise or inheritance, or in any manner whatever the same may be obtained, to be held by her, my said wife, Elizabeth W. Hopkins, during her natural life, she to have sole control of my said estate without let or hindrance from any person or persons whomsoever; and in the event of my said wife having any child or children at the time of her death, I will and devise the whole of said estate to said child or children, equally to be divided if more than one. But in the event of my said wife dying without issue living, then and in that case I devise and bequeath all said estate to my heirs at law.

"Lastly: I do hereby appoint the aforesaid Louis Hopkins of Baltimore City, sole executor of this my last will and testament, revoking and annulling all other wills by me made and ³⁶⁴ratifying and confirming this and none other to my last will and testament.

ss my hand and seal this 14th day of June, in the
een hundred and seventy-three.

"JOHN J. HOPKINS. [Seal]

d, sealed, published, pronounced and declared by
Hopkins, the within-named testator, as and for his
nd testament in the presence of us, the subscribers,
is request and in his presence, and in the presence
ther, have hereunto subscribed our names as wit-
ereto.

esses :

"A. S. BRYAN,

"E. C. GANTT,

"C. McCENEY CLAYTON."

th W. Hopkins, after the death of her husband,
, and died, Elizabeth W. Howard, October 14, 1909,
aving had issue by either marriage, and the estate
J. Hopkins, being the fund above mentioned, is
e distributed to the parties entitled under his will.
at law, answering to that description at the time
th, were his brother, Mahlon Hopkins, and his sister,
Mercer. Mahlon Hopkins died without issue in
ing a will by which he devised and bequeathed all
to his mother, Lavinia Hopkins, who died in 1884
will by which she devised and bequeathed the resi-
er estate to the Safe Deposit and Trust Company
ain trusts declared in said will. This will was con-
this court in *Marshall v. Safe Deposit and Trust*
Md. 1, where it was held that one-twelfth part of
ue vested in Marie Henriette Mercer, widow of
K. Mercer; five twenty-fourths in Charles H. Hard-
ntor and résiduary legatee of Mary M. Harding,
remaining seventeen twenty-fourths in the Safe De-
Trust Company under a deed of trust made to it
garet W. Schapiro.

a W. Mercer died in 1879 leaving a will by which
ot attempt to dispose of any interest she might be
to have under the will of John J. Hopkins, and
wo sons, Samuel H. Mercer and George D. Mercer,
daughters, Mary, wife of Charles H. Harding, and
now the widow of Salo Schapiro, all of whom ex-
garet Schapiro died before Elizabeth W. Howard.

D. Mercer died without issue in 1887 leaving a will
he devised and bequeathed all his property to his
ie W. Mercer, now Jennie Mercer Lake. Samuel
r died in 1897 leaving a will by which he devised
eathed all his property to his wife Marie Henriette
Before his death, however, he had executed a deed
o Lewis N. Hopkins, and on the death of Lewis N.

Hopkins the Safe Deposit and Trust Company was duly appointed trustee in his place. Margaret Schapiro and her husband in 1899 made a deed of trust to the Safe Deposit and Trust Company of all her property and estate in Maryland, "whether in possession, reversion or expectancy . . . including all of her right, title, interest and estate, both at law and in equity in and to that portion of the estate of John J. Hopkins, deceased, which, under his will or otherwise is now or may hereafter be vested in the said Margaret Schapiro as one of the heirs at law of said testator."

If the date of Mrs. Howard's death without issue is the date at which the heirs entitled to this estate are to be ascertained, then Mrs. Schapiro is the only person answering that description, and is solely entitled.

If, however, the date to be taken for that purpose is the death of John J. Hopkins, then Mahlon Hopkins and Ella W. Mercer were the only persons answering that description, if the words "heirs at law" are to be construed in their ordinary sense, or if they are to be construed as "next of kin," in consequence of the admitted conversion of the property into personalty under the will, then Mahlon Hopkins, Ella W. Mercer and Lavinia Hopkins, were the three persons ³⁰⁸ answering that description; the shares so vesting, in either aspect of the case, passing to the beneficiaries of the heirs at law, or next of kin, under the various wills, deeds and devolutions of title before mentioned.

All persons possibly interested in the estate upon any theory were made parties, and have answered admitting the necessity of a construction of the will and the case was heard upon the petition and answers, and an agreed statement admitting all matters and facts alleged in the petition and not denied in the answers, without however admitting any statement as to the construction or legal effect of any instrument referred to.

The court below was of opinion that the words "heirs at law" must be construed as next of kin, but no one prejudiced by the decision upon that point has appealed, and both the appellants agree that the question is not material.

The court below held that the estate vested immediately upon the death of John J. Hopkins, in equal shares in his mother Lavinia Hopkins and his brother and sister Mahlon Hopkins and Ella W. Mercer, as his next of kin, and that "by virtue of the operation of the deaths, wills, deeds and other facts and instruments recited in the proceedings, said shares in remainder should be distributed as follows:

"To the Safe Deposit and Trust Company as trustee under the deed from Mrs. Schapiro, twenty thirty-sixths; to Charles H. Harding, eight thirty-sixths; to Jennie Mercer Lake, three

to Marie Henriette Mercer, two thirty-sixths; the Deposit and Trust Company under the deed H. Mercer, three thirty-sixths."

It thus presents two questions:

1. The remainder after death of Elizabeth W. Howard, the death of John J. Hopkins in those persons composed the class of heirs at law of the testator in this case in the view of the court, his next of kin to vest at the death of Elizabeth W. Howard, in whom, as the only living representative of that class, this remainder vested in Mrs. Schapiro, at Mrs. Howard's death, then was her deed of trust to the Safe Deposit Company effective to vest the estate in the

first of these questions, the learned judge of the court reached his conclusion by adopting the view that in making the testator had said in unambiguous and plain language, that his estate, upon the death of himself, should go to any child or children of hers, that his estate should go to her children by him, in plain language, however contradictory of his apparent intention, but to be so construed as to give effect to his precatory wish. His actual language was, "I will and devise to said Elizabeth W. Hopkins all estate that I possessed of . . . to be held by her, my said wife, during her natural life, she to have and enjoy my said estate without let or hindrance from any person whatever; and in the event of my said wife having no child or children at the time of her death, I will and devise all of my said estate to said child or children, if more than one. But in the event of my said wife dying without issue living, then and in that event I will and bequeath all said estate to my heirs at law." In this finding of the testator's intention, the court cites no authority, nor is any cited by the able counsel of the appellees in their brief in this

It can be properly deduced from the language of the will, it is unquestionably decisive upon the matter under consideration, since if he intended to designate his children begotten by him, the possibility of such designation terminated at his death. He died without issue, and then no class or individual answering the designation of children, or a child, begotten by him, and therefore the remainder would then vest in his heirs at law as next of kin. But is this view tenable? I will reproduce here the language of the opinion on this point.

The court says: "This will was executed June 14, 1875, and the testator died in 1875. He had no children at the time the will was executed, and none at the time of death; but he left surviving him a mother and a brother and a sister.

"If the words of this clause, now the subject of this controversy, be taken literally, the result would be that had a child of the tenant for life by the testator, and a child of her by a future husband survived, they would have shared equally in this estate. In other words, strangers to his own blood would have taken what in all reason justice should go to his own child; and besides, on the future of a child by him, and the birth of a child by a future husband, strangers to him would have taken in preference to his next of kin or heirs at law.

"The natural objects of his bounty were: first, his wife and children, if any should be born after the execution of his will; and second, his mother and his brother and sister. There is nothing in the will to indicate an unfriendly feeling toward his next of kin. On the contrary, he made provision for them without preference. If there had been an intention on his part to provide for children of his wife and a future husband, and divest the property altogether from his next of kin, it is strange he did not create the ultimate bequest in favor of the heirs at law of his wife."

Let us see how this method of dealing with the unambiguous language of a will comports with the decisions of this state. In *Walston's Lessee v. White*, 5 Md. 297, Judge LeGrand said: "The rule is this: where the language of the testator is plain and unambiguous such language must govern and therefore extrinsic evidence is inadmissible to show that he meant something different from what his language imports; in other words, the question in expounding a will is not what the ³⁶⁹ testator meant, as distinguished from what his words express, but simply what is the meaning of the words." That was an action of ejectment, where title depended upon the location of Beaver Dam Branch designated by the testator in his will, as a boundary between two tracts and the only exception in the case was to the ruling on the prayers. One of the plaintiff's prayers left it to the jury to find the location of the stream mentioned, together with other designated facts necessary to recovery. It was objected that this prayer should have left to the jury the intention of the testator in the use of the words "Beaver Dam Branch" and the trial court sustained the objection and rejected the prayer, but this court held that ruling to be erroneous.

When a court is expounding a will, either at law, where it is sitting as a jury, or in a proceeding like that before us,

no other rule by which it must be governed than stated above, nor any authority for allowing greater the application of that rule in the one case than

er.
man v. Thomas, 44 Md. 30, Judge Bartol, quoting Justice Shaw, said: "The general rule certainly is, on of the testator is to govern in the construction, he intention expressed in the will." In Heald v. Md. 300, Judge Robinson said: "Whatever may eral intent of the testator, if it does not appear s omitted words intended to be used, it is not com- the court, by intendment, to reconstruct the will ffect to such intention: Brotherton v. Bury, 18 Martineau v. Briggs, 23 Week. Rep. 889."

ill v. Reid, 71 Md. 175, 17 Atl. 1014, in considering on of when a certain remainder vested, Judge Miller stator had the clear right to fix the time of vesting, "A court has no right to put other words into his place upon those he has used any other than their accepted meaning; and clearly not when there is ty for doing so." And the testator in the case us had as absolute a right to make the children of oy a second marriage the primary objects of his ter his wife's death, as the testator in Demill v. to prescribe the time when a remainder created by l vest.

Abell v. Abell, 75 Md. 44, 23 Atl. 71, 25 Atl. 389, vler said: "It will not do to say the intention must ad then, by some strained or artificial course of attempt to place upon the will a construction pugnant to the language used therein by the testa- ther words, we must be governed not by what we use the testator wished, but by what he says. And based upon the supposed or known wishes of a respect to the disposition of his property are not idered unless such wishes are expressed in his will. answer, says Chancellor Kent, which courts are so pelled to make to such arguments, is, voluit, sed

it is, that if the language which the testator has is to govern in the construction of his will, then ren his wife might have left by her second mar- t have taken this property upon her death, and the the court below could only avoid that result by g for the will actually made a reconstructed will a to the court's opinion of what the testator should expected to do in making a will. The court says, if the testator's wife had left a child by him and

also a child by a second marriage, would, if the clear language used is to govern, go equally to these two children; but that this would be contrary to "all reason and justice," that is to the opinion of the court, and therefore the opinion of the court shall prevail over the intention expressed in the will. Because the cases are rare in which a man makes any provision for the children of his wife by a second marriage, it is not to be assumed when such a provision is made that the testator has said what he did not mean to say, and that the court is at liberty to undo what he has done.

³⁷¹ Mr. Underhill in the second volume of his work on Wills, paragraph 551, says: "When the testator devises property to his widow, and after her death 'to her children,' he will be presumed to mean not only those of whom he is the father, in which case the word 'her' will be exactly synonymous with 'our,' but also those who may be born to her by a subsequent marriage, when 'her' will have its proper meaning. The contrary however has been held in Louisiana, on the ground that a legacy cannot, by the peculiar law of that state, be given a child not conceived at the death of the testator: *Sevier v. Douglas*, 44 La. Ann. 605, 10 South. 804."

Twice, in the will before us, the testator gives the broadest expression to his apparent purpose, first providing for "any child or children my said wife may have at her death," and later providing "in the event of my said wife dying without issue" that the estate should go to his heirs at law, showing his purpose not to confine the gift to her immediate children, but to extend it to her more remote issue.

We have not been referred to any other American decision than that above mentioned from Louisiana, in which it does not appear that either the counsel or the court questioned the intention of the testator, and the sole point of attack being the invalidity under the law of that state of such a limitation over to a person unborn.

In *Barrington v. Tristram*, 6 Ves. Jr. 345, there was a bequest upon trust for the benefit "of all and every the child or children" of the testator's niece, "Mrs. Tristram, the wife of the Rev. Thomas Tristram," distribution to be made at a certain period. Before that period, the Rev. Thos. Tristram died, and Mrs. Tristram married again and had a child by her second marriage. When the period for distribution arrived, the Tristram children claimed the whole estate, and the child of the second marriage claimed a distributive share. Lord Eldon held such child entitled to a share, saying that upon the general rule a child by a subsequent marriage was included, "since the testator has given to persons whom the ³⁷² law makes certain." In the course of his opinion he said: "My private opinion is, he never thought of his niece mar-

rying again, but the object was the children of Mrs. Tristram. The words 'the wife of the Rev. Thomas Tristram,' are merely words of description . . . and notwithstanding a strong conjecture against my judicial opinion, I am bound to declare that every child of Mrs. Tristram shall take." This case is not only a high authority illustrating the general rule applicable to the question, but it emphasizes the obligation to give effect to the testator's expressed intentions, and not to indulge conjecture however strong.

In *Ex parte Earl of Ilchester*, 7 Ves. Jr. 348, the testator being married, but not then having any children, gave the guardianship of all his daughters, born or to be born, to his wife, and of all his sons hereafter to be born, to his wife and his brother or the survivor, and it was held that this testamentary guardianship extended to all the children by that as well as by a second marriage. Lord Alvanley delivered an opinion, concurred in by Lord Eldon and by Sir Wm. Grant, master of the rolls, in which Lord Alvanley said: "If I were at liberty to indulge conjecture, I should certainly be apt to suppose he had not in his contemplation any future marriage. I have read this will with an anxious desire to satisfy myself that I could state to your lordship as my judicial opinion that it would admit of the restrained construction. I have ever thought it imposed upon me not to make any intendment contrary to the plain and usual sense of the words used, unless from other parts of the will, I could plainly see that the testator could not have intended them to have that extensive operation the words themselves could carry. . . . And I cannot see any decisive inference, that necessarily and unavoidably this testator must have meant to restrain the guardianship to the children of his then wife."

But apart from the binding authority of the rule of construction established in the cases cited above we think there ³⁷³ are indications in this will that the testator had in his mind the contingency of a second marriage by his wife, in event of her surviving him, and that he used the broad language he did with knowledge of the effect it would have.

The technical language used in parts of this will indicates that it was drawn by a lawyer and as it is witnessed by Mr. E. C. Gantt, now deceased, but known to this court as a capable and careful lawyer, it is a fair inference that he was the draftsman, and that he did not permit the testator to execute this will without explaining to him the important effect of what is certainly an unusual provision to be made. By the first disposing clause of the will he gave three thousand dollars, the equivalent of one-fourth of his estate, in trust for his wife's sister, Mrs. Warfield, for her life and

after her death to her two children then living, with any other children she might afterward have. This was a strong manifestation of regard and affection for his wife's sisters and of interest in the blood of his wife's family, and it was a large bequest in view of the comparative amount of his whole estate. By the next clause he bequeaths to Mrs. Wardfield's son, whom he designates "my nephew," the watch and chain he wore, articles of personal use, almost always bequeathed to children, or one standing in the place of a child. By the next clause he directed the conversion of all his real and personal property into money and the proceeds to be invested by his executor in securities, not in the name of the trustee, but in the name of his wife, "to be held by her during her life, without impeachment of waste, or let or hindrance from any person whomsoever . . . she to have sole control. . . . And in event of my said wife having any child or children at the time of her death, I will and devise the whole of said estate to said child or children. In these provisions there is an irresistible suggestion that he knew or believed that he would have no children of his own for if he contemplated or hoped for children, and it was his intention that his own children only, if there were any, should take this property on her death, the ³⁷⁴ provision against impeachment of waste, or let or hindrance by anyone becomes unintelligible, being applicable only to personal securities standing in her own name. Without intimating what the legal effect of that provision would have been, if she had encroached upon the corpus of the fund placed so absolutely by the will in her control, it is obvious that it suggested the power of consumption, which is not reconcilable with preservation for his children, though not irreconcilable with the view that in the absence of children of his own he wished her to have absolute control of the estate not only for her own uses but for those of any children she might have in event of a second marriage.

Other considerations tending in the same direction have been suggested in the argument, but we shall not pursue them further, the result of our most careful reflection being that the words "any children" as employed by the testator would embrace children of his wife by any second marriage.

Having reached that conclusion, it must of necessity follow that the remainder limited to the heirs of the testator could not vest until the death of Mrs. Howard. In *Denn v. Reid*, 71 Md. 175, 17 Atl. 1014, Judge Miller says: "It seems to us to be clear law, as well as good sense, that in a case where there is an ultimate limitation upon a contingency to a class of persons plainly described, and there are persons in esse answering the description when the contingency has

ey alone can take." The contingency upon which under was limited to vest in the heirs at law of the was the death of Mrs. Howard without issue, and death that contingency was not determined.

not be denied that the limitations both to the child Mrs. Howard, and to the heirs of the testator are con-

They are alternative contingent remainders, dependent upon a contingency with a double aspect. The heir to the heirs at law is alternative to the remainder Howard's children, and they are both contingent the persons to take in each are not ascertained.

Among the numerous cases in this state discussing the question of the vesting of remainders the recent case v. Thom, 101 Md. 444, 61 Atl. 193, seems more closely applicable to the present case, and we shall quote from it at length.

Jones said: "The grantor, William H. DeCourcy first gave to his daughter, Mrs. May, afterward mas, an equitable life estate in the property during natural lives of herself and her then husband; then a fee simple estate to the survivor of them with power to the survivor to devise and bequeath the estate among the heirs or descendants of Mrs. May and her then husband; without here reciting all the terms of the trust he provided for the final full fee simple interest in the property to vest in the children and descendants of Mrs. May and her husband. Here the first of the alternative fee simple interest provided for in the deed is made to vest if the conditions should happen to call it into existence; and if it does not come into existence, it necessarily excluded all other interests in the property. But in case the conditions should never exist, and necessarily excluded all other interests in the property. But in case they should never exist, he made the alternative provision for the ultimate interest in the property by providing that the property should go to and vest in such persons as would by the now existing laws of Maryland be the heirs at law of the said William H. DeCourcy Wright and his heirs forever. Here the second of the alternative interest provided for by the deed rested. And it was in entire exclusion for and exclusion of all other interests in the property, because it could not come into existence until all other interests so provided were beyond the possibility of coming into existence. The first fee was provided for under conditions that would never happen. When, and only when the conditions that were to call it into existence did not exist and could not exist, the second fee was to be called into existence. The existence of the second fee began when all possibility of the other ceased."

³⁷⁶ This exposition of the nature and operation of alternative contingent remainders, and the demonstration of the impossibility of the later vesting while there is a possibility of the vesting of the earlier, is so clear and conclusive, that we shall not prolong this opinion by any reference to, or attempt to reconcile, the many cases involving the general question, and so fully and ably discussed by counsel in their briefs, and shall content ourselves with declaring that the remainder to Mr. Hopkins' heirs at law did not vest until Mrs. Howard's death, and then only in Mrs. Schapiro, as the sole representative of that class in esse.

The remaining question is whether the interest thus taken by Mrs. Schapiro passes under her deed of trust to the Safe Deposit and Trust Company.

There can be no doubt of Mrs. Schapiro's intention to convey such interest, however acquired, when she executed the deed of trust on July 6, 1899, but as Mrs. Howard was then living, and as the remainder to the heirs at law was at that time contingent, and the person to take unascertained it is contended for Mrs. Schapiro that she had but a mere possibility which was not assignable.

"The common law declares all contingent estates, where the person to take is not ascertained, to be a mere possibility, not coupled with an interest, and to be neither devisable, descendible, alienable by voluntary conveyance nor subject to execution: 4 Kent's Commentaries, 261; 2 Washburn on Real Property, 238. Such a naked possibility is in law neither an estate, property, right nor claim. One having such a possibility may in the future have a right, but cannot be correctly said to have any existing right or claim": In re Banks' Will, 87 Md. 425, 40 Atl. 268, where the question is discussed at some length.

In *Marshall v. Safe Deposit & T. Co.*, 101 Md. 1, 60 Atl. 476 one of the questions was whether a deed of trust made by Samuel H. Mercer to the Safe Deposit Company passed to him an interest in certain property which he afterward acquired. ³⁷⁷ under the will of Lavinia Hopkins, and Judge McSherry said: "Before the deed of trust can be said to include the accruing share with which we are now concerned, it must appear that that share was an existing or contingent interest to which Samuel was entitled when the deed was executed and that the granting clause of the deed contains apt and sufficient words to transfer that interest."

In *Fisher v. Wagner*, 109 Md. 243, 71 Atl. 999, 21 L. R. A. N. S. 121, this court held that where a contingent remainder after a life estate is limited to a person who is definitely described, it may be devised by him, although he dies before the happening of the contingency which is to vest the estate in

ge Boyd, in delivering the opinion of the court, Robert A. Fisher took a transmissible and devisable under the will of his father, *as the person to take* and there was nothing in the will of the father indicating his intention that such interest or right as remainderman may have before the happening contingency, should be postponed until the death of the

The italics are those of the court. Judge referred to "a distinction made by some authorities between a case of a person designated to take a remainder upon the happening of a future contingency, and that of person in a class which is to take in the same contingency." In this distinction he said "has not only been recognized but seems to us to be a logical one."

For reasons we are of opinion that Mrs. Schapiro's instrument operates to convey the estate in question. Where the instrument is based upon a substantial and valuable consideration granted by the grantor, in return for such consideration, and the property thereafter to be acquired, a court will enforce a conveyance in a proper case, but where the consideration is merely nominal, equity will not enforce it. See *Black v. Cord*, 2 Har. & Bl. 274, 6 Md. 274, quoting from *Atherly on Conveyances*, "that as against the settler himself a court could in no case enforce a voluntary agreement."

The role of the court is to withhold its assistance where the settler, whether he seeks to have the benefit of a trust, or settlement": *Snyder v. Jones*, 38 Md. 38. It is not enough that the settler executed a paper purporting to pass it, if in fact the paper does not have that effect. The intention of the settler to divest himself of the property must be consummated and executed, or the court will not enforce the trust": *Perry on Trusts*, sec. 100. Mrs. Schapiro's deed of trust recites by way of preamble her conveyance of her property in trust, and the acceptance of the trust by the trustee, and then alleges the consideration to be the sum of five dollars and other valuable consideration.

Without intimating any opinion as to the validity of the consideration as expressed in the deed, we think nothing we have said will preclude any application to enforce a conveyance upon the theory of the consideration therefor.

For reasons we have stated the decree appealed from is affirmed, but this will be without prejudice to the application of the Safe Deposit and Trust Company, as trustee, to proceed to enforce the conveyance of the property acquired by Mrs. Schapiro as a result of this decision.

Decree reversed in No. 42 and affirmed in 43. The above and below to be allowed out of the trust estate.

Testamentary Gifts to a Class of Persons is the subject of a note to Thomas v. Thomas, 73 Am. St. Rep. 413; and see Estate of Mumford, 157 Cal. 63, 137 Am. St. Rep. 110; Rudolph v. Rudolph, 207 Ill. 99 Am. St. Rep. 211; Dowling v. Nicholson, 115 Iowa, 493, 91 Am. St. Rep. 175.

Construction of Will—Time Considered.—With respect to the construction of a gift or the persons to be benefited by it, a will is construed according to the time when made rather than the date of the testator's death: Lavender v. Rosenheim, 110 Md. 150, 132 Am. St. Rep. 423.

Contingent Remainders, How Barred, Defeated or Conveyed, is the subject of a note to Snelling v. Lamar, 17 Am. St. Rep. 839; and the assignment of expectancies is considered in the note to Mumford v. Hampton, 56 Am. St. Rep. 339.

Conveyances of Remainders.—A vested remainder can be mortgaged and conveyed, and is liable to execution: Roberts v. Roberts, 102 Cal. 131, 111 Am. St. Rep. 344; and contingent interests and expectancies may be assigned so as to be binding in equity: Hudnall v. Hampton, 111 Ill. 486, 75 Am. St. Rep. 124. The assignment of a contingent remainder, where the person who is to take is certain, though the consideration for the assignment is nominal, vests the equitable interest in the assignee from the time of the assignment, whose title, on the happening of the contingency, requires nothing further to perfect it: Kornegay v. Miller, 137 N. C. 659, 107 Am. St. Rep. 505. Where the grantor in a deed of a contingent remainder dies before the contingency happens upon which the estate is to vest, nothing passes by the deed, and its covenants do not estop his children from asserting title where they do not claim by descent from him: Gollub v. Knock, 235 Ill. 412, 126 Am. St. Rep. 224.

McSHERRY v. McSHERRY.

[113 Md. 395, 77 Atl. 653.]

DIVORCE—Alimony—Jurisdiction Over Nonresident.—A decree for alimony is a decree in personam, and unless the court has acquired jurisdiction over the person against whom it is passed, it is not binding upon him. Such jurisdiction over a nonresident may be acquired only by service of process within the state, or his voluntary appearance. Constructive service by publication, or a special appearance for the purpose of objecting to the jurisdiction, is not sufficient. (p. 432.)

COURTS—Continuing Jurisdiction.—Where a defendant appears generally or process is served upon him, he is in court for the purpose connected with the action and is charged with notice of whatever action the court may take while the suit is pending. Jurisdiction continues until judgment. (p. 432.)

DIVORCE—Alimony—Jurisdiction Over Nonresident.—Where, by stipulation of the parties a decree of divorce required the de-

the plaintiff as alimony such sum as the court might determine upon application of either party, the court retains the right to fix such amount by supplemental decree on the plaintiff, although the defendant had removed and notice of such application to his attorney of record (p. 434.)

Stoner and Leo Weinberg, for the appellant. •

. Wisner, Jr., and Milton G. Urner, Jr., for the

IAS, J. This is an appeal from an order of the court for Frederick county, sitting as a court of equity, granting a motion to strike out a decree of that court, requiring the appellant to pay to the appellee the sum of one hundred dollars per month, as alimony and for the maintenance of their children.

In December, 1906, the appellee filed a bill of complaint against the appellant for a divorce, the custody of their children and for alimony, stating the grounds for a divorce, the bill alleged: "Your oratrix has no means of her own for the support of herself and her minor children and is now living, with her children, at the home of her mother . . . in Frederick City, Maryland; and the defendant, who is a resident of your honorable court and is seised of considerable estate, is contributing nothing to the support of his family." The defendant, the appellant, in his answer on the first day of April, 1907, replied to the above allegations of the bill as follows: "Your respondent answering the sixth paragraph denies that the plaintiff has no means of support but avers that she is entitled to the income of a trust fund for her benefit by her father, as well as to the income of said trust fund, and further answering said paragraph your respondent admits that he is a practicing attorney of your honorable court, but denies that he is possessed of considerable estate, but on the contrary avers that he was compelled to execute a deed of trust of all his property to the National Trust Company, for the benefit of his creditors, and is not able to contribute to the support of his said family."

On the same day a general replication was filed by the plaintiff, and leave was granted to the parties to take depositions. On the 6th of May the "testimony on behalf of the appellee" was returned by the examiner, and counsel filed their agreement:

"AGREEMENT OF COUNSEL.

"No. 8105 Equity.

"In the Circuit Court for Frederick County, in Ec

"CORNELIA RINGGOLD McSHERRY }

vs.

JAMES ROGER McSHERRY.

"To the Honorable the Judges of said Court:

"It is agreed by the parties to the above cause that the d
in said cause shall award to the plaintiff as alimony an
the maintenance of the children of the plaintiff and de
ant, such sum or sums of money to be paid by the defe
as may be ³⁹⁸ hereafter determined by your Hono
Court, and that the amount of said alimony and mainte
be reserved by said decree for future determination upo
application of any of the parties in interest. And
further agreed that the rule of Court requiring testi
to lie in Court for ten days be waived.

"URNER & URNER,

"Sols. for Plaintiff

"FRANK L. STONER

"Sol. for Deft."

On the 7th of May, 1907, the court below passed a d
granting the divorce, awarding the guardianship and cus
of the children to the plaintiff, and further providing, '
the said defendant pay to the plaintiff, as alimony and
the maintenance of the said children of the plaintiff an
defendant, such sum or sums of money as may be here
determined by this court upon the application of any o
parties in interest.'" So far as the record in this court
closes, there were no further proceedings in the case
the 10th of June, 1909, when the plaintiff filed a petiti
the case, in which, after stating the provisions of the d
of 1907, she alleged: "2. That since the passage of
decree the said defendant has been employed in the ci
Chicago in the service of a railroad having headquarte
said city, but the nature of said employment and the e
of the defendant's earnings have not been learned by
petitioner until recently; and your petitioner is now rel
informed and avers that the defendant is employed by
Chicago and Eastern Illinois Railroad Company, with o
at 625 La Salle Street Station, Chicago, Illinois, as
agent of said company for the states of Illinois and Ind
at a yearly salary of about three thousand dollars. 3.
the defendant has contributed nothing whatever to the
port of your petitioner or his said children since Oct
1906, and your petitioner has been, and is now, wor

elihood and the support of said children." The petition was for a determination by the court, in accordance with its previous decree, of the amount to be paid to the plaintiff as alimony and for the maintenance of the children. The petition was sworn to by the petitioner, and the court passed the following order: "Upon the affidavit and affidavit of Cornelia Ringgold McSherry, in the above-entitled cause, it is ordered, determined and decreed by the circuit court for Frederick county, in this tenth day of June, A. D. 1909, that James McSherry, the defendant in this case, pay to said plaintiff as alimony and for the maintenance of the children of the plaintiff and defendant mentioned in these proceedings the sum of one hundred dollars per month accounting from the date of this order, unless cause to the contrary be shown by said defendant on or before the twenty-first day of June, A. D. 1909; provided that a copy of said petition and order be served upon the said defendant or his solicitor in this case, on or before the twelfth day of June, 1909." A copy of the petition and order having been served upon Frank L. Stoner, the solicitor of record for the defendant on the eleventh day of June, he filed an answer, stating that he was not "the attorney for the defendant in relation to the matters mentioned in said petition," and that he had no authority to represent the defendant," in said matter. On the thirtieth day of June, 1909, the court below passed a decree, reciting the decree of 1907, the petition of the plaintiff, the order of June 10th, that a copy of said petition and order had been served upon the solicitor of record for the defendant, that a copy of said petition and order had been served to the defendant, and that no cause to the contrary had been shown, and decreeing as follows: "It is there-fore decreed on the thirtieth day of June, A. D. 1909, by the circuit court for Frederick county, in equity, adjudged, ordered and decreed that the amount heretofore decreed to be paid to the plaintiff, Roger McSherry, the defendant in this case, to Cornelia Ringgold McSherry, the plaintiff, as alimony and for the maintenance of the children of the plaintiff and defendant be and it is hereby determined to be the sum of one hundred dollars per month, accounting from the tenth day of June, A. D. 1909, and that the defendant pay to the plaintiff the said sum of money per month, accounting from the date of this decree." "Stoner & Weinberg, attorneys of record for the defendant, McSherry," on the 29th of July, 1909, filed a motion to set aside said decree for the following reasons: "1st. Because there was no service of process upon any person authorized to accept service. 2d. Because the court had no jurisdiction over said J. Roger McSherry at the time of enter-

ing said decree. 3d. Because the defendant was a nonresident, at the time of the decree, beyond the jurisdiction of the court. 4th. Because of the reasons assigned by Frank Stoner in his petition of date June 11, 1909. 5th. And other reasons to be assigned at the hearing of this motion. From the order of the court below overruling this motion the defendant has appealed.

A decree for alimony is a decree in personam, and until the court has jurisdiction over the person against whom it is passed is not binding upon him. Such jurisdiction over a nonresident can only be acquired by service of process upon him within the state, or by his voluntary appearance, in person or by attorney. Constructive service by publication, personal service of process beyond the limits of the state is not sufficient, nor does a special appearance for the purpose of objecting to the jurisdiction of the court confer upon the court jurisdiction to decree on the merits of the case: *Garner v. Garner*, 56 Md. 127; *Fisher v. Parr*, 92 Md. 245, 48 A. 621; *Gemundt v. Shipley*, 98 Md. 657, 57 Atl. 12; *Pennock v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Harkness v. Hyde*, 100 U. S. 476, 25 L. ed. 237; 2 *Bishop on Marriage, Divorce and Separation*, c. 3; 14 Cyc. 745.

Where, however, a defendant appears generally, either in person or by attorney, or process is served upon him within the state, the court acquires jurisdiction over him for the purpose of the suit. It is said in 19 *Encyclopedia of Pleading and Practice*, 574: "When the original process has been served on the defendant ⁴⁰¹ he is in court for every purpose connected with the action, and is charged with notice of whatever action the court may take while the suit is pending. Or, as stated in 1 *Freeman on Judgments*, fourth edition, section 142: "Jurisdiction over a party, being obtained, continues until judgment." And Mr. Bishop says: "In these cases, as in all others governed by the like reasons, a voluntary appearance by the defendant, or the citation of him when found within the territorial limits of the court, lets in the jurisdiction in personam, and then the personal judgment, which would otherwise be incompetent, may be rendered against him": 2 *Bishop on Marriage, Divorce and Separation*, sec. 142.

In the case at bar, the bill prayed for a divorce, guardianship and custody of the children and for alimony, and the defendant appeared and filed his answer. Under such circumstances there can be no doubt about the jurisdiction of the court to grant the relief prayed in the bill. In pursuance of the agreement of counsel, the court passed the decree of 1907, requiring the defendant to pay the plaintiff, alimony and for the maintenance of their children, such sums or sums of money as the court should thereafter determine.

application of either of the parties, and reserving for termination by the court the amount to be so paid. contemplated by the agreement that the court surrender its jurisdiction over the parties. On the was expressly agreed that it should be reserved. having been retained, in accordance with the agreement, for the purpose of determining the be paid, the defendant could not deprive the court jurisdiction by leaving the state.

helps, after stating that "merely formal orders as of course and ex parte," says: "Orders affectual rights are never granted without notice, unless of some pressing emergency. In such cases, would be rare, opportunity is always afforded for a ring. Special orders, or orders other than those ine, are preceded by a preliminary order, or order g distinctly the precise terms of the order to be ess cause be shown to the contrary on or before a provided notice be served (usually by serving a e order) upon all parties adversely interested efficient time. In case of inability to effect service time limited, the time may be enlarged, and if nonresidents, not represented by counsel, con- service by publication is necessary. But service of is generally well made by service upon counsel, re foundation is sought to be laid for a contempt ": Phelps' Juridical Equity, sec. 89; see, also, uity Procedure, sec. 248, and Alex. Ch. Pr. 78-80. enkins v. Whyte, 62 Md. 427, the court said that ust receive special notice of all proceedings against in the progress of the cause, which he could not the ordinary course of practice." In McKim v. Bland, 407, Chancellor Bland says: "The court uted service, in several cases, where the defendant notice of the proceedings, and where, in case he the way, there is a person who he has named in s agent, and who the court can look upon as such. in case of an injunction to stay proceedings attorney at law is such an agent, who the court as one charged with the whole defense of the equity; and so too, where a defendant, who lives uses to answer, after having appeared as required poena with which he has been served, the court service on his solicitor to be deemed good service na to answer an amended bill."

g the practice stated by Judge Phelps, the court he application or petition of the plaintiff, passed isi, and required a copy of the petition and order

to be served on the defendant or his attorney of record, personal service of a copy of the petition and order upon defendant within the limits of the state was not necessary. ⁴⁰⁸ in this case in order to give the court jurisdiction to the decree to June 30th, for, as we have said, after the court had acquired jurisdiction over the parties, they, through their attorneys, agreed that the amount of alimony, etc., should be determined by the court upon the application of either of the parties, and jurisdiction was accordingly retained by the court for that purpose. Service of a copy of the petition and order upon Frank L. Stoner, Esq., who was the solicitor of record for the absent defendant, and who signed the agreement of counsel, was the most effective means of giving the defendant notice of the petition and order, and nothing more was required.

The case of *Smith v. Woolfolk*, 115 U. S. 143, 5 Sup. Rep. 1177, 29 L. ed. 357, relied on by counsel for the appellant, does not touch the question presented by the record in this case. In that case the court said: "After a decree disposing of the issues and in accordance with the prayer of a bill has been made, it is not competent for one of the parties without a service of new process or appearance, to institute further proceedings on new issues and for new objects, though connected with the subject matter of the original litigation, by merely giving the new proceedings the title of the original cause. If his bill begins a new litigation, the parties against whom he seeks relief are entitled to notice thereof, and without it they will not be bound." Here there had been no decree disposing of the issue, and the petition of the plaintiff was not a proceeding for a new object, but was a part of the relief prayed in her bill, and as to which the court had retained jurisdiction, in accordance with the agreement of the parties.

As the court below had jurisdiction to pass the decree, it must affirm the order overruling the motion to strike it. The Order affirmed, with costs.

Alimony.—As Against a Nonresident who is not served with process in the state, and who does not appear in the action, the court cannot decree payment of alimony: See the notes to *Harding v. Harding*, 102 Am. St. Rep. 709; *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 182. A judgment in a divorce suit awarding the plaintiff alimony, if based on service of process made without the state, is void as to such alimony, void: *Moss v. Fitch*, 212 Mo. 484, 126 Am. St. Rep. 568. As against a nonresident, who is not served with process in the state and who does not appear, the court cannot decree payment of alimony: *Proctor v. Proctor*, 215 Ill. 275, 106 Am. St. Rep. 168; *Smith v. Smith*, 74 Vt. 20, 93 Am. St. Rep. 882; *De La Montanya v. De La Montanya*, 112 Cal. 101, 53 Am. St. Rep. 182; *Rigney v. Rigney*, 127 N. Y. 408, 24 Am. St. Rep. 462; and the fact that a resident of a state has in his hands money due a nonresi-

suit does not give the court jurisdiction to order such the plaintiff for alimony: *Smith v. Smith*, 74 Vt. 20, 98 N. 882.

Territorial Effect of a Decree of Divorce is discussed in the *Arrest v. Fey*, 109 Am. St. Rep. 254; *Montgomery v. Constat Store Co.*, 103 Am. St. Rep. 302; *Trumblay v. Aetna Co.*, 94 Am. St. Rep. 553; and *Felt v. Felt*, 83 Am. St. Rep. 388. And see *Van Horn v. Van Horn*, 48 Wash. 388, 125 Am. St. Rep. 102; *Sistare v. Sistare*, 80 Conn. 1, 125 Am. St. Rep. 102; *Proctor*, 215 Ill. 275, 106 Am. St. Rep. 168; *Lynde v. N. Y.* 405, 76 Am. St. Rep. 332. Where in a decree of divorce is made that the husband pay his wife a specified sum for the support of their children, and a statute of the state authorizes the court to modify its order whenever circumstances change proper, an action cannot be maintained in the state to recover arrears alleged to be due under such order: *Mayer*, 154 Mich. 386, 129 Am. St. Rep. 477; but a decree of divorce in favor of a wife in a suit for divorce a vinculo, where the court reserve by the court or the statute of the power to modify may be enforced by a judgment of a court of another state if the parties have become residents: *Mayer v. Mayer*, 154 Mich. 386, 129 Am. St. Rep. 477. If a woman residing in one state obtains a decree of divorce against her husband residing in another state without making any disposition of the property, a court of the first state in which the property is situated may thereupon bring suit for partition or any other appropriate action, divide the property as it would do under the statute controlling divorce in such manner as seems just: *Buckley v. Buckley*, 50 Mich. 126, 126 Am. St. Rep. 900. A judgment upon a decree of divorce awarding alimony is not a judgment in an action of divorce, and cannot be enforced by contempt proceedings: *Mayer*, 154 Mich. 386, 129 Am. St. Rep. 477.

SMITH v. SMITH.

[113 Md. 495, 77 Atl. 975.]

Testamentary Bequest by Implication.—An Erroneous Recital in a will that certain life insurance is in favor of certain person, and that the proceeds will be paid to him, and that he will receive the proceeds, when in fact it was payable to the testator's estate, cannot operate as a bequest thereof by implication. (p. 440.)

Testamentary Bequest by Implication.—If an Erroneous Recital in a will is of a gift contained in the instrument, the gift cannot operate as being in itself a devise or bequest by implication of the property; but if the erroneous recital refers to an interest in property by another instrument, the recital cannot operate to create a bequest by implication. (p. 443.)

Testamentary Election.—Under the Doctrine of Election one cannot take under a will what is devised to him, and at the same time what is devised to another, although but for the will it would be his. But this doctrine has no application where there is no attempt to defeat any

of the provisions of the will; hence it does not apply where a erroneously recites that certain property, belonging to the testator, belongs to another, there being no sufficient bequest to that estate (p. 444.)

WILLS—Charge Against Legatee.—A Provision in a Codicil to a will reciting that the testator had determined to make a charge annually against one of the legatees because of advances her board operates from the date of the codicil and not from the date of the will. (p. 444.)

Frank Gosnell and Hope H. Barroll, for the appellant.

Lewin W. Wickes, for the appellee.

496 THOMAS, J. George W. Smith, of Kent county, Maryland, died in September, 1908, leaving a last will and testament and two codicils which were admitted to probate in the orphans' court of said county.

The testator was married twice. His first wife Eliza A. C. Smith, died in 1884, leaving two children, George M. Mifflin Smith, of Baltimore City, and Eliza Ann C. Smith, of Chestertown Maryland. By his second wife, Margaret Emily Smith, he had one daughter, Margaret Slaughter Smith, who is still under age and resides with her mother in Chestertown.

The will, which was executed on the thirteenth day of March, 1901, after providing for the payment of his debts and directing his executors to sell all his property, real and personal, "except specific bequests hereinafter named," provides as follows:

497 "Item. I hold in the New York Mutual Life Insurance Company a policy on my life of three thousand (\$3,000.00) dollars, this policy is in favor of my first wife, Eliza Ann C. Smith, and of my two children by her namely: George Mifflin Smith and Eliza Ann C. Smith and this sum of money with the interest due thereon they will receive upon and by virtue of said policy at my death; after all my estate is converted into cash I desire that the sum of three thousand (\$3,000.00) dollars, from my estate (or such sum as the said policy may pay at the time of my death) shall be set apart and invested for the use and benefit of my present wife, Margaret Emily Smith and Margaret Slaughter Smith my daughter, and to any other child or children we may hereafter have, the income of this sum of money to be invested and held in trust, and the same paid to my wife and during her natural life, and after her death the same to be invested and the income thereof is to be paid to such child or children as I may leave surviving me by my said wife, Margaret Emily Smith, and when they shall respectively arrive at the age of twenty-one years, the said sum

be paid to them in equal sums, share and share

After the sum of three thousand dollars (\$3,000.00) the sum equivalent to the value of said Life Insurance from the corpus of my estate is set apart for the benefit of my wife, Margaret Emily Smith, and child or children, I devise and bequeath the residue thereof to be divided as follows:

First, of my estate to my wife, Margaret Emily Smith, during her natural life, then to go to my heirs at law in the same manner as I have hereafter devised their respective shares to them, two-ninths to my son, George Mifflin Smith, and one-ninth to my daughter Margaret Slaughter Smith, and that the remaining two-ninths shall be invested in real estate in the order and direction of the Circuit Court for Kentucky, and the income therefrom shall be paid yearly unto my daughter, Eliza Ann C. Smith, for and during the term of her natural life, and from and after her death I direct that the corpus shall be paid to such child or children as she may leave, the child or children of said child to take a parent's share, but if my daughter Eliza Ann C. Smith, should die without leaving any child, it is my will and I direct that the share so devised shall be equally divided among my other children and their heirs share alike."

As it may be necessary for my wife, Margaret Emily Smith, my daughter Eliza Ann C. Smith and my son George Mifflin Smith to have immediate funds after my death, I direct my executors to pay to my said daughter and son the sum of three hundred dollars (\$300.00), payable in six and nine months after my death, and the sum of six hundred dollars (\$600.00) to my wife and infant daughter, payable as aforesaid."

Having given his piano to his daughter Margaret, two years before he received from his first wife, to his daughter Eliza Ann C. Smith, his watch and bedstead to his son, he gave all the residue of his "household goods and furniture" to his daughter Eliza Ann C. Smith for life, and after her death to his children, "to be divided equally among" them.

My will, executed the 15th of January, 1906, the testamentary provisions of which contain the following additional provision for his daughter Eliza Ann C. Smith:

When any division of my estate is made, I hereby bequeath the sum of eight hundred dollars (\$800.00) unto my daughter Margaret Slaughter Smith, and I will and direct that the same shall be kept intact as a trust fund until my daughter shall arrive at the age of fifteen years, and the principal and interest shall be used for her

education, and that no part of it shall be used for any other purpose until my said daughter shall arrive at the age of fifteen years."

⁴⁹⁹ He then revokes the provisions of his will requiring executors to pay to his daughter Eliza and his son "each sum of \$300.00," and to his wife the sum of \$600, and lieu thereof, after repeating that it may be necessary for them to have immediate funds, directs his executors to pay to his son and said daughter "each the sum of \$200.00," and to his wife and his daughter Margaret \$400, in the manner as provided in his will. This codicil contains the following provision:

"And whereas since the date of the execution of my last will and testament I have annually laid out and expended the sum of at least two hundred (\$200.00) dollars for board and maintenance of my daughter Eliza Ann C. Smith (who is more than twenty-one years of age), I have determined to charge her with the sum of seventy-five dollars annually and whatever sum of this charge may be due at the time of my death shall be deducted from the share which my said daughter Eliza Ann C. Smith would receive under the provisions of my said will."

The second codicil was executed on the 13th of August, 1908, and provides that his wife shall be "sole executrix" of his will.

On the 20th of February, 1909, Eliza Ann C. Smith filed a bill of complaint in the circuit court for Kent county against her brother, sister and the executrix and widow, for a construction of the will and first codicil, and asking the court to determine, first, "whether" the provisions of the will relating to the two-ninths directed to be invested for the benefit of Eliza Ann C. Smith for life, etc., "affects, includes or embraces the share or interest of Eliza Ann C. Smith and to the policy of insurance on the life of George W. Smith or the proceeds thereof mentioned in the fourth item of said last will and testament, or whether the said Eliza Ann C. Smith is entitled to her share of the proceeds of said policy of insurance . . . absolutely and clear of the trust created for her portion of her father's estate in the fifth item of said ⁵⁰⁰ last will and testament, and if so entitled clear of the trust so created, from what date her share of the proceeds bears interest"; and, second, "Whether the charge upon the share of the estate of Eliza Ann C. Smith of seventy-five dollars (\$75.00) annually made in the first codicil to the last will and testament of the said George W. Smith begins from the date of said last will and testament, namely, the thirteenth day of March, 1901, or from the date of the said first codicil, namely, the 15th day of January, 1906."

which also contains a prayer for general relief, the policy "was made payable to his wife Eliza or the insured's estate, and was taken out to secure said George W. Smith"; that the proceeds of the policy amounted to the sum of \$3,151, and that said sum was paid to the executrix on the 5th of November, 1908, and that George Mifflin Smith has received a portion of his share of the proceeds of the policy. The answer of George Mifflin Smith admits the facts alleged in the bill. Margaret Mifflin Smith, executrix and widow, in her answer denies that the policy was taken out to secure a debt of \$300 due to her husband, and that George Mifflin Smith has received a portion of his share of the proceeds of the policy, and that \$1,200 was advanced to him by her as a portion of his share of the estate, with the understanding that the policy was to be construed by the court. She admits the facts averred in the bill. Margaret Slaughter Smith, executrix, answered by guardian ad litem; a general replication was made, and evidence was taken, but the evidence was held inadmissible by the court below, and is not in the record. The answer and answers do not apparently question the right of the plaintiff and her brother under the will to the proceeds of the policy, but it appears that that was the principal question discussed and considered in the court below, and it is to that point to which the briefs and argument in this court are mainly directed. The bill, as we have said, alleges, in substance, that the answer of George Mifflin Smith admits, that the policy was made payable to "Eliza A. Smith or the insured's estate," and that the will recites that the policy was in favor of the insured's first wife and his two children by her. It appears from the statement of counsel for the plaintiff and the executrix, and from the record, that the policy was, in fact, payable to the insured's first wife, Eliza A. Smith, "if living, and if not living, to the said George W. Smith or his executors, administrators or assigns." This agreement, however, was made before the decree of the court below. It seems, from the evidence, that the policy was taken out, and may have been the terms of the policy, the object and purpose of the bill is to obtain a construction of the policy, and the question to be determined, in this connection, is whether it contains a valid bequest to the children of testator's share of the proceeds of the policy? That the testator intended to have the benefit of his life insurance cancelled, and that, for all of the provisions of the will are evaded, upon the assumption that they would receive the share of whatever amount was realized on the policy. But the answer does not answer the question. The precise inquiry is, whether the policy was intended to give them the proceeds of the policy by the will, and its answer must be found in the terms of the

will. The only parts of the will in which the policy is referred to are in these words: "I hold in the New York Mutual Life Insurance Company a policy on my life of three thousand (\$3,000.00) dollars; this policy is in favor of my first wife Eliza Ann C. Smith, and of my two children and her, namely: George Mifflin Smith and Eliza Ann C. Smith; and this sum of money with the interest due thereon I will receive under and by virtue of said policy at my death; after all my estate is converted into cash I desire that the sum of three thousand (\$3,000.00) dollars from my estate (or such sum as the said policy may pay at the time of my death) shall be set apart and invested for the use and benefit of my present wife, Margaret Emily Smith, and Margaret Slaughter Smith, my daughter, and to any other children or children we may hereafter have," etc. "After the sum of three thousand dollars (\$3,000.00) or the sum equivalent to the value of said life insurance policy from the corpus of my estate is set apart for the use and benefit of my wife Margaret Emily Smith, and of her said child or children, I devise and bequeath the residue of my estate to be divided among them as follows." Here there are not only no words of gift, but the testator expressly states that the policy was in favor of his first wife and her children, and that said children were to receive the proceeds "under and by virtue of said policy at his death. This language clearly shows that the testator did not regard the amount to be realized on the policy as a part of his estate, or attempt to dispose of it by his will, but that he treated the policy as a provision made for the children of his first wife outside and independent of his will. As he thought they would receive the amount of the proceeds under and by virtue of the policy, he could not have intended to give it to them by his will.

The recital in the will that the policy was in favor of his first wife and her children, and that her children would receive the proceeds under and by virtue of the policy, cannot operate as a bequest by implication. Jarman says: "Sometimes a testator shows by the recital in his will that he erroneously supposes a title to subsist in a third person to property which, in fact, belongs to himself. Such recitals do not generally amount to a devise; for the testator evidently conceives that the person referred to possesses a title independently of any act of his own, he does not intend to make an actual disposition in favor of such person; and though it may be probable, or even apparent, that the testator is influenced in the disposition of his property by this mistake, yet there is no necessary implication that in the event of the failure of the supposed title, he would give to the person that benefit to which it is assumed he was entitled. It seems, however, that if a testator unequivocally

to a disposition as made in his will, which, in fact, made, the intention to make such disposition, at all will be considered as sufficiently indicated. In such case the court has taken the recital as conclusive evidence of intention to give by the will, and, fastening upon it, the erroneous recital the effect of an actual gift,' in this respect, from the cases in which 'the testator says that only which amounts to a declaration that he has that a party referred to has an interest independent of the will, and in which the recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication': 1 Jarman on Wills, 6th ed., star pp. 491-493. The principle is stated in 30 American and English Digest of Law, second edition, 698, where it is said: 'Where the recital is to the effect that the testator has made a gift by another part of the will, when in fact he has not done so, and therefore the recital turns out to be erroneous, such a recital is construed to show a purpose and intention on the part of the testator to make such gift, which the courts proceed to give effect to by raising an estate by implication. Where, however, the recital in the will is to the effect that the testator has made a gift by some instrument other than the will, given property to a named person, when in fact he has not done so, and the erroneous recital does not disclose a purpose and intention on the part of the deviser to give by the will, and in such case resort must be had to the other instrument, and not to the will, by persons interested.' In the case of Adams v. Hare, 538, "a devise and bequest to trustees of the testator's personal estate, subject to the dower and thirds at law of the testator's wife in and out of his real estate, on trust to receive the income, and pay the same to the wife plus thereof after deducting the dower or thirds of the income for the maintenance of his children" (1 Jarman on Wills, supra) was held (the interest of the testator's real estate not being liable to dower) not to give the trustees by implication an interest in the estate, and the vice-chancellor said: "I certainly think that this is a hard case, but the widow; but, whatever my opinion in that respect may be, I cannot make a provision for her which the testator has not directed. The question in all these cases is, whether the testator has actually made any gift; and the gift, if made, must be found either in express words or by implication. . . . Where, however, the testator says that he has made a gift which amounts to a declaration that he supposes that a party referred to has an interest independent of the will, and in which a recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication." In the case of Box v. Barrett, 3 L. R. Eq. 244, which was decided in 1866, the will recited: "Whereas, under the set-

tlement made upon my marriage, my two daughters, Ellen and Emily, will become entitled to certain hereditaments now in making this will, I have taken the same into consideration and have not devised unto them so large a share under this my will as I should have done had they not been so entitled as aforesaid." The testator had four daughters and to his said daughters, Ellen and Emily, he devised certain estates, and gave to his other daughter estates of much greater value. Under the settlement all of the daughters were entitled equally. Proceedings were instituted for construction of the will, and Lord Romilly, M. R., said: "I am of the opinion that no case of election arises here. There must be some disposition of property which the testator had no right to dispose of to make one. . . . In the present case there is nothing more than a recital of an intention under a belief which was erroneous, and thereupon the testator gives certain property in a particular way. If I were to hold that a case of election arises here, the most serious and strange results would follow; for suppose a man recited in his will that his nephew would have a large fortune from his father, and, that therefore he left all his property to his other nephew, and that recital turned out to be incorrect, would any question of election arise upon that, because the supposed intention of the testator was that the property should be divided equally? The most that can be said of the recital in the case before me now is that it is an erroneous one, but because the testator has made a mistake, he cannot afterward remodel the will and make it that which you suppose he intended, and as he would have drawn it he had known the incorrectness of his supposition. The result in this case must be taken as it stands. The result is no question of election arises."

In the case of *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 11 L. R. A. 185, the will recited that the testator had conveyed certain property to trustees. The deed had not, in fact, been executed, and the court, after stating the rule, said: "when the recital in the will is to the effect that the testator has, by some instrument other than the will, given to a certain person named in the recital property, when in truth and fact he has not done so, such a recital does not disclose a purpose and intent on the part of the deviser to give by the will." It says: "Here the recital has no reference whatever to a trust or devise created by or under the will, but it refers to a trust of trust or instrument in no manner connected with the will under which the title to the property passed, and, under the rule announced, reliance cannot be placed on the erroneous recital in the will to pass the title to the property to the persons named as trustees in that recital." To the same effect is the case of *Hurlbut v. Hutton*, 42 N. J. Eq. 15, 6

nowhere is the rule more clearly stated and more applied than by this court in *Zimmerman v. Hafer*, 47, 32 Atl. 316, where the parts of the will relied on follow:

"I, as, I have this day made and executed a deed conveying to J. Monroe Zimmerman the farm whereon I now live, do hereby give and bequeath unto him, the said J. Monroe Zimmerman, all my personal property of whatever description and wheresoever situate."

"I thus give to the said J. Monroe Zimmerman, all my personal property and estate because he is married to my niece, and has been living with them for many years, and have a great love and affection for them, and desire that they shall have the same to the exclusion of my other relations."

McSherry, in that case, said: "It is perfectly obvious that the will makes no direct disposition of the real estate, but expressly recites that the testator had on the same day conveyed the farm to Zimmerman by deed, and it then proceeds to give him, not the farm, but personal property only. But if the deed failed from any cause to convey the real estate, the mere expression in the will of a wish that the testator should enjoy that which the testator then supposed he owned, and which he gave him by the deed, cannot operate as a direct devise of the real estate, or as a devise thereof by necessary implication, although coupled with a declaration that he desired his children and others to be excluded from any participation in his estate. . . This recital in the will was, or at least turned out to be, erroneous, because the deed did not convey the real estate, although it was actually made and executed. Such an erroneous recital does not disclose a purpose or intention on the part of the testator to give the same property by the will. The doctrine as to the effect of erroneous recitals in wills is well established, namely, that if the erroneous recital in a will or any instrument be of a gift contained in this instrument, the recital may operate as being in itself a devise of the real estate by implication of that very property. But where the erroneous recital refers to an estate created by another instrument, that recital cannot operate to create an estate by itself."

As said in *Adams v. Adams*, 1 Hare, 538, this is a hard case against the appellee and her brother, but in view of the rule well established, and so clearly announced by this court, we hold that the recitals of the will in the case at bar operate as a bequest by implication of the proceeds of the real estate to the children of the testator's first wife. Nor is this a case for the application of the doctrine of election. It is in accord with *McElfresh v. Schley*, 2 Gill, 181, 41 Am. Dec. 415: "The earliest case on the subject, the rule is, that a man cannot take a benefit under a will, and at the same time de-

feat the provisions of the instrument. If he claims an interest under the instrument, he must give full effect to it as far as he is able to do so. He cannot take what is devised to him, and at the same time what is devised to another, although, but for the will, it would be his; hence he is driven to his election to say which he will take." This principle obviously has no application to this case. There is no attempt here to defeat the provisions of the will, for as we have seen the testator did not attempt to bequeath the proceeds of the policy. Moreover, the principle only applies where the testator by his will disposes of some interest or estate that does not belong to him: See, also, *Barbour v. Mitchell*, 40 Md. 151; *Albert v. Albert*, 68 Md. 352, 12 Atl. 11; *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 579, 11 L. R. A. 185; 2 *Story's Equity*, 5th ed., sec. 1086; *Bispham's Principles of Equity*, 3d ed. 361; *Box v. Barrett*, 3 L. R. Eq. 244.

As the will contains no bequest of the proceeds of the policy to the plaintiff and her brother, the amount received by the executrix on account of the policy, if it belongs to the estate, passes under the residuary clause of the will, and the amount of the charge of \$75 annually against the share of the appellee, or so much thereof as was due at the death of the testator, should be deducted from the two-ninths of the residue of the estate bequeathed in trust for her and children, etc.

The testator states in the first codicil that since the date of his will he has annually expended at least \$200 "for board and maintenance of" his daughter, Eliza, and that, for that reason, he had determined to charge her with the sum of \$75 annually, and that "whatever sum of this charge may be due at the time" of his death must be deducted from her share of his estate. In respect to this provision of the codicil we adopt the view expressed ⁵⁰⁸ by the learned court below as follows: "The language 'I have determined to charge her with \$75.00 annually,' etc., I think indicates a future purpose to impose a charge, and not to make it retroactive, and the charge should, therefore, be computed from the date of the codicil."

The amount to be deducted from her share of the estate should be, therefore, so much of the charge of \$75 annually, computed from the date of the codicil, as was due at the time of the testator's death, and if there is any uncertainty as to the amount evidence may be taken to establish it.

As the learned court below decreed that Eliza Ann Smith, and her brother, George Mifflin Smith, took under the will the proceeds of the policy to the exclusion of other legatees, so much of that decree must be reversed, and that part of the decree which directs that the charge of \$75 annually be computed from the date of the codicil and t

of said charge be deducted from the two-ninths value of the estate bequeathed in trust for the ap-
her children, etc., will be affirmed, with the
as suggested, and the cause must be remanded in
a decree may be passed in accordance with this

reversed in part and affirmed in part, and cause
the costs in the court below and in this court to be
Margaret Emily Smith, executrix, out of the tes-
e.

Gifts by Implication are discussed in *Re Donges' Es-*
497, 74 Am. St. Rep. 885; *Succession of Allen*, 48 La.
5 Am. St. Rep. 295; *Estate of Jacobs*, 140 Pa. 268, 23
230; *Peckham v. Lego*, 57 Conn. 553, 14 Am. St. Rep. 130.

WARREN BROS. v. KENDRICK & ROBERTS.

[113 Md. 603, 77 Atl. 847.]

AMENDMENT—Bond to Dissolve—Amendment of Declara-
s upon a bond to dissolve an attachment are not dis-
an amendment of the declaration, unless its effect is to
cause of action, and thus to impose upon them a liability
that which they assumed by signing the bond; or unless
nd character of the original claim is altered, and the
h reference to which they contracted is essentially
out their consent. (p. 449.)

AMENDMENT—Bond to Dissolve.—The Amendment of a
containing the common counts and a special count re-
tain written contracts, the suit being for work done
s furnished partly on special order and partly on the
striking out the special count, does not materially alter
action and does not operate to discharge the sureties
given to dissolve an attachment. (pp. 450, 451.)

AMENDMENT—Bond to Dissolve.—The Amendment of a
y substituting in a common count a demand for \$10,000
eu of a specific statement of an indebtedness of \$7,157.53,
ing out of a credit given, where other credits are al-
e amount of recovery is less than the claim for which
brought, is not such a change in the character of the
ation of the parties as will discharge the sureties upon
to dissolve an attachment. (p. 451.)

AL—Reversal—Direction for Judgment.—Where the only
for the court, the appellate court will, upon reversing
, direct the entry of a judgment in accordance with its
452.)

G. Hayes, for the appellant.

F. Harley, for the appellees.

⁶⁰⁵ URNER, J. This is a suit on a bond given to diss an attachment againt a nonresident debtor, and the ques is whether, in the trial of the short note case, resulting judgment for the attaching creditor, there was such a terial change, by amendment, of the cause of action as t lease the appellee as the surety on the bond.

The declaration in the present action alleges in subst that the defendants, the principal and surety, executed bond in question obligating them to pay to the plaintiff, appellat here, the sum of \$14,315.06 and conditioned the payment by the principal of any judgment that sh be recovered against it in the attachment proceeding; judgment for the sum of \$4,309.41, with interest and c ⁶⁰⁶ was obtained against the principal in the case in which bond was filed; that demand was repeatedly made upon defendants without avail for the payment of the judgm and that thereby a right of action upon the bond accrue the plaintiff. Issue was joined upon a plea and travers nul tiel record and was tried by the court below upon an spection of the record to which the pleadings referred. question we have already indicated was thus presented was determined adversely to the plaintiff. This finding fo the subject of the only bill of exceptions taken at the t and the issue being exclusively for the court it is prop before us for review: Poe's Practice, sec. 603; Le Stra v. State, 58 Md. 26; McKnew v. Duvall, 45 Md. 501.

It appears from the record of the attachment proceed incorporated in the bill of exceptions that the appellant company was a subcontractor for portions of the construction a warehouse for Johns Hopkins Hospital in Baltimore C and that Kendrick and Roberts, a foreign corporation, the contractor for the entire building. While the wor be done by the appellant was not completed within the prescribed by the subcontracts, it was accepted by the p cipal contractor and the owner. The attachment suit brought to recover the balance due the appellant for labor and materials covered by its subcontracts and also extra service rendered under a special order. In the affid upon which the attachment was based an indebtednes \$7,157.53 was stated, and there was a certification as to production of "the contracts, order and accounts on and which" the defendants were alleged to be so indebted. short note was in assumpsit. It recited the purpose of suit to be the recovery of \$7,157.53 due and owing f the defendant to the plaintiff for work and labor done materials furnished for the defendant by the plaintiff c certain building constructed in Baltimore City and ow by the Johns Hopkins Hospital, on the order hereunto nexed ⁶⁰⁷ marked "A" and made a part of this declar

ounts hereunto annexed marked "C"; and for work done and materials furnished for the defendant plaintiff "on the same building" on the contracts annexed and marked "B" and made a part of this as per account annexed and marked "D." It ended on the common counts.

her consisted of a statement summarizing the entire together with a number of itemized bills whose totals ended in the summary, an order for the extra work als, and two contracts under seal between the plaintiff and Kendrick and Roberts under which the principal of the plaintiff's work was performed. It appears amounts stipulated by the two subcontracts aggregated \$4,596.21. This had been reduced to \$4,596.21 by a payment, and a further credit was given for thirty which was to be retained under the contracts until after the final completion of the building. The amount claimed for the contract work was thus reduced to \$4,596.21 while the bills for extra labor and materials aggregated \$4,596.21.

Attachment was laid in the hands of the Johns Hospital and others and impounded funds sufficient to satisfy the appellant's claim. It was dissolved and the funds were returned by virtue of the bond executed by the appellee completely for the amount and upon the condition already

endant filed the general issue pleas to the declaration, assumpsit case and also a plea denying the plaintiff's incorporation. Subsequently the plaintiff, by leave of the court, amended the declaration by substituting for it the common counts alone with an ad damnum clause for \$10,000. The defendant moved to strike out the amended declaration, and the case was finally brought to issue on the counts of non assumpsit and nil debet.

During the progress of the trial of the assumpsit case with the attachment suit, an agreement was reached between the parties that the amount due the plaintiff under his contract, as originally filed, independently of the payment of thirty per cent, was \$2,986.29; but the right of the plaintiff to recover any part of this final payment was denied. The plaintiff thereupon, by leave of the court, over the defendant's objection, amended the voucher to show the credit of thirty per cent "retained as per contract" and proved that the amount actually due on account of the final payment was \$1,323.12. A verdict was rendered and judgment entered in favor of the plaintiff for \$4,309.41, being the aggregate of the amount last due and that conceded by the defendant. This

judgment was affirmed on appeal in *Kendrick and Roberts v. Warren Bros.*, 110 Md. 47, 72 Atl. 461.

It is because of the amendments of the declaration a voucher to which we have referred that the appellee seeks to be discharged from all liability on the bond which it executed and which accomplished the release from the appellant's attachment of funds sufficient to pay its claim in full.

The appellee's contention, specifically stated, is that the effect of the amendments was to change the nature of the appellant's claim and enlarge its amount—to convert an action on contracts under seal into one in implied assumpsit with a larger demand—and that this constituted such a material alteration of the case upon which its obligation was predicated as to release it from responsibility for the judgment in which the suit resulted.

Before discussing the law applicable to the case it is desirable to determine just to what extent the cause of action in the attachment suit was altered by the amendments in question.

In *Kendrick and Roberts v. Warren Bros.*, 110 Md. 47, 72 Atl. 461, it was expressly decided that the suit connected with the attachment was in assumpsit and not on the sealed contracts and ⁶⁰⁰ the action of the lower court in permitting amendment of the voucher by striking out the thirty per cent credit and the introduction of evidence to show the amount due for work performed and accepted as represented by the credit was sustained. It was held that the action was properly in assumpsit, the work covenanted to be done not having been finished within the specified time, but the defendant having permitted it to be completed and having accepted the benefits, thereby impliedly agreeing to pay what the labor and materials were reasonably worth. It is true that this decision dealt with the case after the amendment which reduced the short note to the common counts only was made, but it is clear that the same observations would apply to the declaration in its original form. The only ground for the suggestion that the suit was then based on the contracts under seal is the fact that they were annexed to the declaration and made a part of it by reference. It is apparent, however, that the suit was brought not for a breach of any of the contracts contained in the sealed instruments but for the value of work done and materials furnished partly on a special order and partly on the contracts. The declaration when first filed contained the common counts, and the special order for the extra work to which it refers was not under seal. To this extent the suit was unquestionably in assumpsit, and the short note was broad enough to support the whole of the plaintiff's claim regardless of the allusion to the contracts. Under these circumstances we are not willing to rule that an amendment

intact a feature of the declaration which was sufficient to sustain the original cause of action constituted a substantial alteration of the suit for the purposes of this case. The original note as amended, however, contained a claim for \$1000 as damages in lieu of the specific statement in the original declaration of an indebtedness of \$7,157.53. It is insisted that this was such a substantial increase of the claim as to constitute a new cause of action to which the indemnity bond was filed as to the surety. The elimination of the thirty per cent, by the amendment of the voucher, also had the effect of enlarging the claim in suit. In these two respects, the proceeding to which the bond related was unmodified, and we have only to determine whether the bond was sufficient as a matter of law to release the surety from liability.

The general rule, as stated in *Doran v. Cohen*, 147 Mass. 454, 17 N. E. 647, is that "sureties upon a bond to dissolve an attachment are not discharged by an amendment of the declaration unless its effect is to let in a new cause of action, or to impose upon them a liability greater than that which they assume by signing the bond."

In the application of this rule to a case where the amount of the damage had been increased by amendment it was said in *National Bank v. Jones*, 151 Mass. 454, 24 N. E. 454, 17 N. E. 454, that the surety is discharged by a mere change in the amount named in the writ. The liability of the surety is for the penal sum in the bond, with interest. . . . So long as the same cause of action has been introduced, his rights are not affected. . . . If a different and additional cause of action had been introduced into the plaintiff's writ, the amount of the damage would have been increased or not, the defendant would have ground of objection, unless it could be shown that the plaintiff had recovered only on the original cause of action. . . . Unless it is shown that the plaintiff has been, or may have been, injured by the increase of the damage, there is no reason why he should be relieved from his responsibility."

The same principle was applied in *Driscoll v. Holt*, 170 Mass. 309, 49 N. E. 309, where the original suit was brought for the consideration of a sale alleged to have been made. The consideration was stated in the declaration for \$1000 in money, while the evidence tended to show that the plaintiff received \$815 in money and relinquished a valid claim against the vendor amounting to about \$68. A count setting up the claim for wages was allowed to stand in the declaration. It was held that this was not a new cause of action, and the court observed: "nothing in the case on which the defense can rest

except the fact that the cause of action as originally stated did not show quite so large a liability on the part of the defendant as that shown when it was correctly stated. As we have already seen, that fact does not relieve the defendant from liability for the real cause of action on which the suit was founded, to an amount not exceeding the penal sum of the bond."

In *Morton v. Shaw*, 190 Mass. 554, 17 N. E. 633, it was held that if the effect of amendments was "merely to put in proper form the statement of the cause of action upon which the action was brought, they are binding upon the sureties, even though they greatly change the form of the statement of the claim, or greatly enlarge the amount claimed according to the language of the original declaration." The contract in this case upon which the attachment depended was for the sale of forty thousand sides of leather. It was averred in the declaration as it stood at the time of the filing of the dissolution bond, that the defendant delivered 28,538 sides of leather and neglected and refused to deliver the remaining 11,462. The plaintiff was permitted to amend this statement by alleging, as was the real fact, that 11,462 sides had been delivered and that the breach of contract had occurred as to the remaining 28,538 sides. "Such changes," said the court, "do not introduce a new cause of action. They merely put the pleadings in form properly to present to the court the original cause of action for which the action was brought."

The effect of an amendment making new parties upon the liability of sureties in cases like the present was considered by this court in *Furness v. Reid*, 63 Md. 1. There the original action was in the name of certain persons as a partnership ⁶¹² to recover freight claimed to be due them as owners of a steamship. At the trial, on motion of the plaintiffs, amendments were made against the objection of the defendants, sixteen other persons were made coplaintiffs. The court said: "The judgment for the nonpayment of which this suit is brought is not one rendered in favor of the original plaintiffs, . . . but one rendered under an amended state of the pleadings, by which all the part owners of the ship are made plaintiffs, all of whom had an interest in the freight, to recover which the attachment was issued. . . . As the suit was originally brought, the plaintiffs . . . could not have recovered at all because it is well settled that where the contract is joint, either by agreement or by implication, . . . they must sue together." It was accordingly ruled that "the nature and character of the cause of action was in itself changed," and that the sureties were consequently released.

The reason of the rule applied in the varying circumstances of the cases to which we have referred is perfectly obvious and just. It is that a surety whose obligation discharges from

ment the assets of the debtor upon which the attachment could scarcely rely, ought not to be exempted from liability unless the situation with reference to which he had been essentially changed without his consent. He made himself responsible for "any judgment" rendered against his principal in the attachment proceeding, it being unduly restricting his agreement to permit him to successfully an amendment that did not alter the substance and character" of the original claim.

In the present case it is perfectly plain upon the record of the attachment suit that the judgment finally rendered was of an identical cause of action set forth in the short note on which the debtors as they stood at the time of the execution of the writ. While one credit was stricken out, others were added. In the course of the trial, and the amount of the recovery was considerably less than the claim for which the writ was brought. In view of these conditions, we are not to see any prejudice to the appellee that would justify in separating it from the formal obligation into which it was entered for the appellant's protection.

The cases cited by the appellee are not at all in conflict with the controlling principle of those we have discussed. Reliance was placed upon the case of *Prince v. Clark*, 100 Mass. 599. That case was distinguished in *Morton v. Prince*, 100 Mass. 554, 77 N. E. 633, from the decisions applying the doctrine upon which we are satisfied to rest our determination, and it was held not to affect the law as stated in the other cases to which we have referred, because the amendment changed the cause of action so as to enable the plaintiff to recover for that which he did not intend to include in his original action, but introduced later, through the amendment, in order to relieve himself of the consequences of the judgment made in another case, made after his writ was entered.

The conclusion, therefore, is that the learned court below was correct in finding for the defendant upon the issue of the record, and that upon this issue the plaintiff was not to recover and to have judgment entered in its favor against the defendants for the penalty of the bond to be returned on payment of the amount of the judgment in the original case, with interest and costs: Code, art. 75, sec. 90; *Abler*, 41 Md. 236.

In view we have taken of the case it will be unnecessary to consider separately the action of the court below upon the plaintiff's demurrer to additional pleas filed by the defendant, relying more specifically than in the first plea of the record upon the alleged alterations of the cause of action in the attachment suit.

This being an issue for the court, we will, in reversing the judgment rendered below, enter judgment in accordance with ⁶¹⁴ our decision: Poe's Practice, sec. 838; Howard v. Carpenter, 22 Md. 249; State v. Tabler, 41 Md. 236.

Judgment reversed and judgment in favor of the appellant against the appellee for the sum of \$14,315.06, with costs of suit above and below, to be released upon the payment of the sum of \$4,875.23 and interest from the date of this judgment (being the sum of \$4,309.41, with interest thereon from April 14, 1908), and the costs above and below in the assumpsit action and the present case.

The Amendment of Writs of Attachment and the Papers on Which They are Based is the subject of notes to Bunneman v. Wagner, 8 Am. St. Rep. 311; Barber v. Swain, 61 Am. Dec. 125.

Variance in Attachment Proceedings is the subject of a note to Simmons v. Simmons, 107 Am. St. Rep. 894.

The Inherent Power of a Court to Amend Its Process is the same attachment as in other cases: Miller v. Zeigler, 44 W. Va. 484, Am. St. Rep. 777.

SUSQUEHANNA TRANSMISSION COMPANY v. ST. CLAIR.

[113 Md. 667, 77 Atl. 1119.]

COTENANCY—Erection of Power Line.—One Cotenant cannot use the common property for the purposes of a telephone and electric power transmission line to the exclusion of his cotenant. (p. 454.)

COTENANCY—Right of Possession—Ouster.—Tenants in common are jointly seised of the entire estate, and each has an equal right of entry and possession; the possession of one is the possession of all, and ouster will not be presumed from exclusive possession of one cotenant, but actual ouster must be proved. (p. 454.)

COTENANCY.—One Cotenant cannot Divert the Property from its former use to a use that will interfere with its enjoyment and use by his cotenant. (p. 455.)

COTENANCY—Waste.—An Injunction may Issue in favor of one cotenant against the commission of waste by another. (p. 455.)

COTENANCY—Public Use of Property.—The Fact That One Cotenant is a Public Service corporation does not give it a right to put the common property to public use without exercising the right of eminent domain, and such use may be enjoined by its cotenant. (p. 456.)

Francis T. Homer, Fred. R. Williams, George R. Willis and Stevenson A. Williams, for the Susquehanna Transmission Company.

Harry S. Carver, for Allen H. St. Clair.

ISCOE, J. These are cross-appeals from the circuit Harford county, in equity, under article 5, section Code of Public General Laws, and by an agreement appeals were heard at the conclusion of the April term. On the 23d of June, 1910, a per curiam order passed announcing our conclusion in the case, to the effect that so much of the order as granted the injunction to interfere on the part of the defendant with the use of the telephone line proposed by the complainant be reversed, and that part of the order denying the defendant to restrain the defendant from interfering with the use of the towers for the complainant's transmission be affirmed. The reason for the conclusion here- reached by us will now be stated.

That the plaintiff and defendant are tenants in common of a strip of land containing three and forty-sixths acres, one hundred feet wide, and about fifteen and fifty-two feet long, situate in Harford county, Maryland; the former owning four-fifths interest therein and the latter owning the remaining one-fifth interest.

The plaintiff is a corporation formed on the nineteenth day of June, 1910, by the merger and consolidation of the Susquehanna Line Company of Baltimore county and the Susquehanna Pole Line Company of Harford county, and is now known as the Susquehanna Transmission Company, of Maryland. On the fourteenth day of May, 1910, the date of the filing of the bill of complaint in this case, this corporation was engaged in the construction of a transmission line of electrical apparatus consisting of towers, cables, poles, wires, etc., for the purpose of carrying electric power or energy from McCall's Ferry on the Susquehanna river in York county, Pennsylvania, through York, Baltimore and Harford counties, to Baltimore City.

The defendant alleges that the plaintiff proposed to construct a transmission line from McCall's Ferry in Pennsylvania to the Baltimore City upon and over the strip of land, containing three and forty-six hundredths acres and that it will be an electric line, consisting of cables supported on steel towers with concrete or stone bases, at intervals of five hundred feet or more, the interval depending on the topography or contour or elevation of the contiguous strips. The bill of complaint charges that in its capacity and function as a utility corporation, it has become necessary for the defendant to take a preliminary step in the construction of its transmission line to build a telephone line upon and along this strip of land, and that the plaintiff is about to dig holes there- about to plant in the holes telephone poles, and may remove several trees on the strip which are neither orna-

mental nor shade trees, but has not yet dug holes nor poles as aforesaid, nor cut down any trees thereon.

The bill also avers that the land has for many years and now used for farming purposes, particularly for pasture grazing, and that neither the construction and equipment of a transmission line through the farm, nor the construction of the preliminary telephone line has in reality interfered with the farming operations of the defendant, either upon his farm or upon the strip of land.

The bill then charges and avers that the defendant has forbidden the plaintiff to enter upon the strip of land for the purposes herein set out, and is interfering with, hindering and impeding in the performance of its duties to the public in the application of its ownership of its four-fifths interest in the strip to the public utility and public service charged thereon, and to which its title thereto is subject, the defendant has threatened to cut down, dismantle, destroy and waste the property of plaintiff, if said line is constructed upon the strip, and that such threats and acts of interference and hindrance and waste by the defendant if continued or executed, will wantonly interfere with plaintiff's rights and prevent the performance of its public duties and in effect will maliciously waste and destroy the rights of the plaintiff and of the public in the strip, where the plaintiff is a trustee, and will not only maliciously waste and destroy the physical property of the plaintiff thereon but also thereby cause a forfeiture of the plaintiff's character and therefore the plaintiff has an equity to call for the interposition and aid of a court of equity by way of an injunction, mandatory and ⁶⁷¹ prohibitive, to protect it in its estate, and the public in their rights from threats or acts of the defendant.

The prayer of the bill was for a sale of the land for purposes of division and for an injunction, mandatory and prohibitive, against the defendant.

The application for an injunction was resisted by the defendant and from an order of court, passed on the next day of June, 1910, granting an injunction to prevent interference on the part of the defendant with the construction of the telephone line, but denying the application to restrain the defendant from objecting to and interfering with the erection of the permanent structures, to wit, towers for the transmission line, these appeals have been taken.

The law is well settled, that tenants in common are jointly seized of the entire estate and each has an equal right of entry and possession; the possession of one is the possession of all and ouster will not be presumed from exclusive possession by one cotenant, but actual ouster must be proved.

ber v. Frazier, 17 Md. 436; Israel v. Israel, 30 Md. Am. Dec. 571.

American and English Encyclopedia of Law, second page 670, the law is thus stated, as supported by y, that one cotenant cannot eject or dispossess another possession is lawful and not inconsistent with nor can one tenant recover the exclusive possession of property as against his cotenant. The great incident of tenancies, whether joint or in common, is the unity of possession by which the tenants hold. Each is entitled with all the others, to the entire possession of the property and of any part of it and no one has the right to the whole or to any particular part, and will be permitted to deal with the property to the same in any way of his cotenants.

The proof in this case shows that both the construction of telephone lines as proposed and the erection of the towers, the transmission line, as stated in the plaintiff's bill, interfere with the defendant in the use and enjoyment of the strip of land, and will in effect dispossess him of the land in which they have a joint interest. In other words, the plaintiff under the facts of this case is attempting to take the land and common property for its benefit to the exclusion of its cotenant, without compensation and over the objection and protest of the cotenant.

Again, there is proof to show that the property had been used for farming purposes, such as growing cotton and also for pasture, and the contemplated use of the defendant corporation would be a diversion of the land from its former use, and would be an exclusive use for its purpose, and an interference with its use and enjoyment by the cotenant. The bill charges that the land has been used for many years and is now being used for farming purposes, partly for pasture and grazing, and the proof tends to show that the contemplated use would not only divert its use, but would be a dedication thereof to public use.

In addition to these, there is proof to show that the defendant corporation was committing waste by cutting and removing trees, and doing other acts destructive and injurious to the rights of the defendant. This being so, the defendant in this case would clearly be entitled to an injunction to restrain a continuing and permanent injury to the defendant's property, and an interference with the use and enjoyment of the property by the cotenant.

A tenant in common has no right to alter or change the property to the injury of the other without his assent: 17 Eng. Ency. of Law, 2d ed., pp. 669, 705; Russell v. Merbank, 47 Minn. 286, 28 Am. St. Rep. 368, 50 N. W. Rep. 308; v. Early, 95 Va. 307, 28 S. E. 374.

The fact that the appellant is a public service corporation can in no way change or modify the principles of law applicable to the facts of this case. The Code of Public General Laws, article 23, section 360, provides how and in what manner corporations can acquire property for public use. Section 365 of article 23 specially provides that, "Notwithstanding ⁶⁷³ herein contained shall authorize any incorporated company to take or use property without just compensation agreed upon with the owner, or awarded by a jury, has not been first paid or tendered to the parties entitled thereto or paid into a court, after inquisition confirmed, as provided for in the preceding section."

But apart from this, the bill of complaint in this case seeks a sale of the property for the purposes of partition between the cotenants and this sale is not resisted by the defendant. The property can then be offered at public sale and the appellant will have an opportunity to purchase the interest of the cotenant, at such sale and become the owner of the entire strip of land.

Being of opinion, for the reasons stated, that there was no error in the order of court, directing an injunction to be issued against the defendant as to the telephone poles and lines, the order in this respect was reversed. In so far as the erection of the towers and transmission lines were concerned, the order of court, denying the injunction, to restrain the defendant from interfering therewith, for the reasons herein stated, was affirmed.

Decree reversed in part and affirmed in part, the Susanna Transmission Company of Maryland to pay the costs on both appeals.

The Right of One Tenant in Common to Convey or Create an Estate in the common property is the subject of a note to Benedict v. Harman, 21 Am. St. Rep. 593; and the right of cotenants to the whole of the common estate is the subject of a note to Harman v. Gartman, 18 Am. Dec. 659.

What Constitutes an Ouster of One Cotenant by another is the subject of a note to Gillaspie v. Osburn, 13 Am. Dec. 140. To constitute an ouster by a tenant in common there must be some open notice or assertion of an exclusive claim, and a direct interference with the denial of, the right of another cotenant: Morange v. Doe, 143 Am. St. Rep. 459, 111 Am. St. Rep. 52; Gill v. Fletcher, 74 Ohio St. 295, 113 Am. St. Rep. 962. Mere silent possession by one cotenant, however long continued, will not work an ouster and cause the statute to run against another cotenant: Reed v. Backman, 61 W. Va. 452, 123 Am. St. Rep. 996. There must be an actual disseisin brought home to the knowledge of the others: Cramton v. Rutledge, 136 Ala. 649, 136 Am. St. Rep. 94. But an ouster of one cotenant by another may be inferred from long exclusive possession by one without any possession or claim for profits by the other: Joyce v. Dyer, 189 Mass. 64, 189 Am. St. Rep. 603.

se Possession of One Tenant in Common and the creation of title thereby are discussed in the note to *Joyce v. m. St. Rep. 609*. And see *Russell v. Tennant*, 63 W. Va. St. Rep. 1024. The possession of land by one tenant and the exercise of acts of ownership by him will be the common title, and will not, without more, be converse to the other cotenant, but if it appears that he has the title of his cotenant, of which the latter has notice able with notice, then the possession will be adverse: *Campbell*, 155 Ala. 221, 130 Am. St. Rep. 17.

One Tenant in Common is the subject of a note to *Benedict* 1 Am. St. Rep. 593.

CASES

IN THE

SUPREME COURT

OF

MINNESOTA.

NEIMAN v. CHANNELLENE OIL AND MANUFACTURING COMPANY.

[112 Minn. 11, 127 N. W. 394.]

NEGLIGENCE.—The Sale of Adulterated or Poisonous Cooking Oil by a Wholesale dealer is prima facie evidence of negligence in failing to ascertain its true character, although the package properly labeled as cotton seed oil. (p. 459.)

NEGLIGENCE.—A Manufacturer, or Dealer, Who Sells Adulterated or Poisonous Cooking Oil to a retail merchant, is liable to vendee for his consequent loss of business in selling the oil to customers. (p. 459.)

NEGLIGENCE—Sale of Impure Oil by Merchant.—The court did not err in instructing the jury as to the degree of care required of the merchant to ascertain the quality of the oil before selling it to his customers, and the verdict is sustained by the evidence. (p. 459.)

(Syllabi by the court.)

The plaintiff was a retail grocer and purchased from defendant, a wholesale grocer, five gallons of cooking oil claimed by plaintiff to be unwholesome and poisonous, which he sold to his customers and which made them sick. His action was to recover five thousand dollars damages to plaintiff's good name and reputation as a grocer and to his business. The defendant denied all the allegations of the complaint, except that the plaintiff was a grocer, and alleged that any damage was sustained it was the result of the plaintiff's own negligence. A trial by jury resulted in a verdict for two hundred dollars for the plaintiff. A motion for a new trial was denied. The appeal was from the judgment of the order denying a new trial.

Thos. C. Daggett, for the appellant.

Geo. Harold Smith and Francis B. Hart, for the respondent.

¹² LEWIS, J. Respondent conducted a small retail grocery and notion store in Minneapolis. Appellant was a wholesaler.

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ber, and this action was brought to recover damages to have ensued to respondent's business by reason of the purchase by him from appellant of unwholesome and unfit for cooking oil, which was innocently sold by him to respondent. Respondent recovered a verdict of two hundred dollars.

Appellant did not manufacture the oil, but claimed to have purchased it in Kansas City. Appellant's manager, a witness at the trial, testified that he made no examination of the oil, but that it was proper to sell for cooking purposes, but that it was cotton seed oil on the strength of the label. The oil contained forty per cent petroleum, and respondent sold it to all of his customers, who testified that they used it for cooking purposes, and that it made them sick, for which they immediately stopped trading with respondent.

In the course of the instructions, the court charged the jury that if respondent had proven that the act of selling the oil by appellant was in violation of the pure food statute, the jury might be warranted in presuming that it was negligently sold in reference to the conduct of respondent charged in the complaint as follows: "If you find that this plaintiff was negligent in not ascertaining the character of this oil, that he conducted himself as an ordinarily prudent person under the same circumstances, and would have ascertained that this oil was dangerous, then, of course, he could not have sold the oil after that, after the time that he would have ascertained its dangerous character if he had conducted himself as an ordinary prudent person would have under the same circumstances. . . . If one person has been negligent, and such negligence has caused an injury to another person, the person injured cannot recover, if he has also by his negligence contributed to the injury." Appellant sought to shift this charge upon the ground that it lays down a rule of damages to govern the conduct of appellant and not to govern the conduct of respondent; that is, if it was negligent on the part of appellant to sell the oil which was contrary to the statute, it was also prima facie negligent on the part of respondent to sell the

oil. Appellant made no request to charge, and did not ask for a modification of the charge as made. Conceding that the rule was applicable to appellant was also applicable to respondent, the court did not necessarily commit error in referring to the presumption of negligence with reference to respondent. The duty resting on respondent was substantially embraced in the statement by the court that if, by his negligence, he had the opportunity to examine the oil, respondent had a duty to believe it was not a pure article of food, then he was guilty of bringing about the result of which he

complains, and could not recover. If a more definite instruction on this point was desired, it should have been required.

Although the evidence as to the amount of damages in some respects rather vague, yet seven or eight of respondent customers came into court and definitely testified that they refused to deal with him after obtaining the oil in question, and figures were given of the amount of their business for the week, which was consequently lost. No punitive damages were found by the jury, and we need not consider the proper charge on the subject of whether the evidence warranted an award of damages.

The evidence is sufficient to sustain the ruling that appellant was prima facie guilty of negligence in selling the oil. A company which advertises itself as a manufacturer and purveyor of pure articles of food must be deemed to have knowledge of the contents of the articles offered for sale.

Affirmed.

Under a State of Facts Similar to Those in the Principal Case it was held that the wholesaler was liable to one who bought the impure oil from the retailer and was injured by its use, the sale of impure oil by the wholesaler being in violation of the pure food law, and the injury to the consumer resulting proximately from the violation: *Meshbesh v. Channellene Oil & Mfg. Co.*, 107 Minn. 131 Am. St. Rep. 441.

The Liability for Selling Noxious and Unsound Food is the subject of a note to *Hunter v. State*, 1 Head, 160, 73 Am. Dec. 165.

The Liability of a Vendor of Dangerous Articles or Substances is considered in the notes to *Knelling v. Lean Mfg. Co.*, 111 Am. St. Rep. 701, and *Woodward v. Miller*, 100 Am. St. Rep. 192, and see *Cumham v. Pease House Furnishing Co.*, 74 N. H. 435, 124 Am. St. Rep. 979.

Implied Warranties of Quality in the Sales of Goods are considered in notes to *Gold Ridge Mining Co. v. Tallmadge*, 102 Am. St. Rep. 607, the subject as relating to articles of food being specially considered at page 623; *Emerson v. Brigham*, 6 Am. Dec. 113; *St. v. Woods*, 2 Am. Dec. 220; and *Bailey v. Nickols*, 1 Am. Dec. 84.

BJELLAND v. CITY OF MANKATO.

[112 Minn. 24, 127 N. W. 397.]

CONTRACT—Validity of Agreement Between City and Health Officer.—Action to recover for medical services rendered by the plaintiff, who was the health officer of the defendant city at a fixed salary, in controlling and eradicating an epidemic of smallpox and typhoid fever in the city, pursuant to a contract with the city board of health of which he was a member, that he should render such service and be paid the reasonable value thereof. Held, following *Stone v. Board of Health*, 88 Minn. 127, and distinguishing *Chairman of Board of Health v. Board of County Commrs. of Renville County*, 89 Minn. 402, that the contract was void. (pp. 461, 463.)

(Syllabus by the court.)

Wilson, for the appellant.

Schmitt, city attorney, for the respondent.

RT, C. J. The plaintiff was the health officer of Mankato, and commenced this action in the district of the county of Blue Earth to recover sixteen hundred and ninety-five dollars for necessary services rendered in connection with eradicating and controlling an epidemic of smallpox and typhoid fever in the defendant city, pursuant to an alleged contract with the board of health of the city. A general demurrer to the complaint was interposed by the city, and the trial court made its order sustaining the demurrer from which the plaintiff appealed.

The complaint alleges, in effect, that the plaintiff was, during the times therein stated, a physician and surgeon, and the health officer of the city of Mankato at a fixed salary of two hundred dollars per year; that as such officer he was a member of the board of health of the city; that he was authorized by law to prevent the spread of contagious, or infectious diseases, and for this purpose to procure medical and other attendance for persons afflicted with such diseases; that between January 10 and 25, 1908, an epidemic of smallpox existed in the city of Mankato; and, further, that in order to control and suppress such epidemic the plaintiff, at the request of the board of health and for and in its behalf, rendered services as a physician of the actual and reasonable value of six hundred and seventy-five dollars. The complaint further alleges as a second cause of action that between June 27 and 30, 1908, pursuant to an agreement made by and between the board of health and the plaintiff, he performed medical services in controlling and eradicating an epidemic of typhoid fever, for which the board promised to pay a reasonable value thereof, which was one thousand five hundred dollars. The complaint contains other allegations and evidentiary facts tending to show the extent of the epidemic and the emergent necessity of the board securing medical services in stamping them out.

The defendant, in support of the order sustaining the demurrer, that the services rendered by the plaintiff were a part of his official duties as health officer, and, that the contract pursuant to which they were rendered was void, for the reason that plaintiff was a member of the board. We find it necessary to consider only the question of the validity of the contract which is the basis of the plaintiff's claim against the city. The complaint affirmatively alleges that he was a member of the board of health—that is, a health officer—and that he entered into the contract with the city for the performance of the professional services

for the value of which he seeks to recover in this case. Such contracts are forbidden by Revised Laws of 1905, section 5032, and are void: *Stone v. Bevans*, 88 Minn. 12, 13 Am. St. Rep. 506, 92 N. W. 520; *Young v. City of Mankato*, 97 Minn. 4, 105 N. W. 969, 3 L. R. A., N. S., 849; *Town of Martinsburg v. Butler*, 112 Minn. 1, 127 N. W. 420. The fact that such contracts are void and cannot be enforced rests upon a wise ²⁶ public policy, and it must be enforced without reference to the merits of the contract, the intention of the parties, or the hardship of exceptional cases.

It is, however, claimed in effect by the plaintiff that the statute and the rule do not apply to a board of health, that it may employ one of its members, its health officer, for the purpose of controlling and suppressing an epidemic contagious or infectious disease. The cases of *City of Mankato v. County of Blue Earth*, 87 Minn. 425, 92 N. W. 405, and that of *Chairman of Board of Health v. Board of County Commrs. of Renville County*, 89 Minn. 402, 95 N. W. 221, are relied on as supporting the claim.

The case of *City of Mankato v. County of Blue Earth*, 87 Minn. 425, 92 N. W. 405, was based upon Laws of 1905, chapter 29, and was commenced to collect from the county the expenses incurred in controlling an epidemic of smallpox in the city, and in the care and medical treatment of certain persons who were stricken with the disease. Such persons were a county charge, but the county physician refused to care for and treat them. Thereupon it was done by the health officer, who was a physician, and the reasonable value of his services and the value of the services of the health officer and inspector were included in the bill against the county allowed by the district court. On appeal to this court it was urged that the trial court erred in not deducting from the bill against the county the items for the services of the health officer and inspector, for the reason that they were not entitled to compensation for looking after epidemics, and that the services rendered were a part of their official duties. The court held that the health officer, upon the refusal of the county physician so to do, was justified in incurring the expenses and in personally rendering the medical services, and that the county was liable therefor. It is apparent that the validity of a contract of the character of the one here in question was not determined in that case and that it is not here in point.

The case of *Chairman of Board of Health v. Board of County Commrs. of Renville County*, 89 Minn. 402, 95 N. W. 221, when read without reference to its facts, seemingly supports the contention of the plaintiff. In the case cited a destitute family, having a legal settlement in the county, residing in the village, were taken ill with smallpox.

board of health quarantined them, and furnished the necessary medical services and attendance, rendered by the chairman of the board, who was a physician. A reasonable charge for his services was included in the items of expense incurred. The county objected to this item, but it was allowed by the district court. On appeal to this court the county contended that its objection was error, for the reason that the case in this court was within the rule of *Stone v. Bevans*, 88 Minn. 127, 101 St. Rep. 506, 92 N. W. 520, to the effect that all contracts entered into by a public officer in which he is interested are void. This court overruled the contention, disapproving the *Bevans* case. It is to be noted that in the county case the board of health, in incurring the expense, were acting for the county, which was solely liable under the statute (Laws 1901, p. 378, c. 238) therefore: *Com. v. Board of County Commrs. of Le Sueur County*, 92 Minn. 199, 99 N. W. 427, 100 N. W. 652. This and the facts distinguish the case from the one at bar, which is not a city board of health contracts with one of its members for services to be rendered by him to the city, but the city would be liable if the contract were valid. It is suggested that the board of health was confronted with an emergency which justified it in making the contract with the plaintiff. The case of *Dewitt v. Mills County*, 126 Minn. 101, 101 N. W. 766, is cited in this connection; but in that case the health officer was not a member of the board which employed him. An emergency confronts a board of health in every case of an epidemic of contagious or infectious disease, but this affords no reason why such cases should be excepted from the statute by the court, for the board may act when the emergency justifies it, a physician other than one of their own number to render the extra medical services.

The court therefore hold that the contract alleged in the complaint between the plaintiff and the health board, of which the plaintiff was a member, was void, and that the demurrer was properly sustained.

The court affirmed.

Justice L., J., dissented.

A City Board of Public Health cannot Elect One of Its Members to the Office of Quarantine Physician when his duties require him to make recommendations to such board, and the charges which he makes for his services are subject to its approval: *Gaw v. Ashley*, 195 Minn. 122, 122 Am. St. Rep. 229.

Qualification of an Officer Holding One Office to Accept Another—considered in the note to *Attorney General v. Oatman*, 86 Am. St. Rep. 3.

The Idea That a Public Official cannot Employ himself to do for the public is the common-law view of the implied limitation of the powers of a trustee: Flowers v. Logan County, 138 Ky. 51, 10 Am. St. Rep. 347; and it is not an element of the incompatibility of the offices that the clash of duty should exist in all or the greater part of the official functions. If one office was superior to the other in some of its principal or important duties this is sufficient: v. Jones, 130 Wis. 572, 118 Am. St. Rep. 1042.

TOWN OF BUYCK v. BUYCK.

[112 Minn. 94, 127 N. W. 452.]

PUBLIC OFFICER—Payment of Illegal Claims—Liability.

A town treasurer, who pays out the money of his town upon checks issued in payment of illegal claims, presented to and allowed by the town board, knowing all the facts disclosing the illegality of the claims, is liable in an action by the town for a return of the money notwithstanding the fact that the orders may have been fair on their face. (pp. 468, 469.)

PUBLIC OFFICER—Expenditures in Violation of Law.

Supervisors of a town, of which defendant was treasurer, and with his full knowledge, co-operation, and assistance, entered upon an elaborate plan for the construction of a public road at a point where no highway had ever been, legally or otherwise, laid out, established a laborers' camp, which they supplied with tools and implements, and for the purpose, provisioned the camp with necessaries for the laborers and their teams, employed themselves to perform work on the road at a specified compensation, hired the town clerk as a keeper at a fixed per diem and board, designated the town treasurer as purchasing agent of the town, who, as such, purchased for the town goods and property used and employed at the camp. It is held that the acts of the supervisors were not only unauthorized by law but in violation thereof, and that town orders issued in payment of obligations thus incurred were illegal. (pp. 468, 469.)

PUBLIC OFFICER—Unlawful Expenditures—Estoppel.

Where no highway existed at the place where the work was performed, the town received no benefit from the expenditures mentioned, and was estopped from demanding a return of the money from the treasurer, who, with knowledge of all the facts, and an active participant in the unlawful transactions, paid the same out upon the unauthorized orders. (p. 466.)

PUBLIC OFFICERS—Delegation of Power.—A public officer charged with the performance of official duties, cannot delegate his authority to a person not authorized by law to act, nor can he bind the public by any such authorization, or by any attempt at ratification. (By the editor.) (p. 467.)

(Syllabi by the court except when stated to be by the editor.)

The action was by the town (plaintiff) to recover \$26,800 claimed to have been fraudulently paid by the defendant to its treasurer. The answer averred that he had paid out such moneys as were duly authorized to be paid by the town and only on orders duly drawn and signed by the proper

the town, and that all other moneys received had to defendant's successor in office. The court directed for \$9,161.95 in favor of the plaintiff. Appellate order denying motion for new trial. The other dissenters stated in the opinion.

Conham and Alexander Marshall, for the appellant.
& Pickering and Baldwin, Baldwin & Dancer, for defendant.

WYN, J. Action to recover money alleged to have been fraudulently and unlawfully paid out by the defendant, against plaintiff town. A verdict was directed for plaintiff town in the court below, and defendant appealed from an order for new trial.

The statement of some of the controlling facts will give an understanding of the nature of the action, and the foundation for the directed verdict in the court below.

The town of Buyck is composed of several congressional townships in the northern part of St. Louis county, and was organized under the statutes sometime in the fall of 1906. The territory, though quite large, is sparsely settled, and at the time of the organization contained about twenty inhabitants. Officers were chosen, whether in the manner required by law or not is not important, and defendant was made the treasurer, duly qualified as such. A board of supervisors, justices of the peace, and two constables composed the roster of officers.

Prior to the completion of the organization, a proposition for the issuance of \$22,000 of the bonds of the town was presented, submitted to the voters, and adopted. Bids for the bonds were called for, and they were sold to an insurance company at Duluth. The records made by the town show that the bonds were disposed of by the town board to an investment company at par; but Buyck, as town treasurer, previously made an arrangement with the company to give them a bonus of \$2,000 for taking the same. The order representing this amount of money was drawn up by the town clerk and signed by the chairman of the board of trustees of Buyck, who delivered the same to the insurance company at the time he received the amount due on the bonds, which was something less than \$20,000. The manner in which this money was raised was for the construction of a bridge within the town for the convenience of the inhabitants. Upon the receipt of the money, steps were immediately taken looking toward the disbursement of the same, for the purpose for which it was raised. No high-bids, however, ever been laid out in the town, yet the

officers thereof proceeded to construct a road for a distance of five miles, leading from the residence of the defendant and in the direction of the nearest railway point, some three or five miles away. Large expenditures were made in and for this work, and debts incurred in other respects for the town was not legally chargeable; the total aggregated with interest, \$9,161.95.

Upon these facts, more fully detailed in the record referred to later in the opinion, the town brought this action to recover the ⁹⁷ money so paid out, on the ground that the claims were illegal and the payments unlawful.

The complaint alleges that the transactions referred to including the organization of the town, bonding the same for the pretended construction of a road therein, were the result of a scheme and plan inaugurated and controlled through and by the defendant to defraud the town, and to unlawfully appropriate to the use of himself and friends in collusion with him the money of the town. It also alleges, and it appears from the record, that defendant had full and complete knowledge of all the proceedings by or before the board and the purposes for which all orders paid by the town were issued. The trial court, in directing a verdict, has found these allegations to be true.

The record is very voluminous, and only a portion thereof was included in the paper book. We have examined the entire case, and reach the conclusion that the facts stated are conclusively established by the evidence. In fact, they are not seriously challenged by the defendant on this appeal. The record presents for our consideration two principal questions. The plaintiff contends (1) that, because the town received full value for the greater part of the money included within the dictum of the verdict, in the form of a constructed road, and (2) because the money paid out by defendant as treasurer was in obedience to town orders, fair on their face, the town cannot recover.

1. The contention that plaintiff having received full value for the greater part of the money sought to be recovered, and is therefore not entitled to recover, cannot be sustained.

The record is practically conclusive that the town in fact received nothing of value for the money paid out. It expended in the construction of a public road where no road had, legally or otherwise, been laid out. The town officers were trespassers in constructing the road, and they violated their official oaths in appropriating the money to a private purpose. All that remains from their labors and the money so expended is an indifferent corduroy road for a distance of five miles over the lands of private owners leading from the residence of defendant. The town cannot now, without appropriate proceedings under the statute providing for the laying out of highways, ⁹⁸ avail itself of the use of the

ected, or any part of it. The town, therefore, receiving of value for its money.

ment of the same was unlawful, and the rule in defendant does not apply: Gray on Limitations of Powers, sec. 193; Manning v. City of Devils Lake, 7, 112 Am. St. Rep. 652, 99 N. W. 51, 65 L. R. A. 133, 134; Mason v. Town of Elton, 109 Wis. 589, 85 N. W. 425. Arkland, 102 Minn. 213, 120 Am. St. Rep. 621, 113 L. R. A., N. S., 793, is not in point. The only proceeding involved in that case was the failure of the authorities to acquire the right to construct the road across a narrow strip of land across which it extended. In this narrow strip, the city received full benefit of the road constructed, and, besides, the ultra vires character of the contract was attempted to be set up by a third party. The city made no complaint, and did not attempt to establish liability on that ground. Nor is the case of Moore v. Ramsey, 104 Minn. 30, 115 N. W. 750, in point. The material question in that case was the construction of the contract which the county had entered into, and the improvement involved was with reference to a legally existing roughfare.

defendant's second contention, viz., that he was not paying the orders because they were fair on their merits, on the facts presented in the record before us, is not sustained.

number of the orders were not, in fact, fair on their merits. They were not signed by the chairman of the town board, but by defendant's wife during the chairman's absence. The record also shows that many of the orders, to the extent of defendant's claims, were not issued pursuant to the request of defendant, but by the town clerk on the basis of claims by the town board, but by the town clerk on the basis of defendant's request upon unverified statements of account submitted against the town. The records of the town clerk showing the allowance of all claims by the town board. The records, however, are clearly incorrect; for the evidence is that a majority of the supervisors were absent from town at the time the record certifies that some of the claims were allowed. The orders signed by Mrs. Buyck were manifestly unauthorized and wholly illegal. Nor were they legal or binding upon the town by the subsequent action of the chairman in ratifying the act of Mrs. Buyck in signing his name thereto, or by the previous authority given to her to act. However, the chairman of the board expressly authorized her to sign his name, or that he ever ratified the same on his return to town.

It is clear that a public officer, charged with the performance of official duties, cannot delegate his authority to a person not authorized by law to act, nor can he bind the

public by any such authorization, or by any attempt at ratification: *Harrison County v. Ogden*, 133 Iowa, 9, 110 N. W. 32; *Chapman v. Limerick*, 56 Me. 390; *Mechem on Public Officers*, sec. 567; *City of Decatur v. McKean*, 167 Ind. 249, 78 N. E. 982. These orders were not, therefore, fair upon their face. On the contrary, they were in contravention of the law to defendant's knowledge, and no protection to him. The court properly disposed of the question of Mrs. Buyck's authority and the ratification of her acts as one of law.

All other orders were perhaps fair upon their face, but were issued in payment for claims for which the town was neither legally nor equitably liable.

The record discloses, without dispute, that upon receipt of the money from the issuance of the bonds the town officers, under the guidance of defendant, entered upon an elaborate plan for the construction of the road where none had been, legally or otherwise, laid out. They established a camp, supplied with all necessary equipments for working the road, provisioned it with necessary supplies for the comfort of the men employed and their teams, employed themselves to work upon the road, repaired machinery, hired the town clerk to keep their time, paid for shoeing horses, and purchased merchandise of various sorts, including "lice powder," sardines, and soap, all of which was made a charge against the public treasury; and this with the full knowledge and co-operation of defendant, who seemed to have exercised a controlling influence over all the officers of the town. Defendant had full knowledge of the fact that he presented unverified accounts and received orders in payment of the same. He knew, also, that some of the claims had not been properly allowed, because of the absence of a majority of the town supervisors. He knew that the town officers had contracted with themselves to work ¹⁰⁰ upon the road, and he also knew that no public road had been laid, and that all orders here involved were in the main in discharge of debts incurred in these respects. Under such circumstances, it is clear, both on principle and authority, that defendant cannot shield himself on the plea that the orders were fair on their face.

The presentation of unverified accounts to the town, and the allowance thereof, conceding that they were allowed, was a violation of sections 438-441, Revised Laws of 1905. The employment of members of the board of supervisors and the town clerk to work upon the road was a violation of section 688, Revised Laws of 1905. The expenditure of money in the improvement of the road, and the purchase of supplies for the equipment of a laborers' camp, were equally unlawful and without authority. Defendant knew all these facts, and was chargeable with knowledge of the

law (*Ventura County v. Clay*, 114 Cal. 242, 46 Pac. 9), and that all the claims here involved were illegal and not valid obligations of the town. It was his duty, therefore, to refuse their payment: *Bechtel v. Fry*, 217 Pa. 591, 66 Atl. 992; *Russell v. Tate*, 52 Ark. 541, 20 Am. St. Rep. 193, 13 S. W. 130, 7 L. R. A. 180, 11 Cyc. 540, and cases cited. It is the duty of a public officer, charged with the custody and expenditure of the public money, to keep it safely and disburse it in accordance with law. For a failure to do so he is liable to the municipality he represents: 23 Am. & Eng. Ency. of Law, 2d ed., 372; *City of Chaska v. Hedman*, 53 Minn. 525, 55 N. W. 737. It is no answer for him to say that, while he knew the facts, he did not know the law. To sustain a plea of that sort would open the door of public plunder.

We are not to be understood as holding that a public treasurer, who disburses public money on warrants, or orders, fair upon their face, in good faith, and without knowledge of the facts showing the illegality of the claims upon which the order or warrant purports to have been issued, may be made liable for a return of the money upon a showing that the claim was not in fact a legal charge against the municipality he represents. In such a case he would undoubtedly be protected: *Sweet v. Commissioners of Carver County*, 16 Minn. (96) (106). Such is not the case at bar. Defendant knew the facts and was instrumental in creating the illegal claims: *Webster v. Douglas County*, 102 Wis. 181, 72 Am. St. Rep. 870, 77 N. W. 885, 78 N. W. 451; *County of Los Angeles v. Lankershim*, 100 Cal. 525, 35 Pac. 153, 556.

Nor is the question of his liability in any way controlled by the fact that a town board, in allowing claims, acts judicially. In whatever capacity they may act, defendant's knowledge of the facts and his participation therein expose him to liability. That defendant is liable for the misapplied money is settled by the decisions of this and other courts: *Stone v. Bevans*, 88 Minn. 127, 97 Am. St. Rep. 506, 92 N. W. 520; *Bailey v. Strachan*, 77 Minn. 526, 80 N. W. 694; *Board of Commrs. v. Heaston*, 144 Ind. 583, 55 Am. St. Rep. 192, 41 N. E. 457, 43 N. E. 651; *Town of Martinsburg v. Butler*, 112 Minn. 1, 127 N. W. 420.

Order affirmed.

What will Exonerate Treasurers and Other Public Officers from liability for public moneys once in their custody, is the subject of a note to State v. Harper, 67 Am. Dec. 365.

The Duties of a City Treasurer are limited to receiving the city's moneys and paying them out on warrants, and unless specially authorized, an obligation signed, or overdraft made, by him as city treasurer does not commit the city: *First Nat. Bank v. Newcastle*, 224 Pa. 285, 132 Am. St. Rep. 779.

A City may Recover Moneys Wrongfully Drawn and used by its treasurer: City of Newburyport v. Spear, 204 Mass. 146, 134 Am. St. 652; Webster v. Douglas County, 102 Wis. 181, 72 Am. St. Rep. and money paid out in direct violation of law may be recovered by the official himself or the recipients thereof: Webster v. Douglas County, 102 Wis. 181, 72 Am. St. Rep. 870, and see cases cited in cross-reference note thereto. The fact that a public officer, who has been directed to make repairs on certain roads, in paying the cost thereof uses money appropriated to construct a bridge, does not entitle the county to recover the same from him, if it is part of the "road and bridge fund" of the county: Flowers v. Logan County, Ky. 59, 137 Am. St. Rep. 347.

Where the Fiscal Court of a County and the Taxpayers have for many years allowed public money to be expended in an irregular manner, the county is estopped to recover the money from the officer making the expenditure, if he has made it in good faith for an authorized purpose and the county has received the benefit: Flowers v. Logan County, 138 Ky. 59, 137 Am. St. Rep. 347.

The Effect of the Allowance or Rejection of Claims Against a Municipal Corporation is the subject of a note to Commissioners v. Heald, 55 Am. St. Rep. 203.

Estoppel to Contest Illegal Claims or Expenditures is the subject of an extended note to Flowers v. Logan County, 137 Am. St. Rep.

PENAS v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

[112 Minn. 203, 127 N. W. 926.]

LIABILITY OF MASTER to Third Persons for Torts of Servant.—In its early history, the law as to the liability of the master to third persons for the tort of his servant passed from holding the master absolutely liable to holding him liable in case of particular command only. Later the liability was enlarged, and determined by general authority, express or implied, and was subsequently extended so as to result in the rule that the master is responsible for the tort of his servant, done in the scope of his authority with the view to the furtherance of the master's business, and not for a purpose personal to himself, whether committed negligently or willfully and in excess of his authority or contrary to his express instructions. English courts now recognize a still larger responsibility in cases where the wrong complained of was not within the scope of the servant's authority, but was done in the course of employment. American cases have correspondingly extended the master's liability and have considered it, not only from the master's point of view, but also from that of the person injured, and have placed emphasis, not so much on authority, real or apparent, as upon the violation by the servant of the duty owed by the master to the person complaining. (pp. 472-475.)

LIABILITY OF MASTER to Third Persons for Torts of Servant.—Liability may attach to the master under one or more of the different classes of circumstances, namely, first, by virtue of personal commission, singular or joint, or by consent before or after the wrong, and, second, by virtue of relationship subsisting between the master and the person injured, or because of creation, ownership, custody, or

instrumentalities intrinsically or potentially dangerous, or master's conduct, his implements and premises and facilitating business, or the course of his business generally, or of the party complaining, have a natural tendency to create or determine the extent of, damage involved, or by estoppel, often divorced from the resulting standard, concur in liability on the master. (p. 476.)

LIABILITY OF MASTER to Third Persons for Torts of Servant. Master's responsibility in the first class of cases rests on participation through participation or authority, including ratification. In the second class of cases it is largely independent of fault, and rests essentially on reasons of public policy, the reasons of which are here referred to. (p. 476.)

LIABILITY OF MASTER to Third Persons for Torts of Servant. Equivocation and uncertainty of the terminology of the law is necessarily a prolific source of inconsistency in decision. The word authority is used in the sense of (1) real or actual authority, express or implied; (2) fictitious or imputed authority, of which the latter is really one variety. Scope of authority and its application, and their congeners, are often used indiscriminately interchangeably, and sometimes as representing, respectively, the more restricted and the more enlarged and usually the more criterion of liability of the master. (p. 486.)

LIABILITY OF MASTER to Third Persons for Torts of Servant. Master's liability is conditioned on proof of damage caused by the wrong committed by one who at the time is a servant of the master and under such circumstances that liability is attached to the master under the criterion prevailing in the jurisdiction and to the circumstances involved. (p. 487.)

LIABILITY OF MASTER to Third Persons for Torts of Servant. Liability may attach under the test of authority, the test of benefit, or the test of duty violated. No one rule of liability is sole or invariable standard. Different specific torts, or torts committed under different circumstances, may involve application of different principles. (p. 487.)

LIABILITY OF MASTER to Third Persons for Torts of Servant. Plaintiff's minor, who was really, but not apparently, a trespasser, is held to have been thrown from a moving train by defendant and injured. It is held that defendant's liability was established, under proper instructions from the court. *Barrett v. Chicago & N. W. Ry. Co.*, 106 Minn. 51, followed and affirmed. (p. 488, 489.)

(Syllabi by the court.)

Plaintiff is to recover fifty thousand dollars damages for injuries sustained when forcibly ejected from a moving train. The complaint alleged the plaintiff, after boarding the train as a passenger, was pushed or thrown between two cars by a brakeman in attempting to get off the train, whereby he received the injuries complained of. The answer was a general denial. The jury returned a verdict for the defendant. From an order granting a motion for a new trial the plaintiff appealed.

See *See* and *Thos. C. Daggett*, for the appellant.

See *See* and *Nelson J. Wilcox*, for the respondents.

²⁰⁵ JAGGARD, J. For present purposes it will be assumed that plaintiff and appellant's minor was, though not apparently, a trespasser on defendant's passenger train. Plaintiff's contention was that a brake struck or pushed him from one of its cars while in motion, so that he fell to the ground in such a way as to have his right arm and part of his left hand severed. The jury found for defendants. This appeal was taken on the order of the trial court denying plaintiff's motion for a new trial.

This case involves a constantly recurring confusion of the law as to when a master is liable to third persons for the tort of his servant. That confusion is perhaps greater than in any other corresponding branch of our jurisprudence. The multiplication of authorities has not tended to clarify, but to obscure, the subject. Usually a decision on the subject consists of an imperfect collation of the more or less ²⁰⁶ nearly related cases, without consideration of opposed opinions, and without inquiry into the status of the rule in history or in reason. One which contains a bird's-eye view of the principles involved is a rarity. It has, indeed, become practically impossible to view all the decisions on the subject generally, and difficult even to refer to the opposed authorities on a particular point in issue.

The rules themselves originated from the law of master and servant and the law of principal and agent indiscriminately, at a time when torts as a general subject were practically unknown. In consequence their development has been largely, but not entirely, independent of many other necessarily related subjects. That evolution, however, has been in many respects radical. It is often ignored and more often confused. Overruled cases and cases overruling them are constantly cited by eminent judges and writers as authorities and reason for the overruled proposition itself, and almost as often for an inconsistent principle which has been repudiated times without number. In almost every state of the Union three or four stages of evolution will be found irreconcilably confounded. Current judicial language is a tessellation of the terminology of all of those stages.

It is impossible within the necessary limits of this opinion to state all pertinent considerations, or to discuss or refer to any considerable portion of the authorities. On various times practically all the relevant decisions and discussions have been examined. It is feasible here to attempt to state only a small part of the results of that examination applicable to the facts here in issue.

confusion has arisen primarily from failure to apprehend the historical development of the subject. It is elementary that the law as to when the master is liable to third parties for the tort of his servant has passed through many stages of development. These may conveniently be thus

The earliest theory recognized the absolute liability of the master. This survives in few cases only, as where the master is held to have insured safety.

It then came to be recognized that the master was liable only in cases where he had given a particular command to his servant to commit the wrong complained of. This doctrine is treated as beginning about the time of Edward I. (1272-1307).

During Lord Holt's time (about 1700) the rule was so far as to impose liability on the master for his servant's conduct in pursuance of general authority, expressly or implied. Blackstone recognized this as the criterion of the master's liability, but subsequent teaching, correct at the time, but inconsistent with the subsequent trend of decisions, has been followed, and the rule is constantly to-day regarded as the law by both common law and courts.

During Lord Kenyon's time (1800 et circa), the master's liability was greatly enlarged, so as to give to implied authority a wide meaning, including cases within the scope of the master's "apparent scope" of authority, in order to embrace cases of authority, express or implied, and also cases of negligent and excessive execution of authority. The master was held responsible, even if he had specifically forbidden the servant's conduct and the servant had acted fraudulently and maliciously. The essential criterion became whether the conduct was in furtherance of his employment and for the benefit of the master.

The superiority of American scholarship on this subject is demonstrated by a comparison of Mr. Wigmore's article in 7 *Harvard Law Review*, 383 et seq., with the English review of this history in Macdonell on *Master and Servant*, 263.)

The transition in thought between the third and fourth stages of development is well illustrated by contrasting the leading cases of *McManus v. Cricket*, [1800] 1 *Hurl. & C.* 526, and *Limpus v. London*, [1862] 1 *Hurl. & C.* 526. The latter has been subject to much criticism. It has been treated as a universal or invariable rule by practically all the American courts. The English judges, absorbed in contemplation of the law of master and servant and not of the master and agent, appear to have been oblivious to the distinction between the master and the person injured, negligent or not, and to other considerations which in

other, but similar, cases, are judicially recognized as controlling ²⁰⁸ in analogous situations. In particular they have overlooked the increasing stress the progress in their own law has placed upon responsibility for the violation of duties recognized by law.

Thus there are duties to third persons so far nondelegable as to render the employer liable in damages for their breach, although the immediate cause of the harm complained of is an independent contractor, as in nuisance cases (and see Williams, J., in *Pickard v. Smith*, 10 Com. B., N. S., 470, 480; *Penny v. Wimbledon*, [1899] L. R. 2 Q. B. 72; *Winslow v. Commercial B. Co.*, 147 Iowa, 238, 124 N. W. 321, 28 L. R. A., N. S., 563), or a stranger (*Illedge v. Goodwin*, 5 Car. & P. 190 et sim.) Under analogous facts, not distinguishable on principle, the master has been exonerated from responsibility for the tort of his servant. On the same principle, a total stranger to a contract may recover damages in tort from the manufacturer or contractor who has been guilty of negligence in connection with the delivery of potentially dangerous instrumentalities to his servant: *Parry v. Smith*, 4 C. P. D. 325, 327. And see later cases collected and discussed in *O'Brien v. American Bridge Co.*, 110 Minn. 364, 136 Am. St. Rep. 503, 125 N. W. 1012. The basis of the liability is a breach of duty: Clerk and Lindsell on Torts (Can. ed.), at page 465. So, also, a master owes his servant duties which are nondelegable on proof of the breach of which by another servant the master is liable, irrespective of the motive of the servant.

Apart from its inconsistency with these and other lines of authorities, the English criterion fails in reason because it primarily rests on the state of mind of the servant. This is often in fact a remote, accidental, and collateral circumstance: 1 Thompson on Negligence, 2d ed., 553, 554. The test is artificial and metaphysical. The saving grace of a sense of humor is obviously wanting. See, e. g., Beven on Negligence, preface, and Macdonell on Master and Servant, 242.

It is usual, but not accurate, to regard the progress of the English law as having stopped at this point. Exactly what is the present English criterion is not clear, but (Mr. Beven to the contrary) it inclines to follow the reasoning of American courts and to extend further protection to third persons. The difficulties in the situation have led the English courts to yield to "the modern tendency to extend the master's responsibility to acts naturally flowing from the employment thereof not within its scope": *Rudiman v. Smith*, ²⁰⁹ [1889], 60 L. T. R., N. S., 708 (where the servant negligently allowed water taps in a lavatory to run, plaintiff was damaged by the overflow, and the master

was held liable. Compare *Stevens v. Woodward*, [1881] 6 Q. B. D. 318, where under similar circumstances the master was held not liable. The servant there was forbidden to use the lavatory. However, "the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability": *Willes, J.*, in *Limpus v. London*, 1 Hurl. & C. 526, 529. In *Dyer v. Munday*, [1895] 1 Q. B. 742, the master was held liable for the unauthorized wrong of his servant in executing a warrant. In *Richards v. West Middlesex*, [1885] 15 Q. B. 660, under similar circumstances, the master was exonerated. And see *Engelhart v. Farrant*, [1897] 1 Q. B. 240, and *McDowall v. Great Western*, [1903] 2 K. B. 331. In *Citizens v. Brown*, [1904] App. Cas. 423, the court said: "He [the servant] had no actual authority, express or implied, to write labels, nor to do anything legally wrong; but it is not necessary that he should have had any such authority in order to render the company liable for his acts. The law upon this subject cannot be better expressed than it was by the acting chief justice in this case. He said: 'Although the particular act which gives the cause of action may not be authorized, still, if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant'": Compare *Palmeri v. Manhattan*, 133 N. Y. 261, 28 Am. St. Rep. 632, 30 N. E. 1001, 16 L. R. A. 136.

In view of these later decisions the familiar controversy between Lord Erskine, who recognized the larger liability of the master (see *Sleath v. Wilson*, 9 Car. & P. 607, approved in *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502), and Lord Cockburn, who restricted it (see *Storey v. Ashton*, L. R. 4 Q. B. 476, but compare *Venables v. Smith*, 2 Q. B. D. 279, at page 283), has a significance which is principally historical. Lord Erskine's ideas appear to have finally prevailed.

5. In America, however, the subject has undergone a radical change; and the master's responsibility has been distinctly increased. Mr. Beven has pointed out, in connection with *Craker v. Chicago N. W. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504: "Though of the same parentage as ²¹⁰ ours, American law has in late years been developing along divergent lines, and accepts principles widely applicable that are to us not only novel, but fundamentally unsound." Conspicuously the liability of masters to third persons for the torts of their servant has been materially extended: Beven on Negligence, preface, vii. Especially the earlier English cases, reasoned from the point of view of the master only. American judges have regarded the controversy both from the point of view of the master and of the person injured.

They have placed emphasis, not so much upon the authority of the master as upon the duty imposed upon him to protect the person injured, which has been violated by the servant. The term "scope of authority," and especially the "course of employment," and their congeners, have been given a much narrower connotation and wider denotation than in most of the English cases at least. In many groups of cases the master is held liable, although the act be not approved of or clearly forbidden by the master (*Grier v. Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 1 L. ed. 502; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Rep. 175, 33 L. ed. 440), although the motive of the servant was malicious, capricious, and not at all for the master's benefit or purpose, and even where the servant did wrong that he might embezzle for himself or merely injure the master's business. The English criterion is the formal result of a priori reasoning; the American is the natural product of a posteriori reasoning.

The confusion has been in part due to the failure to distinguish between the different ways in which liability for tort may attach. The person sought to be charged in an action *in delicto* may be held responsible under one or more of the different classes of circumstances: (1) By virtue of a personal commission, single or joint, or by consent before or after the wrong; i. e., by command or ratification. (2) By virtue of relationship, or because of the creation, ownership, custody, or control of instrumentalities intrinsically or potentially dangerous, or otherwise capable of doing harm because of conduct operating as estoppel. In the nature of things the elements ²¹¹ of the second class often do appear isolated. They usually run into each other, and occur blended in combinations in which they are more or less distinctly separable. The vital distinction is between the first and second class of cases: See *Amidon, J. v. Helms v. Northern Pac. Ry. Co. (C. C.)*, 120 Fed. 715. *Blackburn, J., in Mersey Docks v. Gibbs*, 11 H. of L. 715. And see *Macdonell on Master and Servant*, c. 24.

In the first class of cases, liability attaches to the master for a personal act, as where the master participates in the wrong of the servant, or is guilty of initial wrong, as in selecting or retaining an improper servant, or an insufficient number of servants, or in failing to establish rules for their government, and the like. It may also be that the master is held responsible because of his command or consent, given before or after the servant's tort, as where the master expressly or impliedly authorized or ratified the tort. In such cases the wrong may be fairly said to be that of the master himself. In these cases he is usually culpable. His liability is founded on the doctrine of identification.

servant is the alter ego of the master. *Qui facit per alium facit per se.*

In the second class of cases, the tort is in no sense the master's personal wrong. He is not exonerated by proof of personal culpability. He is merely held responsible in damages for reasons the law holds sufficient. His liability is "imposed" or "imputed." His authority to the servant to do the act complained of is in strict logic as wholly irrelevant as the fact that he may have expressly forbidden the servant so to act. His authority does not exist in fact. If the language of authority be used, the authority is purely fictitious: See Macdonell on Master and Servant, 247. It exists by construction, and this in cases wherein it is attributed, although the act complained of was not for the benefit of the master, but to his affirmative disadvantage. It is "imputed" or "quasi" (compare Real and Quasi Contracts, 9 Cyc. 242, 243), as distinguished from "actual," authority.

(a) This is obvious in the familiar cases in which liability attaches by virtue of relationship, existing between the person complaining and the person sought to be charged. A "principal who ²¹² contracts to do a particular thing is liable for agent's torts which prevent the performance of the contract": Wharton on Agency, sec. 487.

The relationship may be that of carrier and passenger. The carrier is liable for breach of his duty imposed by common law "of protecting each passenger from avoidable discomfort, from insults, indignities, and personal violence": *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 124 Am. St. Rep. 90, 43 South. 210, 9 L. R. A., N. S., 929; *Birmingham v. Baird*, 130 Ala. 334, 89 Am. St. Rep. 43, 30 South. 456, 54 L. R. A. 752; *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504. Possible advantage to the master is entirely irrelevant. A street-car conductor throws a dead hen at the motorman of another car, and strikes plaintiff, a passenger therein. The car company is liable: *Hayne v. Union St. R. Co.*, 189 Mass. 551, 109 Am. St. Rep. 655, 76 N. E. 219, 3 L. R. A., N. S., 605. And see *Savannah E. Co. v. Wheeler*, 128 Ga. 550, 58 S. E. 38, 10 L. R. A., N. S., 1177, 66 Cent. L. J. 23, note; and compare with *McCarthy v. Timmins*, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038, and *Hayes v. Wilkins*, 194 Mass. 223, 120 Am. St. Rep. 549, 80 N. E. 449, 9 L. R. A., N. S., 1033.

The relationship may be that of innkeeper and guest. The best discussion as to whether the innkeeper is liable for tort of servant committed for his own purposes will be found in the majority and dissenting opinions in *Clancy v. Barker*, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653. And see *Clancy v. Barker*, 71 Neb. 83, 115 Am. St. Rep. 559,

98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 8 Ann. C. 682.

The relationship may be vendor and vendee. In *Strahan Bros. C. Co. v. Coit*, 55 Ohio St. 398, 45 N. E. 634, L. R. A., N. S., 506, the master, the vendor, was held liable to his vendee for the act of his servant, done with intent to injure the master's business, in adulterating milk contrary to statute.

The relationship may be that subsisting between the proprietor of a place of amusement and a patron who has purchased admission: *Drew v. Peer*, 93 Pa. 234; *Dickson v. Waldron*, 135 Ind. 507, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. L. R. A., N. S., 483, 488; compare *Williams v. Mineral Co. P. Assn.*, 128 Iowa, 32, 111 Am. St. Rep. 184, 102 N. W. 783, 1 L. R. A., N. S., 427, 5 Ann. Cas. 924.

The relationship may arise out of contract generally. A watchman hired by defendant, who has agreed to guard plaintiff's house, ²¹³ burglarizes it; the defendant cannot escape liability on the "ground . . . that he never authorized that other person to do the particular act complained of." *Williams v. Brooklyn, D. T. Co.*, 12 Misc. Rep. 565, 33 N. Y. Supp. 849. And see *Jones v. Morgan*, 90 N. Y. 4, 43 Am. St. Rep. 131. (Compare *Foster v. Essex Bank*, 17 Mass. 49, 9 Am. Dec. 168, to which, without any appearance of conscious humor, defendant has referred us. That case was decided on the theory that no circumstances were shown from which could be inferred authority of the master to the servant to steal bags of gold delivered to defendant bank as bailee. Therefore the bank could not be held responsible for its servant's theft.)

The relationship need not be contractual; it may be merely conventional. The servant, for his own amusement or other personal purpose, assaults one whom the master has invited to use his premises as a store, station, or saloon; the master is liable, irrespective of the servant's authority or motive, to the master's benefit. Most of the many cases in this group will be found collated in *Cressy v. Republic Creosoting Co.*, 108 Minn. 349, 122 N. W. 484. And see notes to *McDermott v. Sallaway*, 198 Mass. 517, 85 N. E. 422, 21 L. R. A., N. S., 456. So a railroad company may be liable for failure, or refusal, to give prescribed warning to pedestrians at a crossing, or for not protecting persons near its works, as those loading cars; the owner of adjacent premises may be liable to persons on a highway for the misconduct of his servant; et sim. There are many other classes of cases similar on principle.

(b) The same situation is presented when liability attaches because the master has put in the servant's power an ability to do damage by means of instrumentalities dangerous intrinsically or potentially: See *O'Brien v. American Bridge Co.*

110 Minn. 364, 136 Am. St. Rep. 503, 125 N. W. 1012. This is a natural, though somewhat remote, extension of the familiar principle given extreme expression in *Rylands v. Fletcher*, L. R. 3 H. L. 330, and in some cases of nuisance modified so as to meet the facts of each case. Servants, contrary to orders, take a dog out of an inclosure and into the presence of the person whom it injures. The employer cannot escape liability because the wrong was beyond the scope of the servant's authority: *Fye v. Chapin*, ²¹⁴ 121 Mich. 675, 80 N. W. 797. An employee of defendant blows a whistle (*Texas & P. R. Co. v. Scoville*, 62 Fed. 730, 10 C. C. A. 479, 27 L. R. A. 179; *Alsever v. Minneapolis etc. Ry. Co.*, 115 Iowa, 338, 88 N. W. 841, 56 L. R. A. 748; but see *Ballard's Admx. v. Louisville & N. R. Co.*, 128 Ky. 826, 110 S. W. 296, 16 L. R. A., N. S., 1052), or explodes a torpedo (*Pittsburg etc. Ry. Co. v. Shields*, 47 Ohio St. 387, 21 Am. St. Rep. 840, 24 N. E. 658, 8 L. R. A. 464, which contains an especially valuable discussion; but compare *Sullivan v. Louisville & N. R. Co.*, 115 Ky. 447, 103 Am. St. Rep. 330, 74 S. W. 171) for his own amusement, and a horse runs away. Plaintiff, injured thereby, it is quite generally recognized, can recover from the master.

(c) The principle is the same in many cases where the work of the servant is not naturally dangerous to third persons. The liability is recognized in the master largely because the master has put it in the power of the servant to inflict harm by investing him with means, or by putting him in positions innocent enough in themselves. In cases of false imprisonment or malicious prosecution, for example, an officer of the law is in no wise, or but little, assisted in making an arrest by the fact that he may be in defendant's employ. The master's responsibility, if any, must depend largely on his authority, express or implied, actually conferred on his servant. The more restricted rule of liability usually controls cases of this kind. This is often true, also, in cases of assault and battery. The master's liability naturally involves the question of his authority to his servant, except where the circumstances impose a special duty of protection or hospitality: *Supra*; and see Mr. Shumaker's article in 5 *Current Law*, 275. For example: A train or car man who assaults a person on premises in which his employer has no property or interest ordinarily commits an independent tort. The fact that he is a servant has no natural tendency to contribute to or to aggravate the wrong, and is naturally wholly disconnected from it. Yet a street-car conductor, subject to a rule to prevent boys from catching on cars, who strikes a boy running by the side of the car, renders a car company liable: *Hewson v. Interurban St. R. Co.*, 95 App. Div. 112, 88 N. Y.

Supp. 816 (the collation of trespasser cases on pages 114, 1 of 95 App. Div., and page 818 N. Y. Supp., is valuable).

When, for example, the railroad trainman throws a trespasser ²¹⁵ from a moving train the situation is substantially different. The facts of the service on the train and of trespasser's place on the moving cars are necessarily conditions precedent to the commission of the wrong, and, in connection with the physical environment and the speed of train, may determine the fact and extent of damage. If trespasser is attempting to get on a train, he may be prevented by force without liability to the master; but his situation once on the moving car, has a direct effect on the master's responsibility for the force exercised in his removal: *Kelly v. Central Pac. R. Co.*, 37 Cal. 400, 99 Am. Dec. 282. And the assault be committed before the trespasser has left the car, and is completed by a brakeman who follows the plaintiff off the car, the defendant may be liable: *Girvin v. New York etc. R. R. Co.*, 166 N. Y. 289, 59 N. E. 921. It is, however, too obvious to justify discussion that, e. g., an assault by a trainman on a trespasser when in a train at rest in a railroad yard and when in a train moving rapidly over a high bridge involves radically different applications of elementary rules of law. The master is under no affirmative duty to take care of a trespasser, but is subject to the familiar rule applied to trespassers generally, to abstain from willful or wanton harm: *Kansas City etc. R. Co. v. Kelly*, 36 Kan. 659, 59 Am. Rep. 596, 14 Pac. 172; *Marion v. Chicago etc. R. Co.*, 59 Iowa, 428, 44 Am. Rep. 687, 13 N. W. 415; *Illinois Central R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Illinois Central R. Co. v. King*, 179 Ill. 91, 70 Am. St. Rep. 93, 53 N. E. 547; *Holler v. Ross*, 68 N. J. L. 324, 96 Am. St. Rep. 546, 53 N. J. 472, 59 L. R. A. 943; *Johnson v. Great Northern R. Co.*, 190 Wash. 98, 94 Pac. 895; *De Vane v. Atlanta etc. R. Co.*, 4 Ga. App. 136, 60 S. E. 1079; *Gates v. Quincy etc. Ry. Co.*, 125 Ill. App. 334, 102 S. W. 50; *Magar v. Hammond*, 183 N. Y. 376, 76 N. E. 474, 3 L. R. A., N. S., 1038; *Illinois Central R. Co. v. Brown* (Miss.), 39 South. 531 (brakeman). Compare *Ellington v. Great Northern Ry. Co.*, 96 Minn. 176, 104 N. W. 827.

That the servant's motive in violating that duty was malicious is immaterial: *Chicago etc. R. Co. v. Kerr*, 74 Neb. 104, 104 N. W. 49 (brakeman); *Dealy v. Coble* (1906), 112 App. Div. 296, 98 N. Y. Supp. 452. (The transition in thought from the original rule following *McManus v. Crickett*, 1 E. 106, is apparent with the contrast of this last case ²¹⁶ with *Wright v. Wilcox* (1838), 19 Wend. (N. Y.) 343, 32 N. Y. Dec. 507, still sometimes cited as authority.) The motive of the servant generally, whether to act for the master's benefit

or not, is not vital: *Kansas City etc. R. Co. v. Kelly*, 36 Kan. 655, 659, 59 Am. Rep. 596, 14 Pac. 172.

While the language of authority is often used to describe the liability of the master under such and similar circumstances, it is strained to meet the conclusion which the court has reached by independent reasoning, as in *Rowell v. Boston & M. R. R.*, 68 N. H. 358, 44 Atl. 488. Compare *Barmore v. Vicksburg etc. R. Co.*, 85 Miss. 426, 38 South. 210, 70 L. R. A. 627, 3 Ann. Cas. 594. Thus the learned editor, in 27 L. R. A. 162, justly says of the familiar and leading case on this subject, *Rounds v. Delaware etc. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597, *Chase L. C. Torts*, 2d ed., 600 (in which a boy trespasser was thrown from a moving train): "The absurdity of those statements (as to express and implied authority), taken together, is such that the learned judge who made them never would have done so had he not wished to apparently conform to precedents by which he did not intend to be bound, as is apparent from the remainder of the opinion." At the end of the opinion the court rests the master's liability expressly upon the violation by the servant of the master's negative duty to abstain from willful violence.

(d) On the same principle, the conduct of the master, the place, implements, facilities for doing business, and the course of the business or dealing may justify third persons in believing that the servant had certain powers conferred upon him and in acting in reliance thereon. Thus is created a duty to them, or, as is often said, the servant is given not real, but imputed, authority, commonly called "apparent authority." A telegraph agent who is also an express agent, forges and sends a message from a merchant to his local correspondent for a purchase of grain. The agent steals the remittance. The telegraph company is liable, not because of the agent's authority or motive to benefit the master, but because a duty to third persons is imposed on the master by law, which the master has put in the power of the agent to violate: *McCord v. Western Union Tel. Co.*, 39 Minn. 181, 12 Am. St. Rep. 636, 39 N. W. 315, 1 L. R. A. 143; *Jasper T. Co. v. Kansas City etc. R. Co.*, 99 Ala. 416, 42 Am. St. Rep. 75, 14 South. 546. On much the same theory a railroad company is often, but not universally, held liable for a fraudulent bill of lading issued by an agent, who ²¹⁷ has appropriated the proceeds: *Bank of Batavia v. New York etc. R. Co.*, 106 N. Y. 195, 60 Am. Rep. 440, 12 N. E. 433; *Planters R. U. Co. v. Merchants' Nat. Bank*, 78 Ga. 574, 3 S. E. 327. Compare, contra, *Friedlander v. Texas & Pac. Ry. Co.*, 130 U. S. 416, 9 Sup. Ct. Rep. 570, 32 L. ed. 991; and see *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 20 Am. St. Rep. 566, 46 N. W. 342, 560, 9 L. R. A. 263.

(e) This is really the principle involved in cases in which the liability of the master is worked out in the language of estoppel. A secretary of a corporation, intrusted with the seal of a corporation and authorized to sign certificates of stock, issues unauthorized certificates and appropriates the proceeds. The agent, having no authority, could not be held liable for his employer, but the corporation is held estopped from denying the validity of the fraudulent issue: See *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Fifth Avenue Bank v. Forty-second St. etc. R. Co.*, 137 N. Y. 231, 33 A. 2d 111, 19 L. R. A. 331. Great English judges have deplored their inability to enforce the just American rule. Their own authorities deny it: See *British & Mercantile Navigation Co. v. Magnet*, 18 Q. B. D. 714.

Indefinite confusion is produced by this paradox; criteria of liability formulated by the courts have generally no logical connection with the reasons for which liability is recognized by the law. All dictates of proper thought would lead to the creation of a test of liability which would be a natural result, if not the formulated reason for, liability. In point of fact, the real basis of the master's liability and its accepted criterion are often absolutely divorced. The same estrangement appears in the terminology employed. The standard is adopted, not in pursuance of the logical basis of liability but to accord with surviving tradition. In the effort to achieve consistency by the establishment of one test the courts have produced confusion worse confounded. A necessarily abbreviated review of some of the various reasons for imposing the apparent hardship of liability on a personally innocent master it is hoped will tend to clarify the situation.

Negatively, the doctrine of identification, as has been pointed out, ²¹⁸ suffices only when the tort complained of is the master's own by commission or consent, including ratification, and when the law has imposed no duty to a third person on the master, but rarely, if ever, in any other case. Responsibility superior is not a reason, but only a dogmatic restatement of the rule. Neither the lawfulness or unlawfulness, nor the maliciousness, mischief, or the caprice of the servant's conduct, is an invariable reason for the master's exoneration from liability.

Affirmatively there are numerous reasons of public policy "which have had their origin in history, not in science." Sometimes one is exclusive and sufficient; sometimes many concur to produce the rule. Often the result is clear and explicit; often obscure and inferential.

1. The fundamental underlying reason applicable in such cases from general considerations of policy and security (see *Moody, J., in Standard Oil Co. v. Anderson*, 212 U. S. 221, 29 Sup. Ct. Rep. 252, 53 L. ed. 480) is that

nounced in *Farwell v. Boston & W. R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339: "This rule is obviously founded on the great principle of social duty that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it": See *Anderson v. Pittsburg Coal Co.*, 108 Minn. 455, 122 N. W. 794, 26 L. R. A., N. S., 624.

2. The expediency of having a remedy against some one capable of paying damages (see *Willes, J.*, in *Limpus v. London*, 1 Hurl. & C. 526; *McClung v. Dearborne*, 134 Pa. 396, 19 Am. St. Rep. 708, 19 Atl. 698, 8 L. R. A. 204), and of making a "master careful in the point of whom he employs" (*Bramwell, L. J.*, in *Swainson v. Northeastern*, 3 Ex. Div. 341, at page 348), has been regarded as a general consideration. It is obviously not an adequate universal reason: *Guy v. Donald*, 203 U. S. 399, 27 Sup. Ct. Rep. 63, 51 L. ed. 245.

3. The master is sometimes regarded as the "*causa causans*" of the mischief: *Grier, J.*, in *Philadelphia & Reading R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502. And see *Duncan v. Findlater*, 6 Clark & F. 894; *Quarman v. Burnett*, 6 Mees. & W. 499; *Mersey Docks* ²¹⁹ *v. Gibbs*, 11 H. of L. 716, 717. Negatively the master is not answerable for a tort of one whom he cannot select, control, or discharge, as a pilot whom he is compelled to accept: *Guy v. Donald*, 203 U. S. 399, 27 Sup. Ct. Rep. 63, 51 L. ed. 245. So there has often been applied the rule of public policy, not invariably of law, that, when one of two innocent persons must suffer by acts of a third, he who has enabled such third person to occasion the loss must bear it. Essentially the basis of the later English doctrine is this: "The grounds upon which it seems to rest, as explained in cases such as *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, appear to be that the principal is the person who has selected the agent, and must therefore be taken to have had better means of knowing what sort of a person he was than those with whom the agent deals on behalf of his principal, and that, the principal having delegated the performance of a certain class of acts to the agent, it is not unjust that he, being the person who has appointed the agent, and who will have the benefit of his efforts if successful, should bear the risk of his exceeding his authority in matters incidental to the doing of the acts the performance of which has been delegated to him": *Hamlyn v. Houston*, [1903] 1 K. B. 81, 85, 86. And see *Houldsworth v. City*, [1880] 5 App. Cas. 317, at page 326; *Citizens v. Brown*, [1904] App. Cas. 423, at page 428. Compare *Ploof v. Putnam*, 83 Vt. 252, 138 Am. St. Rep. 1085, 75 Atl. 277, 26 L. R. A., N. S., 251.

4. Estoppel may account for liability, because the master has retained the benefit of the servant's wrong, as in cases of fraud and conversion (see Lord Mansfield, in *Harmer v. Trott*, Cowp. 371), and because of consideration of public general policy (e. g., *New York & N. R. Co. v. Schuyler*, N. Y. 30).

5. The motive of the servant for the purpose or benefit of the master is regarded both as reason for and as a criterion of the master's liability. It is clear that the benefit of the master, as that expression is used in England, is often leading and sophistical: See *Macdonell on Master and Servant*, 242. The gist of the rule is that the motive of the servant must have been to have performed his duty to, or further the business or the interests of, the master. It is not at all necessary that the actual result should have been to the master's benefit. The cases on this subject resolve themselves into three classes:

(a) There are cases in which no recognized legal obligation to the party injured has been violated, where the controlling consideration is quite frequently held to be that the servant must have acted with the intention of furthering the master's business: See *New York v. United States*, 212 U. S. 481, 29 Sup. Ct. Rep. 304, 53 L. ed. 613; *Kwiechen v. Holm*, *Hallowell Co.*, 106 Minn. 148, 118 N. W. 668, 19 L. R. A. N. S., 255. But see dissenting opinion. Compare *Curran Olson*, 88 Minn. 307, 97 Am. St. Rep. 517, 92 N. W. 112; *L. R. A.* 733, with *Anderson & Co. v. Diaz*, 77 Ark. 606, 4 Am. St. Rep. 180, 92 S. W. 861, 4 L. R. A., N. S., 649.

(b) Where the law recognizes that a duty is owed to the person injured and that duty has been violated by the servant, the liability of the master follows, irrespective of the motive of the servant or the benefit of the master. An example, is employed to warn persons who go over a crossing near a sharp curve of the approach of a train. He forgets to do so; he falls asleep or gets drunk, and B. is run over. A's employers would, it is conceived, be answerable, even under the English law, for misconduct certainly not intended to benefit them: *Macdonell on Master and Servant*, Compare *Smith v. Southeastern*, [1896] 1 Q. B. 178. (Quoting that if a servant be insane, see *Christian v. Columbus & R. Co.*, 79 Ga. 460, 7 S. E. 216; 90 Ga. 124, 15 S. E. 701; see *Cole v. Nashville Corporation*, 4 Sneed (Tenn.), 111. And compare *Stranahan Bros. C. Co. v. Coit*, 55 Ohio St. 45 N. E. 634, 4 L. R. A., N. S., 506; with *Nelson B. C. Co. v. Lloyd*, 60 Ohio St. 448, 71 Am. St. Rep. 729, 54 N. E. 46 L. R. A. 314. This subject has been previously discussed.

(c) Two motives may coexist in the mind of the wrongdoer, one his own personal motive and the other the benefit of the master and the furtherance of the master's business. M

but not all, cases refuse to subtly distinguish between the two classes of motives, and hold the master liable unless the motive be purely and solely personal to the servant: See *Gracey v. Belfast*, [1901] 2 I. R. 322; *New Ellerslie F. Club v. Stewart*, 123 Ky. 8, 93 S. W. 598, 9 L. R. A., N. S., 475; *Macdonell on Master and Servant*, collecting cases, on page 243. The cases recognizing the liability of the master despite the deviation of the servant from the prescribed journey of his vehicle are familiar illustrations of this principle.

²²¹ 6. The distinctive reasons for the American rule have been previously pointed out. In an increasingly large number of cases, and of classes of cases, the master is held responsible for the act of his servant as an instrumentality (compare *Innes on Torts*), not because the servant was in any wise authorized to do the wrong, or because of his intention to benefit the master's business, but because he has violated the duty which the master owes to third persons: 27 L. R. A. 161, 163. The rule in *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504, is properly to be regarded as of general application, not as confined to carrier cases. That criticism states merely a rule of thumb or of indexing or digesting. In *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922, the court, in approving the doctrines in the *Craker* case, said: "The mere fact that the conductor's duty to the passenger . . . arose out of the passenger's contract with the master does not confine the principle involved to the breaches of duty created by contract." Responsibility for damages resulting from racing sleighs on a public highway was accordingly attributed to the master. So in *Winslow v. Commercial B. Co.*, 147 Iowa, 238, 124 N. W. 320, 28 L. R. A., N. S., 563, it was held that, whenever the law imposes a personal duty upon anyone he cannot escape responsibility therefor, for the manner of its performance, by delegating its performance to another.

The equivocation in the constantly recurring middle terms "authority," "scope of authority," "course of employment," and their congeners, is also a prolific source of error in decision. The reasoning of the law in this connection has been largely formal and nominalistic. It is saturated with the methods of the Schoolmen. Its vices are those of mediaeval logic. The inevitable penalty for failure to clearly define terms has been peculiarly marked. In this connection *Holmes, J.*, in *Guy v. Donald*, 203 U. S. 399, 27 Sup. Ct. Rep. 63, 51 L. ed. 245, has aptly said: "As long as the matter to be considered is debated in artificial terms there is a danger of being led by a technical definition to apply a certain name, . . . then to deduce consequences which have no relation to the grounds on which ²²² the name was applied." In numberless instances, gross miscarriage of justice has resulted.

(a) It has just been pointed out that "authority" is used in three senses: (1) That of real or actual authority, express or naturally implied; (2) that of fictitious or imputed authority, of which (3) apparent authority is really one variety. The ambiguity is plain. We reiterate: It is a palpable error to hold the master liable because of the authority of the servant to do the thing which the master has openly forbidden the servant to do, in good faith, and expressly forbidden the servant to do. It is still more misleading to trace the liability of the master to the authority of the servant, when the master has not expressly forbidden the servant's conduct, but also when the servant has not acted in the furtherance of the master's business, for the protection of the master's property, nor in performance of his assigned duty, but for the servant's own benefit and to the master's damage. Yet, as has been pointed out in many groups of such cases the master has been held responsible. The authority of the master survives, as a "legal easy reason" for the master's liability.

The term "implied authority," as used generally and in the trial court here, is worse than ambiguous. It is constantly treated as including (1) authority which is naturally inferred from actual authority; (2) authority apparent from the course of dealing between the parties, or from an established and known course of business; (3) imputed by law according to recognized principles entirely apart from the actual instructions given. A jury is generally the proper judge in the first class of cases, often of the second, and rarely, if ever, of the third. The authorities have recognized the certainty of consequent errors: Macdonell on Master and Servant, note "f"; 4 L. R. A., N. S., 49.

The subject is further confused by the fact that this distinction between master and servant is intimately related to, and largely but indiscriminately, drawn from that of principal and agent. The rule of master and servant concerns all acts of the representative which are noncontractual, and the rule of principal and agent such as are contractual. Hence, for example, an insurance solicitor, who makes false representation as to the business in hand, has been regarded as acting on behalf of the insurance company in a ministerial, and not a contractual, capacity. Fraud has therefore been held to be chargeable to the insurance company, irrespective of the actual authority, and written restrictions on the agent's authority, to be immaterial. Almost as many authorities have reached the opposite conclusion: See Mr. Vance in 4 Michigan Review, 208-213.

(b) Quite as marked an equivocation and as great an uncertainty occurs in the current use of the middle terms "scope of authority" and "course of employment," and their synonyms and synonyms. "Much of the confusion in the

cisions exists by reason of difficulty in determining what the courts mean by the phrase 'scope of employment.' If the same meaning were attached to this phrase by all of the courts using it in deciding the point under discussion, most of the confusion would vanish, and in many instances it would probably appear that decisions apparently conflicting were in reality harmonious, since it is used to describe acts ranging all the way from one clearly within the line of duty to one entirely outside it, but committed during the continuance of the contract relationship between the master and the party injured, and in direct violation thereof": Note, 4 L. R. A., N. S., 49. In England generally, and in America frequently, they are used indiscriminately. The later English cases, however, seem (for the matter is not certain) to have followed the general American usage and regard the "course of employment" as indicating the widest measure of liability, as distinguished from "scope of authority," which signifies the more restricted rule. Compare later English cases previously cited and Mr. Abbott's celebrated note to *Mallach v. Ridley*, 24 Abb. N. C. 172-184, with Macdonell on Master and Servant, 241, 242.

(c) It is obvious that accurate and certain definition of these terms, "authority," "implied authority," "scope of authority," "course of employment," and the like, is a *sine qua non* to correct reasoning. Such a definition is rarely, if ever, to be found. Identically the same charge is given the jury in different jurisdictions to describe entirely different and inconsistent criteria. Miscarriage of justice is inevitable. The correct definition, it will be found, must resolve ²²⁴ itself into an enlarged formula of the standard of liability applicable to the particular case.

It follows from the previous discussion: (1) The master's liability is conditioned on proof of damage consequent on the wrong committed by one who at the time is a servant of the master and under such circumstances that liability is attached to the master under the criterion prevailing in the jurisdiction, and appropriate to the circumstances involved. (2) Liability may attach under the Blackstone test, the English test of motive and benefit, or the American test of duty violated. (3) No one rule of liability is the sole or invariable standard. Different specific torts, and the same tort committed under different circumstances, may involve the application of different principles. (4) The test of responsibility should be determined primarily by the reason the law assigns, and not by incidental or collateral circumstances, to be consistent with tradition. (5) The terms "implied authority," "scope of authority," "course of employment," and the like when used, should be clearly defined. (6) Generally little significance is to be attached to the fact that a

given conclusion is or is not sustained by a group of cases. Many decisions are negligible, because they consist of anachronisms in history, anomalies in logic, and aberrations from accepted general principles. (7) The fact that liability was attached to the master under a restricted criterion of liability is entirely consistent with holding him, under appropriate circumstances, responsible under an enlarged standard. (8) The tendency of the cases is to increasingly regard the question of the master's responsibility as one of fact, to be determined by the jury.

In this case the first question is whether the defendant is entitled to a directed verdict; if so, plaintiff is not entitled to a new trial. Defendant argues on this appeal that a brakeman upon ²²⁵ a passenger train is presumed to have authority to eject from his train a person who is obviously a trespasser. But . . . the presumption does not obtain where such person is not obviously a trespasser, and therefore the ejection of such a person would be without the scope of his authority." The subtlety, artificiality, and fallacy of this reasoning are apparent. The confusion as to the scope of authority is familiar. It might well be held that actual authority could be implied from the situation, and the liability of the master is independent of authority of that sort. It might exist, although the master is shown to have expressly forbidden the brakeman to determine the question or to expel the person from the train. The criterion for which defendant contends has been abandoned by the law of this and every other jurisdiction, including England and Massachusetts, for more than a century.

The question then arises whether plaintiff is entitled to a new trial. The court charged first that the master was liable within the scope of the brakeman's actual authority, express or implied. He then charged that the master was liable for what the servant did in the course of his employment with a view to the furtherance of the master's business and not for any purpose personal to himself, in which case the actual authority was immaterial. He finally charged that the company was not liable if the act was beyond the scope of his actual agency or authority. It is obvious that this court submitted the Blackstone test, then the later English criterion, and finally reverted to the rule of the great common law. The anachronism is as plain as it is confusing. The criteria are hopelessly inconsistent. Under the first charge, "if . . . authority was expressly withheld or its exercise forbidden, then . . . the defendant company would not be liable." Under the second charge, "the fact that [the brakeman] exceeded his actual authority, or even disobeyed instructions, would not alter the rule" that the defendant would be liable.

This court itself held, in *Brevig v. Chicago, St. P. M. & O. Ry. Co.*, 64 Minn. 168, 66 N. W. 401: "A railway company owes trespassers no contract duty. Neither are trespassers in a position to invoke the doctrine of apparent authority. They can only, ²²⁶ under any circumstances, hold the company liable for acts of its agents or servants done within the scope of their actual authority, either express or implied." But in *Barrett v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 106 Minn. 51, 130 Am. St. Rep. 585, 117 N. W. 1047, 18 L. R. A., N. S., 416, the court said: "A master is responsible for the torts of his servant, done in the course of his employment with a view to the furtherance of his master's business, and not for a purpose personal to himself, whether the same be done negligently or willfully, but within the scope of his agency, or in excess of his authority, or contrary to the express instructions of the master." The same conclusion must be reached if the question of liability be based on the violation by the servant of the duty to abstain from willful harm the defendant owed to plaintiff.

Reversed.

A Master is Liable for the Act of His Servant, Though Willful and Malicious, when it is done in furtherance of the master's business, and within the scope of the servant's employment; but he is not liable for such act done to effect some purpose of the servant alone: *Ploof v. Putman*, 83 Vt. 252, 138 Am. St. Rep. 1085; and this rule applies to railroad companies: *Barrett v. Minneapolis etc. Ry. Co.*, 106 Minn. 51, 130 Am. St. Rep. 585, and see cases cited in the cross-reference note thereto.

The Liability of a Railroad for the Act of Its Brakeman in Expelling a Trespasser from the train is discussed in *Barrett v. Minneapolis etc. Ry. Co.*, 106 Minn. 51, 130 Am. St. Rep. 585; *Pollack v. Pennsylvania R. R. Co.*, 210 Pa. 631, 105 Am. St. Rep. 843; *Bjornquest v. Boston etc. R. R. Co.*, 185 Mass. 130, 102 Am. St. Rep. 332; and *McKeon v. New York etc. R. R. Co.*, 183 Mass. 271, 97 Am. St. Rep. 437. It is within the general authority of a brakeman on a freight train to remove trespassers who get, or attempt to get, thereon, and, if in so doing, he does not exercise care and caution, but acts wantonly and maliciously, and an injury results, the railroad company is liable without evidence showing the brakeman's authority: *Dixon v. Northern Pac. Ry. Co.*, 37 Wash. 310, 107 Am. St. Rep. 810, and see cases cited in the cross-reference note thereto.

The Liability of a Railroad Company for the Act of Its Engineer in Expelling a Trespasser from the locomotive is considered in *Galveston etc. Ry. Co. v. Zantlinger*, 92 Tex. 365, 71 Am. St. Rep. 859, and *Polatty v. Charleston & Western Carolina Ry. Co.*, 67 S. C. 391, 100 Am. St. Rep. 750.

BASTING v. CITY OF MINNEAPOLIS.

[112 Minn. 306, 127 N. W. 1131.]

INJUNCTION—Whether Lies Against Enactment of Ordinance.—An action to restrain and enjoin the enactment of a municipal ordinance cannot be maintained, except where, by the mere enactment, irreparable damage to persons affected will immediately follow, or cause a multiplicity of suits, or violate existing contract rights. (112 Minn. 306, 127 N. W. 1131.)

INJUNCTION—Enactment of Ordinance.—Complaint in an action to restrain the passage of an ordinance by the city of Minneapolis held not to state a cause of action within the rule. (p. 492.)

PLEADING.—A General Demurrer to a Complaint, holding that the allegations thereof may be stated, raises the question whether the facts pleaded entitle the plaintiff to the relief demanded. (p. 493.)

(Syllabi by the court.)

Frank Healy, city attorney, Henry S. Mead and Harry Swenson, for the appellants.

A. T. Ankeny and Norton M. Cross, for the respondents.

307 BROWN, J. The charter of the city of Minneapolis authorizes the city council, among other things, "to regulate and designate where the following kinds of business and amusements may be hereafter located or carried on, to-wit: Foundries, tanneries, dyehouses, boiler-shops, rendering houses, storehouses for oil and powder, glue factories, houses, storehouses for hides, stables, roller rinks and ball grounds." On April 27, 1907, the city council enacted an ordinance prohibiting the establishment of any industry or amusement of the kind or character mentioned in the foregoing quotation from the charter at any place within the city without first obtaining its consent. On February 18, 1910, the council duly passed another ordinance upon the same subject, by which the establishment of certain of such enterprises was prohibited absolutely within the territory described therein.

Immediately after the passage of the ordinance by the council, plaintiffs, owners of a large part of the land situated within the territory prohibited by the ordinance, brought an action against the city, its mayor, and clerk to restrain them from enforcing the ordinance, and to enjoin them from enjoining them from "executing or attempting to put into operation said pretended ordinance, and from signing, approving, publishing or causing to be published the same." At the time the action was commenced an order was granted directing defendants to show cause, at a date named, why a temporary injunction should not issue restraining further proceedings by the mayor and clerk until the determination of the action. Defendants joined in a

eral demurrer to the complaint and appeared on the return day of the order to show cause and opposed the granting of a temporary injunction. The court below made an order overruling the demurrer and granting a temporary injunction, from which defendants appealed.

It is the contention of plaintiffs, and such is the foundation of their asserted right to maintain the action, that the ordinance, unconditionally ³⁰⁸ prohibiting the establishment of any of the industries mentioned within the specified territory, its ultra vires, arbitrary, discriminatory, and unreasonable, and therefore unconstitutional and void, and its enactment may be restrained in equity.

We are confronted at the outset with the question whether such an action may be maintained; in other words, whether the courts may by means of their restraining power interfere with and control the exercise of legislative and executive functions of the municipalities of the state. The charter of the city provides that no ordinance enacted by the city council shall take effect until approved by the mayor or passed over his veto, and not until it has been published by the city clerk in the manner prescribed. The ordinance in question had been passed by the council, but not yet approved by the mayor or published, when the action was commenced, and its purpose was to restrain either an approval by the mayor or the publication by the clerk. The approval and publication were essential elements in the passage of the ordinance and a consummation or completion of the legislative power of enactment. The question, therefore, whether the exercise of this power may be controlled by the courts, is squarely presented; and, as we answer the question in the negative, it becomes unnecessary to consider the objections urged against the ordinance.

There is a decided conflict in the adjudicated cases, both in the state and federal courts, upon the question when and under what circumstances courts of equity have jurisdiction to restrain by injunction at the suit of a private person either the enactment or enforcement of statutes or ordinances of municipal corporations: 22 Cyc. 890, 891; 2 Joyce on Injunctions, 1277, 1289; *City of Rushville v. Rushville N. G. Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. Rep. 441, 52 L. ed. 714, 13 L. R. A., N. S., 932, 14 Ann. Cas. 764. While the decisions are uniform to the effect that courts will, subsequent to their enactment, in proper cases, declare statutes and ordinances unconstitutional, some of the courts join in declaring that it is unimportant whether the legislation be attacked before or after its passage. There is logic and force to this position, yet the general rule, supported ³⁰⁹ by the great weight of authority, limits the jurisdiction

of the court in restraining the passage of ordinances to where by the mere passage irreparable injury or damage immediately follow, cause a multiplicity of suits, or violate previously existing contractual rights: 22 Cyc. 890. In cases not coming within the exceptions, the question of validity of the ordinance must be presented in some proceeding subsequent to its enactment and when attempt made to enforce it.

But, whatever may be the law in other states, the general rule stated has been adopted and followed in this state. It controls the case at bar: *Cobb v. French*, 111 Minn. 429, N. W. 415; *Nelson v. City of Minneapolis*, 112 Minn. 127, N. W. 445, 29 L. R. A., N. S., 260.

Cobb v. French was an action to restrain and enjoin the enforcement of a general statute of the state, and it was held that it could not be maintained, the facts presented not coming within the exception to the rule. The reason for the rule is clearly stated in the opinion in that case, and need not be repeated. The *Nelson* case was brought to test the enforcement of an ordinance authorizing the sale and destruction of milk brought into the city for sale which did not conform to the conditions prescribed by the ordinance, and the facts brought it clearly within the exceptions to the rule. There can be no difference on principle between an action to enjoin the enforcement of a statute or an ordinance, and one to restrain its enactment, unless there is a greater reluctance on the part of the court to entertain the latter action, and we follow and apply, without further discussion, the doctrine of the *Cobb* case, for it cannot be distinguished.

Nor does the case at bar come within the exceptions to the rule. The mere passage of the ordinance in question does not result in immediate irreparable damage or injury to the plaintiffs, involve a multiplicity of suits, nor disturb or violate previously existing contractual relations. The ordinance merely prevents or prohibits the establishment of particular enterprises in a particular locality. If, as contended, the ordinance is a nullity, as violating plaintiffs' constitutional rights, they may, in the orderly course of procedure subsequent to its passage, raise the question and be relieved from its restraint. No established business is interfered with, no property taken and destroyed, as in the *Nelson* case; the complaint proceeding solely on the theory that the ordinance prevents plaintiffs from devoting their property to the particular purpose. This does not bring the case within the exception to the rule.

The case of *Minneapolis St. Ry. Co. v. City of Minneapolis*, 155 Fed. 989, cited and relied upon by plaintiff, is not in point. The ordinance, the enactment of which was s

to be restrained in that case, if enacted, violated an existing contract with the city, and the case came within the rule as followed by the federal courts. The case of *Cooke v. Iverson*, 108 Minn. 388, 122 N. W. 251, was an action to restrain the state auditor from distributing money of the state under an unconstitutional statute, and was commenced after its passage. It is therefore not here in point.

Counsel for plaintiffs contend that defendants' general demurrer, that the complaint does not state facts sufficient to constitute a cause of action, does not raise the question decided; that the objection that the action cannot be maintained goes to the jurisdiction of the court, and, as that ground is not assigned by the demurrer, the question cannot be considered. Counsel are in error. The objection that the complaint does not state facts sufficient to constitute a cause of action goes, not only to the sufficiency of the allegations of the pleading, but also to their sufficiency, taken as a whole, to justify a recovery. The facts in this complaint are well and carefully set forth, and the question whether, conceding their truth, plaintiffs are entitled to the relief demanded, or any relief, is presented by the general demurrer: *Sanborn v. Eads*, 38 Minn. 211, 36 N. W. 338. The question is not strictly one of jurisdiction, but whether the facts pleaded, in any view of the law, present a right to recover.

Order reversed.

Injunctions Against the Enforcement of Void Municipal Ordinances are fully treated of in the extended note to *New Orleans etc. Co. v. City of New Orleans*, 118 Am. St. Rep. 366.

Injunctions Against the Enactment of Void Municipal Ordinances is the subject of a note to *Stevens v. St. Mary's Training School*, 36 Am. St. Rep. 438; and see *Lewis v. Denver City Waterworks Co.*, 19 Colo. 236, 41 Am. St. Rep. 248.

HEIDAH L v. GEISER MANUFACTURING COMPANY.

[112 Minn. 319, 127 N. W. 1050.]

MORTGAGE—Assumption by Grantee—Effect of Satisfaction.

When real estate is conveyed subject to a mortgage, and the grantee assumes payment of the mortgage debt, the relation of principal and surety is established between the parties, the grantee becoming the principal and the mortgagor the surety; and the satisfaction of the mortgage by the mortgagee, with knowledge of such conveyance, releases the mortgagor from the mortgage debt. (pp. 494, 495.)

(Syllabus by the court.)

Benton, Molyneaux & Morley, for the appellant.

Henry T. Ronning, for the respondent.

³²⁰ LEWIS, J. Respondent purchased a threshing machine outfit from appellant, and executed a chattel mortgage to secure the payment of purchase money notes, and also executed a mortgage upon eighty acres of land as security. He then sold and conveyed the real estate by warranty deed to one George Washburn, subject to the mortgage to appellant, and also subject to a prior mortgage of one thousand dollars. Washburn assumed the payment of both mortgages as a consideration of the purchase price, and then conveyed the premises to Ida Ganske, subject to both mortgages, and assumed their payment as a part consideration of the purchase price. The first mortgage was then foreclosed, a few days before the expiration of the time to redeem a representative of appellant company entered into an agreement with Ida Ganske by which the company received two hundred and fifty dollars in cash and satisfied the mortgage. Appellant claiming that the balance of the original notes given on the purchase of the threshing outfit had not been paid, closed the chattel mortgage and bid in the property.

Respondent then commenced this action in replevin to recover the property, or its value. The court found, in addition to the facts above stated, that at the time appellant satisfied the real estate mortgage it had full knowledge of the conveyance by respondent to Washburn, and by Washburn to Ganske, and of the fact that in each deed the grantee assumed and agreed to pay both mortgages. The court also found that the real estate was equal in value to more than the amount of both mortgages. Ganske alone redeemed.

It is contended by appellant that its representative, who delivered the satisfaction in consideration of two hundred and fifty dollars, was a mere collecting agent, and had no authority to deliver it without payment of the full amount of the indebtedness, and, further, that the satisfaction was obtained by fraud and surrendered without consideration. Mr. ³²¹ Kutz testified at the trial that his business was that of collecting and adjusting claims for appellant, and that as the record shows he was acting within his authority in this instance. There is no evidence to sustain the contention that the satisfaction was obtained from him by any fraudulent practices, and whether he accepted the two hundred and fifty dollars because he was doubtful of the value of the real estate, or because he relied on the chattel mortgage, is not material. He was fully informed of the state of the title, viz., that George Washburn and Ganske had assumed payment of the mortgages, and, having caused a satisfaction of the mortgage to be given, appellant is bound by the legal result.

It is the law that where a purchaser of real estate assumes as a part of the consideration of the purchase, an existing mortgage upon the property, then, as to the mortgagee

knowledge of the fact, the purchaser becomes the principal, and the mortgagor a surety. The mortgagor had a right to assume that the real estate would be held for the payment of the debt. He did not consent to the release, and consequently the debt was discharged as to him: 1 Jones on Mortgages, sec. 741; Groesbeck v. Mattison, 43 Minn. 547, 46 N. W. 135; Nelson v. Munch, 28 Minn. 314, 9 N. W. 863. The relation of principal and surety was not changed by the fact that the real estate mortgage executed by respondent contained a covenant against encumbrances, and the case of Sandwich Mfg. Co. v. Zellmer, 48 Minn. 408, 51 N. W. 379, has no application. The facts as found by the court are sustained by the evidence, and respondent was entitled to recover.

Affirmed.

What Amounts to an Assumption of a Mortgage by a Grantee of the property, and his liabilities thereunder are considered in the note to Klapworth v. Dressler, 78 Am. Dec. 73; and when the purchaser of property subject to a mortgage becomes liable for the mortgage debt is the subject of a note to Trotter v. Hughes, 62 Am. Dec. 141.

The Acceptance of a Deed Reciting a Mortgage "which the grantee assumes and agrees to pay" makes a contract binding the grantee to pay the mortgage: Kendrick v. Brooks, 80 Kan. 1, 133 Am. St. Rep. 186.

The Payment of a Debt Secured by a Mortgage on real estate extinguishes the lien without satisfaction in writing or of record: Friend v. Yahr, 126 Wis. 291, 110 Am. St. Rep. 924; although the payment is made by a grantee and an assignment to a third party is taken in place of a satisfaction: Lydon v. Campbell, 204 Mass. 580, 134 Am. St. Rep. 702.

A Mortgagor has the Right to Insist that the mortgagee shall not, by releasing the land which should pay the debt, throw upon him a personal liability therefor: Crisman v. Lauterman, 149 Cal. 647, 117 Am. St. Rep. 167; Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108; and where after conveyance by the mortgagor with covenant against encumbrances, the mortgagee releases a portion of the premises, the mortgagor is released from liability for the mortgage debt: Meigs v. Tunncliffe, 214 Pa. 495, 112 Am. St. Rep. 769.

LONG v. LONG.

[112 Minn. 400, 128 N. W. 464.]

VACATION OF JUDGMENT—Whether Purchaser may Apply for.—One who, after a judgment against a defendant in an action to quiet title, purchases defendant's title, succeeds to all his interest and rights, and may properly apply for a vacation of the judgment. In such case the applicant's rights are those the original defendant would have had, if the application had been made by him. (p. 497.)

DEFAULT JUDGMENT—Right to Open—Laches.—Where judgment is entered by default upon substituted service of summons, a defendant is entitled as a matter of right to have the judgment

opened and be allowed to defend upon application, if made one year, unless by his laches he has lost such right. The claimant's right has been so lost is addressed to the discretion of the court in which the judgment was entered. (p. 497.)

(Syllabi by the court.)

Savage & Purdy, for the appellant.

Thwing & Rossmau, for the respondents.

⁴⁰¹ O'BRIEN, J. Plaintiff brought this action to title. The complaint was filed June 24, 1908. Defendant Charles A. Long was a nonresident, and service was made upon him by publication; the last publication September 1, 1908. Findings were made and judgment in favor of plaintiff was entered November 5, 1908. During this time defendant Huntley secured the address of defendant Charles A. Long and entered into negotiations with him for the purchase of his interest in certain portions of the land involved in the action. On December 2, 1908, Huntley wrote a letter to plaintiff's attorneys which contained the following: "I have just purchased of Charles A. Long certain lots in the State land division of Grand Rapids, list attached, all or a portion your client, Mr. George F. Long, purchased at November, 1907, tax sale. . . ." Then follows a suggestion for some settlement of their claims.

On January 25, 1909, taking the date from one of the affidavits in the record, a motion in the name of defendant Long was made to open the judgment, and supported by an affidavit. The affidavit was dated December 23, 1908, and on the same day defendant Long executed a deed to Huntley of his interest in the property. The motion does not appear to have been brought on for hearing, and on November 1, 1909, there was issued an order to show cause why ⁴⁰² defendant Huntley should not be substituted for defendant Long, and the judgment opened, and he allowed to answer. The record shows that, at the time of the purchase by Huntley and the making of the affidavit by Long, they both had knowledge of the judgment. Upon the hearing of this order plaintiff moved that Huntley be required to elect whether to proceed upon the motion of Charles A. Long or upon his present application. This motion was denied, and an order made vacating the judgment as to Charles A. Long, substituting defendant Huntley as defendant in place of Long, and permitting him to answer.

It is contended by plaintiff that Huntley was a stranger to the judgment and that the subsequent purchase by him of Long's interest in the land gave him no standing or right to apply for a vacation of the judgment, and that defendant Long, having parted with his title December 23, 1908, had no longer any interest in the subject matter of the suit.

therefore could not be heard. Counsel has cited decisions of other states which support his position: *Powell v. McDowell*, 16 Neb. 424, 20 N. W. 271; *Browne v. Palmer*, 66 Neb. 287, 92 N. W. 315; *Ward v. Montclair Ry. Co.*, 26 N. J. Eq. 260; 1 *Freeman on Judgments*, sec. 91.

This, however, is a question which involves the construction of the statutes of this state, and we think the question is foreclosed by the previous decisions of this court to the effect that one who purchases from the defendant in an action affecting the title to real property, after the entry of judgment against such defendant, acquires his interest and rights as they are, and may make an application under the statute to have the judgment opened, and, if the application is granted, defend upon the merits: *Boeing v. McKinley*, 44 Minn. 392, 46 N. W. 766; *Kipp v. Clinger*, 97 Minn. 135, 106 N. W. 108. In the *Kipp* case it was held that such purchaser occupied the same position as would the original defendant, had the application been made in his name.

We have only, therefore, to consider what would have been defendant Long's rights, had no conveyance been made by him, and had the application to vacate the judgment been made by him. If such had been the case, there can be no doubt that the order vacating the ⁴⁰³ judgment would be sustained. The trial court expressed the opinion that under all the circumstances of the case proper diligence was shown.

Under section 4113, Revised Laws of 1905, the granting of such relief is a matter of right, unless it is shown that the applicant has been guilty of laches. The claim that laches were shown was addressed to the discretion of the court, and we feel we would not be justified in setting aside the finding upon that question.

Order affirmed.

The Right of the Grantee or Assignee of a Party to an Action to Move for the Vacation of the Judgment is discussed in the note to *Furman v. Furman*, 60 Am. St. Rep. 637. A person whose interest in real estate has been barred by a judgment rendered against his grantor upon service by publication has the same right to have the judgment opened and make defense as the party from whom he obtained such interest had: *Leslie v. Gibson*, 80 Kan. 504, 133 Am. St. Rep. 219.

Default Judgments Depend upon the Statutory Evidence of Service of process and cannot stand where the return does not show such service: *Lawrence v. Stone*, 160 Ala. 382, 135 Am. St. Rep. 105; *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

SIMON v. METROPOLITAN STREET RAILWAY
COMPANY.

[231 Mo. 65, 132 S. W. 250.]

STREET RAILWAYS—Care Toward Child Approaching

The rule that there must be something noticeable in the conduct of a person who leaves the sidewalk and approaches a street railway track so as to apprise the motorman that such person is about to enter into a place of danger, before it becomes incumbent upon the motorman to stop the car, is not applicable when such person is a child four years of age. When a motorman sees a child of tender years leave the sidewalk and approach the tracks in front of the moving car, he sees the child in a position of danger and must act accordingly. (p. 504.)

STREET RAILWAYS—Care Toward Child Approaching

Where a child four years of age leaves the sidewalk and approaches a street railway upon which a car is running, it is the duty of the motorman to stop the car, although the child may have made a momentary pause after leaving the sidewalk. To give him time to proceed, the child must have made such a stop as would give him the idea that the child does not intend to go forward. (pp. 506, 507.)

STREET RAILWAYS—Care Due to Child Approaching

The size of a child four years old, its extreme infancy, its position in a public street upon which ponderous cars are constantly running, its having left a place of safety on the sidewalk, and started to cross the street, is enough to warn a motorman that it will capriciously proceed in its journey, and is enough to cast upon him the duty of stopping his car until the danger to the child has passed. (p. 506.)

STREET RAILWAYS—Care Due Child Approaching

The danger line for children is farther away from a street railway track than for adults, and it is the duty of a motorman to stop his car sooner for children than for adults approaching the track. The danger to a child of four years begins the instant it leaves the sidewalk, bound headlong for the track, and the motorman in charge of a ponderous car on a public street is required to stop until the danger to the child is averted. He is not to wait until it is too late that it may not run upon the track, and cannot indulge

presumption, as in case of adults, that it may not go into further danger; it has already entered into the danger zone. (p. 507.)

STREET RAILWAYS—Care Due Child Approaching Track.—

Where the testimony showed that a child four years of age left the sidewalk, and approached a moving car; that it momentarily stopped after leaving the curb, and again momentarily stopped nearer the car and then "toddled on toward the track"; and where there was testimony that the motorman was looking the other way and did not see the child until the accident, or until it was close to the car, an instruction that if the motorman, after seeing the child start toward the track after making "its last stop" in the street, used ordinary care with the means at his command to stop the car and prevent a collision with the child, there was no negligence, is erroneous, as eliminating from the consideration of the jury every other fact—the negligence of the motorman if failing to see the child, failing to ring the bell, or to heed the warnings of bystanders, and as giving the jury to understand the motorman was under no obligation to stop the car until after the "last stop" of the child, although it was but momentary. (p. 508.)

APPEAL—Improper Instructions—Right Verdict.—There are instances where, notwithstanding the circuit court has given improper or erroneous instructions, the whole record shows that the verdict was right, and in such instances the judgment will not be reversed; but where there is an issue for the jury, it is not the province of the supreme court to pass upon the weight of the evidence. (p. 509.)

John H. Lucas and Chas. N. Sadler, for the appellant.

Leon Block and Daniel O'Byrne, for the respondents.

⁶⁸ GANTT, P. J. This is an appeal from an order of the circuit court of Jackson county granting the plaintiffs a new trial.

The action was for ten thousand dollars, brought by the plaintiffs for the death of their minor daughter. The trial resulted in a verdict for the defendant, and the court set aside the verdict and granted plaintiffs a new trial on the ground that the court erred in giving instruction "number 3A" on behalf of the defendant.

The petition stated that the plaintiffs were husband and wife and respectively the father and mother of Sarah Simon, who was at all times a minor and unmarried; that the defendant was at all the times mentioned a corporation operating an electric car line over and upon the streets of Kansas City, among other streets an electric car line and electric cars over and upon Third street between Walnut and Grand avenue; that on or about July 11, 1905, about 5 o'clock in the afternoon, on said Third street and about sixty feet west of Grand avenue, Sarah Simon, the minor child of plaintiffs, while attempting to cross said Third street from the south side thereof to the north side thereof, the said Third street running east and west, was run into, her left leg fractured, and she was terribly injured otherwise, by an electric car which was then and there run, conducted and managed by

the employees of the defendant, and as a result of said injuries said Sarah Simon died within ten hours thereafter. That the said Sarah was thus run into and injured ⁶⁹ said car through the negligence and unskillfulness of the servants and employees of the defendant whilst running and managing said electric car in this: First, the motorman of the said car and in charge thereof negligently failed to sound any bell or give any other warning of the approach thereof; second, the said motorman failed to stop the said car within a reasonable time after he saw the dangerous situation of the said Sarah; third, that the said motorman negligently failed to stop the said car within a reasonable time after he might have seen the dangerous situation of the said Sarah; and, fourth, that the agents, servants and employees of said defendant negligently failed to attach a good and sufficient fender to the front end of said car which in the exercise of ordinary care they should have done.

The answer was a general denial and a plea of contributory negligence on the part of the said Sarah Simon and the plaintiffs directly contributing to the injury of the said Sarah.

The evidence tended to show that on July 11, 1905, the plaintiffs resided on the north side of Third street just west of the alley between Walnut street and Grand avenue in Kansas City. They were the parents of several minor children, and among them the deceased child Sarah, aged five years and three months. The father conducted a clothing pressing shop at said place, and his family lived in the rear of it. Third street runs east and west. Almost directly across the street from the plaintiff's business place was home, Mrs. Barman, with her husband, conducted a millinery establishment. In the afternoon of the 11th of July, 1905, Mrs. Barman, who testified she was a childless woman, went over to plaintiffs' residence and on the parents' order sent took their three minor children across the street to their business place. They played around her establishment on the south side of the house or store. She had the youngest child on her knee and ⁷⁰ did not notice that Sarah had gone across the street until she heard the shouts and cries in the street about 5 o'clock that afternoon. She went out and found that Sarah, the deceased child, had been struck and run over by an electric car. There was no one on the car except the motorman and conductor. She testified that the child was never permitted to cross the street unaccompanied.

George Chapman testified that he was walking along Third street, proceeding east, between Walnut street and Grand avenue, on the south side of the street, and passing the little girl Sarah about the time she was leaving

curb to cross the street; that at the time the child first started in the street, the car was at the Walnut street curve; that he stopped four or five feet after he passed her and leaned against the iron post, one of the posts that supports the electric line of the defendant. He saw the child standing four or five feet from the curb in the street; that the child started again, and when she did so the car was about to the vacant lot west of the alley. He saw she was in danger; there was no object between the child and the street-car. The witness heard no bell, and the car's speed was about five or six miles an hour. The child toddled, did not run. She was dragged six or seven feet after she was struck. A colored policeman took the child from under the car.

Edwin J. Shannahan testified that he had made measurements for the plaintiffs, and that it was seventeen feet and four inches from the south curb to the rail at the alley; that it was sixty-one feet and seven inches from the alley to Grand avenue, and twenty-nine feet and one inch east of the east line of the alley to the east line of the door in Barman's place; that the vacant lot alluded to by Chapman in his testimony was over forty feet west of Mrs. Barman's door, out of which the child came.

Mrs. Bernstein testified that she was coming from 71 Grand avenue into Third street; that when she was six or seven feet from the corner of Grand avenue, she saw the child coming from the sidewalk into the street and also saw the car coming; she hallooed to the motorman to stop the car, but he paid no attention, he was looking toward the north side of the street (all the testimony showed that the child came from the south side of the street). Mrs. Bernstein testified that she hallooed when the child was leaving the curb of the sidewalk. At that time the car was fifty or fifty-five feet west of the place where it struck the child. She testified further that no bell was rung, and that the child was walking and did not stop.

Mrs. Emma Bernstein testified that she saw the child and then saw the car about fifty feet on the other side of the alley. She raised her hand and hallooed to the motorman, but he was looking to the other side. He paid no attention. No bell was rung.

Lee J. Hill testified that he was an ex-motorman; that he had operated similar cars to this one over similar grades; that this grade was three or four per cent, and in this connection it may be remarked that Mr. Satterlee, defendant's assistant superintendent, corroborated this witness as to the grade of the track. Hill testified that his car, under the circumstances in evidence, could have been stopped within ten to fifteen feet. The motorman himself testified

that he stopped the car within from twenty to twenty-five feet.

The father of the deceased child testified that at the time the child was hurt, he was at work in his shop on the north side of Third street between Grand avenue and Walnut street and just east of the alley, which extends south through the block; that there was no window in the front side of his shop, but there were large windows in the front that he could see about fifty feet up toward Walnut street through the front window; that from time to time he looked across the street and saw his children over in Mrs. Barnard's store; that ⁷² he saw the car that injured his child where it was about fifty feet west of the alley; that the motorcar was looking toward the north side of the street and up toward the point above the witness' shop; that he heard no sound.

Irvin Schofield, on behalf of the defendant, testified that he was the motorman in charge of the car which killed the child and that the accident happened at 5:55 P. M. He testified: "Well, I was coming from Third and Walnut going east toward Grand; I got probably two-thirds of the way down Grand. There is an alley there; I got somewhere close to the alley, maybe not quite to it, or maybe a little past it, and as I came of me between the curbing and the rail, I seen a little girl starting toward the track running fast, and I seen that they were going to come together, the way we were going, and I hallooded, 'Look out!' at the child, just like that, as loud as I could, and applied the brakes at the same time. By the time we had pretty near come together, we had come together and the little child ran right in ahead and back of the fender and fell back and I had the car pretty near stopped." On cross-examination he testified that he did not see the child on the curb; that she was probably halfway between the curbing and the rail when he first saw her, and she was running toward the track. The only thing he did to avert injury was to apply his brake and hallooded to the child. The car was moving five or six miles an hour; that he was about the alley when he first saw her; that he stopped the car by a hand-brake within from twenty to twenty-five feet.

Peter Campbell, a witness for the defendant, did not see the bell ring; he was a police officer; that he and Sergeant Lynch and Mr. Thompson were standing somewhere on Third street and Grand avenue, looking west up Third street and saw some children playing on the sidewalk up the street; saw a little girl start across the street; at the time she started the car ⁷³ was about opposite her, she started due north across the street and when near the track turned north and ran between the fender and the bumper of the car and was knocked down. The car ran three or four feet after she was struck. The front wheel mashed the child's leg.

was not on the track or in front of the car. Witness took the child from under the wheel. The child ran faster than the car when she started toward the track. The motorman made a quick stop. He did not think the motorman knew what had happened. "Q. You do not think then that he saw the child? A. I do not think he did. Q. He did not give any evidence or make any alarm which would indicate as far as you heard? A. No, sir, of course the child began to hollo and I holloed and he stopped. I holloed and told him to back up, of course he knew there was something wrong there and then he backed up."

Jerry Lynch, a sergeant of the police, testified in behalf of the defendant. His evidence is substantially the same as that of Peter Campbell, except that he testified that the motorman halloeed, but he did not hear any bell rung, and that at the time the child hesitated in the street the street-car was close to the alley.

William Spenamen, for the defendant, testified that he was looking out of the window on the north side of the street, did not see the accident, but saw the child start to run across the street and the car came between him and the child and he did not see her any more; that when the child was stepping off of the curb the front of the car was about at the west line of the alley. When the child was halfway between the curb and the track the car was about one hundred feet west of the little girl. The first motion on the part of the motorman to use his brake was after the car had gotten across the alley.

This was substantially the evidence in the case. ⁷⁴ At the close of the evidence the defendant requested an instruction in the nature of a demurrer to the evidence, which was refused. The court then instructed the jury, and the jury returned a verdict for the defendant, and thereupon plaintiffs filed their motion for new trial, alleging among other grounds that the court erred in giving instructions as asked by the defendant. The court sustained the motion for new trial on the ground that it had erred in giving instruction number 3A on behalf of the defendant and from this order the defendant takes its appeal to this court.

Said instruction number 3A is in these words: "The court instructs the jury that the fact that a person leaves the sidewalk and comes near the track is not enough in itself to impose the duty on the motorman to stop the car; there must be something noticeable in the conduct of the person coming toward the track to apprise the motorman that such person is about to enter into a position of danger, to make it incumbent on the motorman to stop the car. Now, if the jury believe from the evidence, that the motorman saw the child leave the sidewalk and come into the street and stop before

getting to the track, then the motorman in charge of the car in controversy had the right to proceed with his car, and was not required to stop the car until there was a move by the child which indicated that it was about to run into a position of danger; and if the motorman, after seeing the child start toward the track after making its last stop in the street, used ordinary care with the means at his command to stop said car and prevent a collision with the child, then there was no negligence, and the plaintiff cannot recover in this case, and the jury must return a verdict for the defendant company."

1. The defendant insists that the order of the circuit court granting plaintiffs a new trial should be ⁷⁵ reversed because the court erred in reaching the conclusion that its instruction number 3A, given in behalf of the defendant, was erroneous and asserts that the said instruction correctly stated the law. The statement in that instruction "that the fact that a person leaves the sidewalk and comes near the track," is not enough in itself to impose the duty on the motorman to stop the car, that there must be something noticeable in the conduct of the person coming toward the track to apprise the motorman that such a person is about to enter into a place of danger, so as to make it incumbent upon the motorman to stop the car as well enough when the person is an adult," but it is inadequate to a child of the tender years that the deceased child in the case of the plaintiffs was in this case. On the contrary, numerous cases in this court assert the doctrine that when a child of tender years, as the plaintiffs' child was in this case, is in the way of a train or car approaching the track in its front, then he sees the child in a perilous or dangerous position.

In *Cytron v. St. Louis T. Co.*, 205 Mo. 692, 104 S. W. 2d 111, it was said by this court in bank: "The motorman knew the car was bound to occupy, with crushing force, the very place where the child's steps were directed to. It was obvious to the motorman that the child did not know that fact." Under such circumstances it was said, "Both danger and duty exist at the instant the child left the sidewalk, bound headlong into peril": *Livingston v. Wabash R. R. Co.*, 170 Mo. 452, 71 S. W. 136; *Meeker v. Metropolitan St. R. R. Co.*, 178 Mo. 173, 17 S. W. 58; *Heinzle v. Metropolitan St. Ry. Co.*, 213 Mo. 102, 11 S. W. 536; *Cornovski v. St. Louis Transit Co.*, 207 Mo. 263, 11 S. W. 51. In this last-mentioned case it was said: "Our instinct teaches us that when a four year old child, unattended, leaves the curb of a sidewalk—that is, leaves a place of comparative safety—and heads across a street devoted to traffic in a great city, with a car track twelve feet away on which a car is approaching, the little one ⁷⁶ as surely and instantaneously plunges into danger as that the square of the h

enuse of a right-angled triangle equals the sum of the squares of the other two sides; i. e., speaking broadly, it is axiomatic. Danger to the child and duty on the motorman's part began the instant such a child left the sidewalk, bound headlong for the track: *Cytron v. St. Louis T. Co.*, 205 Mo. 692, 104 S. W. 109; *Livingston v. Wabash R. R. Co.*, 170 Mo. 452, 71 S. W. 136."

We are cited, however, by the defendant to the decision of the Kansas City court of appeals in *Gabriel v. Metropolitan St. R. Co.*, 130 Mo. App. 651, 109 S. W. 1042, in which that court, in speaking of a child of six years of age, used this language: "But there was no evidence that there was any action upon the part of the child to indicate that she was unaware of her danger in time for the defendant's motorman to have avoided striking her. The mere fact that a person is on the street with the evident purpose of crossing it while a car is approaching, is no evidence in itself that he intends to place himself in a position of peril": Citing *Reno v. St. Louis & S. R. R. Co.*, 180 Mo. 469, 79 S. W. 464. *Reno v. Railroad* was a case in which an adult was the plaintiff who walked across the street-car track in broad daylight, when there was no obstruction either way, but that case, as is pointed out in *Heinze v. Metropolitan St. R. R. Co.*, 213 Mo. 102, 111 S. W. 536, has no application to a case of a minor child of tender age, who is incapable of contributory negligence, and that decision did not follow the decisions of this court on this point.

But counsel say that this statement in the instruction is a mere abstract statement of the law, and we infer from this that in his opinion, even though it should be held erroneous with reference to the facts in evidence in this record, still it would not justify the circuit court in granting a new trial on account of its error. The remainder of the instruction must be considered, and it is in these words: "Now if the jury believe from the evidence that the motorman saw the child leave the sidewalk and come into the street and ⁷⁷ stop before going to the track, then the motorman in charge of the car in controversy had the right to proceed with his car, and he was not required to stop the car until there was a movement by the child which indicated that it was about to run into a position of danger." The plaintiffs challenge the predicate of this part of the instruction, because they insist that the fact that the child stopped for an instant, or hesitated in its movement toward the train, did not absolve the motorman from the duty of taking precaution to prevent its injury and death. Defendant insists, however, that this instruction is based upon the plaintiff's own evidence in the case, and contends that the witness Chapman testified that he saw the little girl playing in the street near the curb and

the fact that she was playing or standing there, and whether she started to cross the street, whether she was playing just on the curb or just on the curb, would not affect the matter. In either event, the motorman was not bound to stop the car, or slacken the speed of it, until there was some indication to indicate the purpose of the child to cross the street. We have carefully examined this evidence of Chapman and the other testimony in the case, and while some of the witnesses speak of other children being along there, neither Chapman nor any other witness states that this child was playing on the street, or on the sidewalk at any time. The witness Chapman states that he saw the child step off of the curb, start across the street, and when it had gone a few feet it stopped, and then, to use the language of the witness, "it dled on toward the track." The instruction directs the jury that if the motorman saw the child leave the sidewalk and come into the street and stop before going to the track, the motorman was under no obligation to stop his car. Viewing the whole evidence of Chapman and others is taken into account, with the necessarily short time within which the transaction occurred, it ⁷⁸ is perfectly obvious, we think, that the child only made a momentary stop or hesitation, either from confusion at seeing the wagon cross or from childlike indecision, but whatever the occasion of the stop, and though the motorman might have seen its action from the time it left the curb, and understood the likelihood that it was going to continue its journey across the track, under the instruction, the motorman was free from any duty to stop the child to prevent its injury at all after it made a subsequent start across the track. We think the instruction is strong in this respect; it was not enough that the child merely stopped and hesitated, to give the motorman the right to stop, but it must have been such a stop as gave him the impression that the child did not intend to go forward; if it looked like the stop was a mere pause or hesitation, as was testified by various witnesses, it was his duty to have stopped his car before the child made the further movement which indicated that it was about to run into a position of danger. The age of the child, its extreme infancy, its position in a public street upon which ponderous cars were constantly running, its having left a place of safety on the sidewalk, and started to cross the street, was enough to warn the motorman that it might capriciously proceed in its journey and enough to cast upon him the duty of stopping his car until the danger to the child was past.

In *Jones v. United T. Co.*, 201 Pa. 344, 50 Atl. 826, the injured child was not upon the track, but was walking upon another track upon which cars ran in an opposite direction and the supreme court said: "She was not at that time

is true, on his track [that is, the track of the motorman whose car ran over her] but he was bound to know that in her childish caprice she was as likely to cross over in front of his moving car as to go back to the pavement, and his duty the instant he saw her, or if, exercising proper care and watchfulness, he ought to have seen her, was to stop or to so ⁷⁹ absolutely control his car as to avoid the risk before him."

Counsel for defendant properly concede that this court and other courts of last resort have placed the danger line for children farther away from the track than for adults, and have held that it is the duty of a motorman to begin to stop his car sooner for children than for adults who are presumed to know the danger and to stop before going upon a car track, but insist that even these cases do not require a motorman to stop his car until there is some movement of the child indicating its intention to cross the track or come near enough to the car to put itself in danger of being struck, and this is what this instruction declares, and it is in this that the error lies. We think this court announced the true rule as to children of tender age in *Cornovski v. St. Louis Transit Co.*, 207 Mo. 263, 106 S. W. 51, when it said: "Danger to the child and duty on the motorman's part began the instant such a child left the sidewalk, bound headlong for the track." Present in the street where horses, wagons, and cars were constantly moving in broad daylight, a child less than four and a half years old, with only a few feet between the curb and the car track, with its face to the track, every instinct of a normal man and universal experience teach him that the child is already in imminent danger, and the law having regard for human life requires a motorman in charge of a ponderous car on a public street to stop until the danger to the child is averted. He is not to speculate that it may not run upon the track, and cannot indulge the presumption which he may indulge as to adults that it may not go into further danger; it has already entered into the danger zone. As said by the supreme court of Pennsylvania: "He was bound to know that in her childish caprice she was as likely to cross over in front of his moving car as to go back to the pavement, and his duty the instant he saw her, or if, exercising proper care ⁸⁰ and watchfulness, he ought to have seen her, was to stop or to so absolutely control his car as to avoid the risk before him." The mere temporary stop of the little child, caused either by its caprice or hesitation on account of the wagon or car, did not absolve the motorman from his duty to stop his car until danger to the child was certainly averted, but this instruction did, and the jury were told that his duty only arose or began when the child again started on its journey to its destruction. Thus instructed the jury might well have found that after that last start the motorman could not have stopped his car

in time to have prevented the injury and death of the child and hence they must find for defendant.

Moreover, this instruction was erroneous because it assumed there was evidence that the motorman saw the child leave the sidewalk and stop, whereas the motorman himself testified he first saw the child when it was only a few feet from the track and another witness, officer Campbell, testified he did not think the motorman saw the child at all until the collision occurred, and other witnesses testified the motorman was looking upward in the opposite direction from that from which the child approached the train. The instruction concluded: "If the motorman after seeing the child start toward the track after making its last stop in the street, used ordinary care with the means at his command, to stop said car and prevent a collision with the child, then there was no negligence and the plaintiff cannot recover in this case and the jury must return a verdict for defendant." In a word, the jury was told that if the motorman used ordinary care after he saw the child start toward the track after making its last stop, then there was no negligence and no liability. Every other fact was eliminated from their consideration, notwithstanding there was evidence tending to show the motorman was negligent in not seeing the child and the jury might have believed⁸¹ that by the exercise of ordinary care he would have seen her in time to have avoided injury to her, and the instruction wholly ignored the testimony as to his failure to ring the bell and the efforts of bystanders to warn him of the child's presence.

Especially harmful was the making the "last stop" the point when the duty of the motorman began, inasmuch as there was testimony that the little child stopped first at the edge of the curb and then other testimony that it made another stop and then toddled on toward the track, and under this part of the instruction the jury were given to understand that the motorman was required to take no step to stop until after this last stop, though the whole evidence shows it was only momentary. Officer Campbell, a witness for the defendant, testified that she might have stopped a second, not that anyway.

In our opinion this instruction was erroneous and harmful and occasioned the verdict against plaintiffs, and the circuit court did not err in so holding and in granting a new trial on that account.

2. But it is urged that even though the instruction was erroneous, the circuit court erred in granting a new trial because the court ought to have sustained the demurrer to the evidence and taken the case from the jury. The statement of the facts already set forth we think required the court to submit the question of defendant's negligence to the jury.

under the first instruction given in behalf of plaintiffs, without the instruction 3A given in behalf of defendant.

3. As to the proposition that the verdict was for the right party, it is sufficient to say that the plaintiffs' evidence entitled them to have the jury pass upon the negligence of defendant under proper instructions, and we have held they did not have that privilege, and the learned circuit court so held.

⁸² There are instances in which the appellate court has well said that notwithstanding the circuit court has given an improper or incorrect instruction, the whole record showed that the verdict was right and the judgment would not be reversed where it was evidently for the right party. Under the evidence in this case there was an issue for the jury under proper instructions and it is not our province to pass upon the weight of the evidence.

It should also be said that instructions numbered 4 and 8 were improper in that they submitted to the jury whether the plaintiffs were guilty of contributory negligence in permitting the child to be upon the street. We think there was no evidence tending to show the plaintiffs were negligent in this regard.

In our opinion the circuit court had the right to grant a new trial and there was no error in its action in so doing, and the judgment is therefore affirmed.

Burgess, J., concurs; Kennish, J., not having been a member of the court when the cause was argued, takes no part in the decision.

Negligence in Dealing With Children is the subject of a note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 406. As to the duty of a railway company to a child approaching its tracks, see *McDermott v. Boston Elevated Ry. Co.*, 184 Mass. 126, 100 Am. St. Rep. 548, and cases cited in the cross-reference note thereto; *Crabtree v. Missouri Pac. Ry. Co.*, 86 Neb. 33, 136 Am. St. Rep. 663.

BROWN v. SOUTH JOPLIN LEAD AND ZINC MINING COMPANY.

[231 Mo. 166, 132 S. W. 693.]

APPEAL.—Findings When the Evidence is not Brought Up in the record are, in an action at law, binding on the supreme court. (p. 511.)

CONTRACTS—Fraud and Deceit—Remedies.—In cases of fraud and deceit the injured party has two remedies: First, he may rescind the contract; or, secondly, he may fully perform the contract, and sue for damages resulting from the fraud and deceit. (pp. 511, 514.)

CONTRACTS—Fraud—Waiver of Damages.—Adhering to a contract is not a waiver of damages for fraud and deceit. The injured party is not compelled to abandon his contract upon the discovery of fraud, but may go on in the fulfillment thereof and rely upon his action for fraud and deceit. (pp. 511, 514.)

CONTRACTS—Fraud in Procuring—Effect of New Agreement. Where a party to a contract, with knowledge that it has been procured from him by fraud, makes a new agreement in reference to the subject matter, he cannot recover for the fraud tincturing the original contract; and this although he expended a large amount of money under the contract before discovering the fraud. (pp. 512, 514.)

J. W. McAntire, for the appellant.

Spencer, Grayston & Spencer and Meredith & Harwood, for the respondent.

¹⁷⁰ GRAVES, J. This is the second appearance of this cause in this court. When first here it appears that the plaintiffs had obtained a verdict for something over fourteen thousand dollars, which verdict the trial court set aside for reasons assigned, and the plaintiffs appealed: *Brown v. South Joplin Lead and Zinc Mining Co.*, 194 Mo. 681, 92 S. W. 699. Upon that appeal, Fox, J., by opinion eliminated much of plaintiff's case. The action is one for fraud and deceit in the execution of a certain mining lease, the pleadings being fully analyzed in the former opinion. When the case was remanded by this court the defendant amended its answer, and pleaded that after the execution of the lease pleaded and after plaintiff knew of the facts, they entered into a new and subsequent contract, by which the original lease was ratified and modified, and that by so entering into the new agreement plaintiffs waived and lost all the rights to sue for and recover any damages by reason of the alleged fraud and deceit. The trial court found that such subsequent contract had been made and that by reason thereof plaintiffs were precluded from recovering. In this regard the case is different from that of the former appeal, otherwise it remains very largely the same. For a fuller statement the former opinion, ¹⁷¹ 194 Mo. 681, 92 S. W. 699, should be read with this. We shall take the question of this subsequent contract and its effect first, and then if necessary discuss other questions.

1. The case was tried before the court, and upon motion of the defendant certain finding of facts were made. This was done by the defendant presenting a number of findings of fact and asking the court to give or refuse the same as is done with instructions. Instructions were also presented for the action of the court. The court among other findings of fact gave and made the following two, which are important upon the issue now under discussion:

"The court sitting as a jury finds the following facts: That the only ground of recovery on which plaintiffs offered any evidence was the alleged false and fraudulent representations made by Henry B. Pain as to the new shaft on lot 9 being on solid ground and as to the proximity and direction of the old drifts in reference to said new shaft.

"The court sitting as a jury finds the following facts: That on February 18, 1901, plaintiffs entered into a new contract in writing with defendant company for a valid consideration, reducing its amount of the royalty and making other changes in the lease, and at that time plaintiffs had knowledge of the falsity of the alleged misrepresentations made by Pain on which this action is based.

"The court sitting as a jury finds the following facts: That in sinking the new shaft the plaintiff struck at a depth of about one hundred and forty-six feet a small prospect drift leading into a large drift, referred to in the plaintiff's petition, and the plaintiffs had the prospect drift cleaned out, and had knowledge of facts showing the falsity of Pain's misrepresentations, upon which this action is based, and up to that time the plaintiffs had expended the sum of \$3,476."

These findings become important because the evidence ¹⁷² upon which they were made is not before us, although the plaintiff seems to have excepted to the findings. The abstract simply says what the evidence tends to show upon both sides. This is an action at law and we are bound by these findings: *Snuffer v. Karr*, 197 Mo. 182, 94 S. W. 983, 7 Ann. Cas. 780, and cases therein cited.

The finding of facts, to which we must bow, is to the effect that there was a new agreement made after the plaintiffs were fully possessed of the facts. This new agreement was to the advantage of the plaintiffs as the record runs. Under such circumstances the trial court did not err in holding that plaintiffs had waived their action for fraud and deceit under the original contract. In cases of fraud and deceit the party has two remedies: First, he may rescind the contract, or, secondly, he may fully perform the contract, and sue for damages resulting from the fraud and deceit. Nor does it appear that there can be a waiver of damages for the fraud and deceit so long as the party adheres to the original contract. He is not compelled to abandon his original contract upon the discovery of fraud, but may go on in the fulfillment thereof and rely upon his action for fraud and deceit. Such would seem to be the doctrine of the cases relied upon by the plaintiffs, of which the following are samples: *Morman v. Harrington*, 118 Mich. 623, 77 N. W. 242; *Haven v. Neal*, 43 Minn. 315, 45 N. W. 612; *Sell v. Mississippi River Logging*

Co., 88 Wis. 581, 60 N. W. 1065; Wilson v. Nichols, 72 Cal. 173, 43 Atl. 1052.

But whilst this is true, yet where a party entitled to rescind for fraud and deceit has knowledge of the fraud and deceit in the original contract and thereafter makes a new agreement, the case law seems to preclude a recovery for the fraud and deceit tincturing the original contract. The making of a new agreement touching the subject of contract has been denominated as an exception to the rule that the affirmation and further prosecution of a contract tainted with fraud and deceit do not bar a recovery.

¹⁷³ In 14 American and English Encyclopedia of Law, second edition, page 171, this idea of an exception is expressed: "The rule that affirmation of a contract made with knowledge of fraud does not bar an action for damages is subject to the limitations that the party defrauded must stand toward the other party at arm's-length, must not assent with the terms of the contract on his part, must not do favors of the other party or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it. If he does so he waives the fraud."

In 1 Page on Contracts, section 139, it is said: "Where fraud in the inducement makes a contract voidable, the party defrauded may make the contract valid by electing with full knowledge of the facts, to treat it as valid. Thus, the promise to pay the purchase money, making a partial payment thereon, the payment of interest thereon, an assignment of a mortgage, the obtaining of an extension of time for renewing a note, or making payments thereon, *making a new contract*, or receiving money under the contract, or leasing the property bought through fraud, or remaining in possession and making improvements, or taking security for the performance, or treating as his own property received under the contract, or other performance of an executory contract, or bringing suit on the contract, are all acts which amount to a ratification if done after discovery of the fraud and with full knowledge thereof." The italics in the foregoing are ours.

The California court has very concisely thus stated the doctrine in the case of Schmidt v. Mesmer, 116 Cal. 26, 10 Pac. 54: "It is no doubt the law, that while, where a party seeks to rescind a contract into which he was induced by the fraudulent representations of another party, he may rescind at once upon the discovery of the fraud, and release the other party, as near as may be, to his former condition, yet he may elect to go on with the contract and sue to recover ¹⁷⁴ damages for the deceit, without giving any notice to the other party that he intends at some future

to charge him with fraud. This rule, when applied to a continuous contract which runs through a series of years, sometimes, no doubt, works an injustice to the party charged with fraud. It is true that one actually guilty of fraud is not entitled to much consideration. But the real difficulty usually is to determine whether or not the alleged fraud actually existed, and the issue has generally to be determined upon conflicting testimony, and in accordance with the preponderance of evidence. In such a case it is evident that the party who keeps his intended charge of fraud secret for years has a great advantage in preparing for a future intended action, which he alone anticipates, over his adversary, who has had no intimation of such action or such charge of fraud, and has had no reason to preserve or discover evidence concerning it. *But this rule, which relieves a party when he chooses to sue for damages from any of the acts required of him when he elects to rescind, is subject to some just limitations. If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages, he must stand toward the other party at arm's-length; he must on his part comply with the terms of the contract; he must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud.*" Again the italics are ours.

In this Schmidt case is a resume of the case law upon the subject. We do not find it questioned except in the dissenting opinion of Sanborn, J., in the case of Schagun v. Scott Mfg. Co., 162 Fed. 209. The principal opinion in that case by Philips, J., accords with the California court. In Taylor v. Short, 107 Mo. 384, 17 S. W. 970, is found in effect a recognition of the doctrine. ¹⁷⁵ That case was to rescind a contract rather than for damages for fraud and deceit, yet many expressions used by Sherwood, J., accord with the views above expressed.

In fact, plaintiffs' counsel do not in their brief dispute the well-founded doctrine of the California case, *supra*, but urge that this case does not fall within the rule. We are of the opinion that it does, and if so there is no error in the trial of this cause. As to whether it does so fall within this rule we discuss in the next paragraph.

2. As indicated above, the case law is to the effect that so long as the party adheres to the original contract, things done under that contract and required by its terms will not work a waiver of an action for fraud and deceit, even though such things be done after a discovery of the fraud. To illustrate, if by the original contract partial payments

are to be made, such payments, being under the contract, not waive an action for damages for fraud and deceit, although such payments are made after the discovery of fraud. It must be borne in mind that the party defrauded has two remedies, i. e., (1) an action to rescind, which should be brought upon discovery of the fraud, and (2) an action for fraud and deceit, which action is on the theory that the injured party will comply with the contract induced by the fraud, but will ask damages occasioned by the fraud. In the latter case he does not have to act upon the first discovery of the fraud. He has a right to go on with his contract and fulfill it to the letter, and hold what property he got under the contract, and then thereupon bring his action for the damages occasioned by the fraud and deceit of his adversary: *Cottrill v. Krum*, 100 Mo. 18 Am. St. Rep. 549, 13 S. W. 735. Many cases might be cited. An action for fraud and deceit contemplates that the party adheres to his original contract with its burdens and benefits, and that he ¹⁷⁶ can hold the property acquired and yet have damages for the injury done him by the fraud and deceit practiced upon him in the procurement of the contract. He can even recover in such action for the benefit of the bargain: *Kendrick v. Ryus*, 225 Mo. 150, 135 Am. St. Rep. 585, 123 S. W. 937. All, however, upon the theory that he adheres to the contract.

The rule, however, is different, as we have seen, where, after knowledge of the fraud, enters into a new contract. Plaintiffs urge, however, that the court found that they expended \$3,476, before they discovered the fraud, and that their claim takes the case out of the rule as to waiver.

We are not impressed with this contention. This doctrine of waiving the right to sue for fraud and deceit by entering into a new agreement concerning the same subject matter may well be sustained on the theory that all such questions were considered by the parties in making the new agreement. If at the time the parties entered into the new agreement the facts as to the fraud and deceit were known, it is to be presumed that both parties acted with that question in mind, and the new agreement was the wiping out of all old scores. Such seems to be the case law, and it is reasonable. Considering the facts found, there was no error upon the part of the trial court, and its judgment is affirmed.

All concur.

A Rescission of a Contract is not Necessary to Support an Action for Damages for False Representations whereby the plaintiff was induced to enter into it: *Andrews v. Jackson*, 168 Mass. 266, 60 St. Rep. 390, and see cases cited in the cross-reference note thereto.

Ratification of Contract.—If a plaintiff claims that a contract or conveyance were procured by fraud, still if it appears that he

taken counsel, insisted on having certain terms of the agreement carried out, and treated the whole matter in controversy as satisfactorily arranged, he must be deemed to have irrevocably ratified such contract and conveyance, although it is assumed that he was induced to make them through the wrong of another: *Burnham v. Burnham*, 119 Wis. 509, 100 Am. St. Rep. 895.

The Rights of Parties to Fraudulent or Illegal Contracts is the subject of a note to *Boyd v. Barclay*, 34 Am. Dec. 765.

To Maintain an Action for Deceit, the statement relied on must be false, and made with actual or constructive knowledge of its falsity, and it must also be shown that it did actually mislead or deceive: *Southern Exp. Co. v. Fox & Logan*, 131 Ky. 257, 133 Am. St. Rep. 241; and see *Bowe v. Gage*, 127 Wis. 245, 115 Am. St. Rep. 1010; *Kuelling v. Lean Mfg. Co.*, 183 N. Y. 78, 111 Am. St. Rep. 691; *Hooker v. Midland Street Co.*, 215 Ill. 444, 106 Am. St. Rep. 170.

Actions to Recover Damages for False Representations are discussed in the note to *Cottrill v. Krum*, 18 Am. St. Rep. 555.

JEWELL v. KANSAS CITY BOLT & NUT COMPANY.

[231 Mo. 176, 132 S. W. 703.]

MASTER AND SERVANT—Vice-principal or Independent Contractor.—Where there is evidence tending to show a certain person to be a servant or vice-principal of another, and also evidence tending to show him to be an independent contractor, the question is one of fact for the jury. (p. 523.)

MASTER AND SERVANT—Assumption of Risk.—A Servant, by entering the service of the master, assumes all dangers incident to that service, and when injured in consequence thereof he cannot recover from the master on account of such injuries; but he assumes only such risks as are incident to that employment. (p. 523.)

MASTER AND SERVANT—Assumption of Risk.—Negligence of the Master is in no sense incident to the servant's employment. The servant can neither by express or implied contract release the master from liability for injuries sustained in consequence of the master's negligence. (p. 523.)

MASTER AND SERVANT—Safe Place and Appliances—Independent Contractor.—Where the master or owner of rolling-mills undertakes to furnish the place and the appliances with which an independent contractor is to perform his contract, and retains possession and control over them, the contractor and his employees have the same right as any servant to demand that they be reasonably safe for the purpose for which they were furnished. (p. 524.)

MASTER AND SERVANT—Safe Place and Appliances—Instructions.—Where there is a conflict in the evidence as to whether a master has been guilty of negligence in furnishing a safe place and appliances for the servant, the question should be left to the jury under appropriate instructions, and the court should not peremptorily charge the jury on the subject. (p. 526.)

MASTER AND SERVANT—Safe Place and Appliances—Question of Fact.—Where the evidence shows that it is usual and

customary in rolling-mills to have an iron post firmly set in floor in a certain position for the protection of workmen, that a post had been maintained at one time in the mill of the defendant but had been removed and superseded by an iron spool or spindle, the question whether such device was an adequate substitute for the post and whether the defendant was guilty of negligence in removing the post, etc., should be submitted to the jury, and there is a conflict in the evidence the court should not give an empty instruction to the jury to find for either party. (p. 526.)

MASTER AND SERVANT—Assumed Risk.—The Negligence of the Master cannot, under any circumstances, become an independent ground of recovery to the servant's employment, and the doctrine of assumed risk does not apply to injuries caused by the negligence of the master. (p. 526.)

MASTER AND SERVANT—Contributory Negligence—Burden of Proof.—Ordinarily, contributory negligence is a defense which must be charged in the answer, and established by the defendant by a preponderance of the evidence to the reasonable satisfaction of the jury. (p. 527.)

MASTER AND SERVANT—Contributory Negligence—Assumption of Risk.—When a peril of a servant in the performance of his duty is augmented by the negligence of the master, and the servant, if knowing that the master has been thus negligent, nevertheless continues to perform his duty, that such negligence has rendered the performance of his duty hazardous, continues in the performance of that duty, there is no question of contributory negligence and not a question of assumption of risk. (p. 527.)

MASTER AND SERVANT—Contributory Negligence—Absence of Safeguard.—Where the evidence shows that an iron post set in the floor in a certain position is customary and usual in rolling-mills for the protection of workmen, that an employee in the defendant's mill complained to the foreman of the absence of the post, and was told the other men did not object to working without it, that other employees had worked there for years without sustaining any injury, it cannot be said the danger of working there without the post would be so obvious that a reasonably prudent person would not attempt to work thereat, or that doing so would, as a matter of law, constitute contributory negligence. (p. 529.)

MASTER AND SERVANT—Contributory Negligence—Right of Master to Proceed With Work.—Where the evidence shows that an employee in a rolling-mill complained to the foreman of the absence of an iron post usually placed in a certain position in rolling-mills for the protection of employees, but was told the other men did not object to working without it, and if he did not wish to do likewise he knew what he could do, meaning that he could quit the work, the remark of the foreman was even more than an order to continue in the performance of the work in the absence of the post, and hence it must be held that the employee did not voluntarily assume the perils caused by the absence of the post, and that his conduct in remaining at his work was not negligent as to warrant the court in declaring as matter of law that he was guilty of such contributory negligence as would bar his right to recovery. (p. 531.)

MASTER AND SERVANT—Negligence—Liability of Master.—The foreman in a mill is not liable in damages for personal injuries sustained by a servant of the master in consequence of the foreman's nonfeasance or mere neglect of duty, but he is liable jointly with the master for a positive wrong or misfeasance. (p. 531.)

MASTER AND SERVANT—Independent Contractor—Negligence.—Servants of an independent contractor engaged in the manufacture of iron bars in a rolling-mill may recover from him their damages for personal injuries caused by his negligence in not having the iron properly prepared for the rollers. (pp. 532, 533.)

Walter Littlefield, John W. Clements and Sebree, Conrad & Wendorff, for the appellants.

Reed, Atwood, Yates, Mastin & Harvey, for the respondent.

¹⁸⁵ WOODSON, J. This suit was begun in the circuit court of Jackson county, by the plaintiff, to recover the sum of twenty-five thousand dollars damages for personal injuries sustained by him through the alleged negligence of the defendants.

A trial was had, and at the close of plaintiff's evidence the court, at the request of defendants, gave a peremptory instruction directing the jury to find for the defendants. In obedience to that instruction the jury returned a verdict for them. Thereupon, the plaintiff filed his motion for a new trial, which was by the court sustained, and from this order and judgment the defendants duly appealed to this court.

The defendant company was a corporation organized and incorporated under the laws of the state of Missouri, engaged in the manufacture and sale of iron ¹⁸⁶ bars, bolts and nuts, at Kansas City. The plant was a large one and employed about three hundred men in the various departments. There was evidence tending to prove that defendant Sturges was an employee of the defendant company, and was the foreman in charge of the rolling-mill department of the company; and there was evidence which also tended to show that he was an independent contractor manufacturing iron bars in the rolling-mill and delivering them to the company as a finished product.

The respondent's evidence tended to show that the mill was operated by appellant company under an agreement with appellant Sturges, by the terms of which he hired certain men, all of whom were paid so much per ton for the iron rolled, this sum being paid to Sturges in bulk and divided by him among the workmen according to a certain scale of wages fixed by the National Association of Iron, Steel and Tin Workers. That the mill was owned by appellant company, and that it employed and furnished the superintendent thereof, S. Y. High, who had entire charge of the mill, hired and discharged the men, including those who were working under Sturges. That two roller bosses had charge of the men, Sturges and one Palmer. The catchers, that is, such

men as respondent, were also paid by Sturges, as indicated while machinists, that is, men who had general charge of the machinery and appliances about the mill and who received the same when necessary, were employees of and were paid by the appellant company.

The arrangement between Sturges, and the appellant company was in writing, but not introduced in evidence. There was some parol evidence introduced without objection attempting to prove the contents of that writing, yet so meager and vague we are unable to ascertain the true just what was the character of the arrangement made between them, or to determine therefrom just what was the result¹⁸⁷ thereby created between the plaintiff and the defendant as to the manufacture of the iron bars, or as between the defendant and the defendants themselves.

The plaintiff was employed in the rolling-mill department which manufactured the iron bars, and he was known as a "catcher," suggested by the character of his work, as presently mentioned.

Those bars were manufactured according to the following process: Scrap iron was bundled up, bound together and heated to a white heat in a furnace. It was then run through a set of rolls by other employees, called "roughers," and formed into billets some three feet in length and three inches thick; it was then passed to another set of employees, called strainers and catchers, of which plaintiff was one, who ran it through other sets of rollers several times, reducing its thickness in time in thickness and increasing its length until it reached the desired dimensions.

The rolls at which plaintiff was engaged stood in a north and west direction, containing several sets of rolls some fifteen feet in length. The plaintiff occupied the north end of the string of rolls. Those working with him were on the south side of the string of rolls. Those on the north side would take a billet from the roughers and place the front end of it in the rolls, the rotary motion of which would carry it to the north side, where the plaintiff would catch it with a pair of iron tongs, and place the end of it in a set of rolls beneath the ones from which it had just been taken, and it would be carried back to the south side by the same means and reduced in thickness and extended in length as previously stated. This method was continued until the bar was some thirty or forty feet in length, when the process of "repeating" was begun, that is, the plaintiff would catch the end of the bar with a pair of tongs as it came through at the east end of the rolls and carry it to the north in a semicircle and place the front end in the rolls at the west end of the¹⁸⁸ string which so ran as to carry the bar back to the south side. By this process the bar

be coming through at the east end of the string of rolls to the north side and at the same time it would be going through the rolls to the south side at the west end of the rolls.

The following is a copy of the charges of negligence made by the plaintiff against the defendants, to wit:

"That it was the duty of the defendants to furnish to the plaintiff reasonably safe material, and reasonably safe machinery with which to work, and a reasonably safe place in which to work and to operate said machinery, and to permit and direct the doing of said work in a reasonably safe manner. That at all the times mentioned herein all of said materials, appliances and machinery were, and the method of conducting, controlling and operating the same was under the direct management, supervision and direction of the said defendants, or their representatives and vice-principals, and at all times herein mentioned plaintiff exercised due care and caution and was without negligence. That the defendants, disregarding their duty in the premises, carelessly and negligently, on the day last aforesaid, caused certain materials, to wit, scrap iron of an inferior and unfit character to be furnished and used in the manufacture of the said heavy bars of highly heated iron, which plaintiff was required to handle as aforesaid.

"Plaintiff further states that one of said bars hereinafter referred to was improperly and insufficiently heated, and that because of the inferior material used, and because the said bar was improperly heated, said bar contained flaws and was irregular in shape and that one of the ends thereof was flattened and spread so that it caught in the machinery of said train of rolls, as hereafter stated.

"Plaintiff further states that a part of the machinery necessary to the reasonably safe doing of the ^{1st} work plaintiff was required to perform was a device commonly known as 'the shears,' used for the purpose of cutting off the irregular, rough, flattened, splintered or otherwise improperly shaped ends of the bars of iron being manufactured. That at the time of the accident, hereinafter described, and for a long time prior thereto, the shears, attached to the machine aforesaid, had been out of order; that they were worn and refused to work properly, and at the time of the accident would not work—all of which was known to the defendants, or by the exercise of reasonable diligence could have been known to them. That it was dangerous to work said machine in the manufacture of iron as aforesaid, without the use of said shears, which the defendants well knew. That notwithstanding such knowledge the defendants directed the plaintiff to continue to work with said machine in the defective and dangerous condition aforesaid, and that because said shears were in the defective and useless condi-

tion aforesaid, plaintiff was unable to trim or cut off irregular ends of said iron bar, and that by reason thereof said bar caught, as hereinafter set forth.

"Plaintiff further states that the ordinary, usual and reasonably safe way of manufacturing iron of the weight and size which he was then required to work, was to pass the same back through the same set of rolls through which it had been received, and that he was so engaged in doing such work when by express direction of the defendants, through their vice-principal, he was required to receive said iron as it was passing through one set of rolls and to bend or turn it so as to cause it at the same time to start to pass through a second set of rolls. That it was dangerous to operate said machinery, as last aforesaid, with a bar of iron of the weight and size then being manufactured—all of which the defendants well knew, or by the exercise of ordinary care could have known.

"Plaintiff further states that on said ninth day of 190 December, 1902, the said defendants carelessly and negligently failed and neglected to provide and to maintain the usual, ordinary and customary device, used by such mills for similar purposes of handling, supporting, guiding and protecting said iron bar, so as to keep it from coming in contact with the person of the plaintiff or the employees similarly engaged. Said usual, ordinary and customary device being in substance an iron post or stanchion or support adjusted between the two series of rolls through which said iron was being passed as aforesaid.

"And plaintiff further says that at said time and date the defendants carelessly and negligently failed and neglected to provide or maintain any device or machinery to take the place of or supply the absence of the aforesaid usual, ordinary and customary device.

"And plaintiff states that the neglect and failure of the defendants to so have an iron post, stanchion or other proper device to keep said highly heated iron from coming in contact with the plaintiff as aforesaid, rendered his place in said rolling-mill department and the work there where plaintiff was then and there required to so work as aforesaid unusually and unnecessarily hazardous and dangerous.

"Plaintiff states that the defendants knew or by the exercise of ordinary care and caution could have known of all of the aforesaid defects and deficiencies on said day of December, 1902. That said defendants had knowledge or by the exercise of ordinary care and caution could have known of said deficiencies long before the plaintiff was injured and in time to have remedied the same, and by the use of reasonable care and caution could have prevented

all of said defects before plaintiff was injured, and thus have prevented the injuries to plaintiff complained of; but plaintiff says defendants carelessly and negligently failed to so remedy said defects and carelessly and negligently allowed said defects in said materials and machinery to exist and carelessly ¹⁹¹ and negligently directed plaintiff to proceed with his work with the defective machinery, appliances and materials aforesaid, and carelessly and negligently required plaintiff to work the iron bar through the two sets of rolls as aforesaid, when defendants knew or by the exercise of ordinary care would have known that it was unusually hazardous and unsafe to so work the said iron bar.

"And plaintiff states that while he was so engaged in his work, under the direction of defendants, as above set forth, one of said large, heavy and highly heated iron bars, which he was working, because of the improper material in the same and because it had been improperly heated as above set out and because it had not been trimmed and could not be trimmed because of the want of iron shears, and because the iron shears would not work as aforesaid, and because said bar was improperly and imperfectly shaped as aforesaid, one end of the said iron bar became fastened and stuck in the first set of rolls above referred to, while the other end of said iron bar was passing through the second set of rolls whereby and because of the absence of said stanchion to protect plaintiff from coming in contact with said iron bar, and to hold said iron bar where it could not come in contact with him, that said iron bar was pulled rapidly through said second set of rolls, and brought suddenly in contact with and against the right leg of plaintiff, greatly injuring plaintiff, as hereinafter set forth. That in all of the matters and things aforesaid defendants were careless and negligent. And that the injuries complained of by plaintiff as herein stated were directly caused by said carelessness and negligence."

For the safety of the catcher, similar mills customarily have a stout iron post for use when bars are to be repeated, which is inserted in a fixed hole in the floor of the mill, and the bar being rolled is taken by the operative around this post before inserting the same ¹⁹² into the second set of rolls, to the end that should the same become stuck in the first set of rolls, as it pulls taut, it may be stopped by the fixed post, and thus prevented from coming in contact with the workman who necessarily stands within the circle described by the bar of iron. Such a post as this had been in use in the defendants' mill, but at the time of plaintiff's injury, had been superseded by the use of a kind of an iron spool or spindle, weighing about two hundred pounds, which was set up in the place where the fixed post usually

stood, but which was not fastened to the platform in any way, and which had no device of any kind to prevent it from toppling over when the iron bar came in contact with the same. Before his injury, respondent complained of the use of this spindle and the disuse of the fixed post or stanchion which had been in use when he was formerly at the mill, whereupon Sturges, the boss to whom he complained, told him "that the other men worked there before if they could do it I certainly could, and gave me to understand that if I could not do it I knowed what I could do, and I would have to do as the rest of them done."

It is shown by the testimony of many witnesses that a fixed post or stanchion is customarily provided for the safety of workmen in repeating iron by similar rolling throughout the country. It further appears from the evidence that for the safety of the catcher it was necessary to cut off the bad ends of these billets of iron as they came red hot through the rolls, for the reason that they would become ragged and present such jagged ends as sometimes to cause them to catch in the rolls. For this purpose, a pair of large metal shears were hung just above the catcher stand at the rolls which were worked by machinery. Respondent, who was working upon the night shift, was injured about fifteen or twenty minutes before quitting work, that is, about a quarter to 6 o'clock in the morning. Learning that the shears were out of order, respondent called the attention of the night boss, Palmer, to this fact, and ordered him to go ahead, as it lacked but a short time before they would quit work. Palmer said, "We will go ahead, it is about six."

While working under the conditions before mentioned, without the protection of the fixed post, such as was customarily furnished in mills of this character, and while working with the shears out of order, as indicated, and in repeating the bar, as stated, the last end of it caught in the first set of rolls through which it passed, the other end of it, previously been inserted in the second or west set of rolls, thus forming a semicircle about plaintiff, and in being taut knocked over the spindle before described, and was not anchored to the floor, and pulled directly against the leg of plaintiff, and so burned the same that several months of suffering his leg was amputated.

Such are substantially the facts of the case.

Whatever additional evidence may be necessary for the proper disposition of the case will be noted in the opinion.

1. The first insistence made by counsel for appellant is that the relation of master and servant did not exist between it and the respondent; and for that reason

not liable to him in any sum for the injuries of which he complains.

That insistence is predicated upon the contention that the record shows that appellant Sturges was an independent contractor, employed by the company to manufacture the iron bars mentioned in the evidence, and deliver them to it in a finished condition, without any authority or control on its part over said Sturges. If that is true, then the respondent was not an employee of the company, but was an employee of Sturges. In that case the doctrine of respondeat superior would not apply, and the company would not be liable in this case for any fault or neglect on the part ¹⁹⁴ of Sturges: *Hilsdorf v. St. Louis*, 45 Mo. 94, 100 Am. Dec. 352; *Barry v. St. Louis*, 17 Mo. 121. While that contention of counsel correctly states an abstract legal proposition, yet the trouble we are confronted with in applying that rule to the case at bar is the fact that the evidence also tends to show that Sturges was an employee and a vice-principal of the appellant company. That being true, the evidence presented a question of fact for the jury to determine and it could not be reached by a peremptory instruction. This is elementary, and a citation of authorities in support thereof would be a supererogation of labor.

We, therefore, hold that the trial court erred in giving the peremptory instruction.

2. It is next insisted by counsel for both appellants, that respondent is not entitled to recover from either of them, regardless of the relation that existed between them, for the reason that respondent's injuries were due to the dangers incident to his employment, which he assumed by accepting employment from them.

It is elementary that a servant by entering the service of the master assumes all dangers incident to that service, and when injured in consequence thereof he cannot recover damages from the master on account of such injuries. While this rule is plain and easily understood, yet its application to particular cases has been a great source of trouble and annoyance to both the bench and bar of this state and elsewhere. Much of this confusion could be obviated, if the terms of the rule itself should be constantly borne in mind, that is, that the servant by entering the employment of the master assumes all risks which are incident to that employment, but he assumes none other. The carelessness and negligence of the master are in no sense incident to the servant's employment. The servant can neither by express or by implied contract release the master from liability for injuries sustained in ¹⁹⁵ consequence of the master's negligence: *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167; *Smith v. Fordyce*, 190 Mo. 1, 88 S. W. 679; *Phippin v. Missouri*

Pac. R. R. Co., 196 Mo. 321, 93 S. W. 410; Dakan v. Ch. M. Co., 197 Mo. 238, 94 S. W. 944; George v. St. Lou. R. R. Co., 225 Mo. 364, 125 S. W. 196. So in discussing the rule and its application to a concrete case, great care should be exercised in ascertaining whether or not the injury complained of was due to dangers incident to the servant's employment, or was it the result of the master's negligence. If due to the former, then a recovery should be denied; but if caused by the latter, then a recovery should be allowed.

In the case at bar, what was the proximate cause of the injury? Clearly it was the failure of the company to maintain the iron post described in the petition. If it had been there it would have been a physical impossibility for the respondent to have sustained the injuries of which he complains. That being true, then the question presents itself: Was the company negligent in failing to maintain the post at the place and in the manner stated in the petition? In order to properly determine this question we must examine the evidence bearing upon that question.

It is undisputed that the appellant company owned the entire plant in question, and had exclusive control over every department thereof, including the rolling-mills. The relation is (whatever may have been the relation that existed between the appellant company and Sturges, whether contractor or vice-principal), the company had possession and control over the building in which the mill was located, as well as the mill itself, including the engines, boiler, and machinery connected therewith. The company also owned the entire plant, including the mill, and made all necessary repairs throughout all of the departments of the plant. Sturges and his assistants had nothing to do with those departments, except to manufacture the iron bars mentioned in the evidence in the building and on the mill ¹⁹⁶ which was thus owned, controlled and operated by the company. As previously stated, this record does not disclose whether Sturges was an independent contractor in doing that work, or whether he was an employee and foreman of the company in charge of that work.

Under this view of the case, the company undertook to furnish and furnishing the place where and the instrumentalities with which the work was to be performed, thereby imposed upon it the duty to exercise ordinary care in that the place where Sturges and his assistants were to work, and that the instrumentalities with which they were to labor were reasonably safe for that purpose, even though it may be conceded that Sturges was an independent contractor. This is true for the reason that if the owner undertakes to furnish the place and the appliance with which

dependent contractor is to perform his contract, and retains possession and control over said place and appliances, then the contractor and his employees have the same right that an ordinary employee has to demand of the owner that they be reasonably safe for the purpose for which they were furnished: *Geismann v. Missouri Edison El. Co.*, 173 Mo. 654, 73 S. W. 654; *Ryan v. St. Louis T. Co.*, 190 Mo. 621, 89 S. W. 865, 2 L. R. A., N. S., 777; *Clark v. St. Louis & Suburban Ry. Co.*; *Clark v. Union Iron & Foundry Co.* The last two cases are just handed down by this division of the court, and are now pending in court in bank. The precise question now under consideration was fully considered in the *Clark* case, and for that reason it is useless to further extend this discussion along that line.

The only reason why the owner is not liable in damages for injuries sustained by an employee of an independent character is because the owner has no control over the actions of the contractor, whether they be negligent or not. But in the case at bar, as before stated, *Sturges* had no control over the place in which or the ¹⁸⁷ instrumentalities with which he was manufacturing the bars. And since it is practically undisputed that respondent was injured in consequence of the absence of the post, we may drop the question of independent contractor, and proceed to the consideration of the question, Was it negligence on the part of the company to have failed to furnish and maintain the post in question?

The petition alleged and the evidence of respondent tended to prove that the ordinary, usual and safe way to operate rolling-mills of this class while the process of "repeating" was going on was to have an iron post firmly set and maintained in the floor of the building in which the mill is located, some ten or twelve feet from the string of rolls, around which the bar was to pass in a semicircle, of sufficient strength to stop the movement of the bar whenever the end thereof should for any cause become caught in the rolls, and thereby prevent the loop of the bar from catching the employees by the feet or legs and drawing them up against the framework of the rollers. Upon the other hand, the evidence introduced on behalf of appellants tended to show that, notwithstanding the fact that the post had been dispensed with, still the place where and the instrumentalities with which respondent was laboring were made reasonably safe for respondent and the other employees in the mill, by reason of the fact that the brakes and spindle mentioned in the evidence in the mill in lieu of the post were maintained as a means of protection against danger to respondent and other employees thereof.

The evidence of the respondent upon this question is contradictory of and in direct conflict with that of the appellants. This presented a question of fact for the trial court and the trial court should have, under proper instructions, submitted it to the jury. If they should take respondent's theory of the case, then, of course, ¹⁹⁸ they would necessarily find that the company was negligent as charged; upon the other hand, should they find according to the appellants' contentions, then the company would be exonerated from all negligence in that regard, and, consequently, the respondent would not be entitled to a recovery on his account.

There are instances where the court can declare as a matter of law that the plaintiff's injuries are the result of an assumption of risk, that is, where all the evidence in the case shows that the danger which caused the injury was the negligence of the master, or the result thereof. For instance, in a case where the master employs a servant to dress a stone and furnishes him with the usual and ordinary tools with which that work is usually performed; and the servant is so engaged, supposes the servant should so use the hammer as to cause a chip from the stone to fly up and strike the servant in the eye and injure the same. In such a case clearly the servant assumed the risk of being so injured, for the injury was not traceable to the negligence of the master, and in such a case the court should so instruct the jury. But there is no analogy between that case and the case at bar as made by respondent. The rule governing the case would be more like that case if the platform furnished by the master upon which the stone was to be dressed was so weak as to properly support the weight, and the evidence shows the servant should tend to show that the master was negligent in furnishing the weak platform; and if while so engaged the stone the platform should give way and precipitate the servant to the ground and injure him, then in that case the court could not as a matter of law declare the servant's injury was due to an assumed risk; but such a case would be one for the jury to pass upon under proper instructions. In other words, I understand the law to be that a master, by accepting employment from the master, thereupon assumes all risks or dangers incident thereto, and if injured by any of ¹⁹⁹ them, then he is not entitled to a recovery against the master. While upon the other hand, the negligence of the master is not and cannot under any circumstances become an incident to the servant's employment. The moment the master's negligence enters into the causation of the servant's injury, then at that moment the negligence of the master withdraws the doctrine of assumption of risks, or, probably more correctly speaking, the doctrine

assumption of risk does not then apply to injuries caused by such conduct of the master: See cases previously cited. Where there is a conflict in the evidence, as here, it is error for the trial court to give a peremptory instruction to the jury to find for either party, but should submit the issues to the jury for determination under proper instructions.

We are, therefore, of the opinion that the circuit court erred in giving the peremptory instruction to find for the appellants.

3. Counsel for appellants also contend that respondent was guilty of such contributory negligence as should bar his right to a recovery.

This contention is based upon the facts that the record shows that respondent knew of the absence of the safety post mentioned, and that he was aware of the danger incident to its absence, for the reason that he complained to Sturges of its absence and told him that he did not like to work around the mill without the post. To that protest, Sturges replied that the other men did not object to working without it, and if he, the respondent, did not wish to do likewise he knew what he could do, meaning that he could quit the work.

It is upon that state of the record counsel for appellants contend that the court should, as it did by giving the peremptory instruction, declare as a matter of law that respondent was not entitled to a recovery.

In approaching this proposition it is well to bear in mind some of the elementary principles of law governing ²⁰⁰ contributory negligence. In the first place, ordinarily, contributory negligence is a defense which must be charged in the answer and established by the defendant by a preponderance of the evidence to the reasonable satisfaction of the jury. It is also equally well settled in this state that when the peril of the servant in the performance of his duty is augmented by the negligence of the master, and the servant, if knowing that the master has been thus negligent, and that such negligence has rendered the performance of his duty more hazardous, continues in the performance of that duty, the question of contributory negligence then arises, and not a question of assumption of risk: *Dakan v. Chase etc. M. Co.*, 197 Mo. 238, 94 S. W. 944; *Cole v. St. Louis T. Co.*, 183 Mo. 81, 81 S. W. 1138.

In the case of *Brands v. St. Louis Car Co.*, 213 Mo. 698, 112 S. W. 511, 18 L. R. A., N. S., 701, the court said: "It is the settled law of Missouri that the master is bound to use reasonable care and precaution to furnish his servant safe appliances with which to do his work and in keeping them in good order and condition, and the servant does not assume the risk of danger from the use of unsafe machinery

unless the defects are so glaring and obvious that a reasonably prudent man would not attempt to use them."

In *Mathis v. Kansas City Stock Yards Co.*, 185 Mo. 84 S. W. 66, it is said: "And if the servant knows, the exercise of ordinary care could know, that the appliances furnished are not altogether or reasonably safe, the servant is not obliged to refuse to use the appliances or quit the service of the master if he reasonably believes that by the exercise of proper care and caution he can safely use the appliances, notwithstanding they are not reasonably safe. And if he does use them, and exercises such care and caution, and is injured, the servant does not waive his right to compensation for injuries received in consequence, nor is he guilty of contributory negligence; but if the appliances are obviously so ²⁰¹ dangerous that it cannot safely be used even with care or caution, or, as it is sometimes said, if the danger of using it is patent, or such as to threaten immediate injury, then the servant is guilty of contributory negligence if he uses it, and the master is not liable notwithstanding his prior failure of duty."

"Mere knowledge of the danger in working with defective instrumentality will not defeat the action unless the danger was so glaring as to threaten immediate injury." *Deputy v. Chicago etc. R. R. Co.*, 110 Mo. App. 110, 84 S. W. 103; *Sheperd v. St. Louis T. Co.*, 189 Mo. 362, 87 S. W. 1007; *Dakan v. Chase & C. M. Co.*, 197 Mo. 238, 94 S. W. 944; *Weldon v. Omaha etc. R. R. Co.*, 93 Mo. App. 60, 75 S. W. 698.

The following are cases where plaintiff knew the danger and so testified, yet was permitted to recover: *Burkholder v. A. Leachen & Sons Rope Co.*, 217 Mo. 466, 117 S. W. 103; *Monahan v. Kansas City C. & C. Co.*, 58 Mo. App. 68; *Conroy v. Stock Yards Horse & Mule Co.*, 221 Mo. 700, 120 S. W. 766; *Conroy v. Vulcan Iron Works*, 62 Mo. 35.

Unless the only conclusion that can be drawn from the facts is that there was contributory negligence, the question is for the jury. So stated in *Campbell v. St. Louis & N. W. R. Co.*, 175 Mo. 161, 75 S. W. 86.

The latest case in this state to which my attention has been called which discusses contributory negligence and the law applicable thereto is the case of *George v. St. Louis etc. R. Co.*, 225 Mo. 364, 125 S. W. 196, where it is said: "But a servant incurs the risk of place or machinery, which, though dangerous, are not so much so as to threaten immediate injury, or where it is reasonable to suppose that they may be safely used or occupied with great skill and care, the knowledge of the defects on the servant's part will not bar a recovery. Negligence on the part of the servant in such cases does not necessarily arise from his knowledge of the defects."

defect, but is a question of fact to be determined by the jury from such knowledge and all other facts and circumstances shown by the evidence."

After a careful reading of this evidence we are unable to see how any disinterested, fair-minded man ²⁰² could say that the dangers from working about the mill without the post were so glaring and obvious that a reasonably prudent person would not attempt to work thereat, especially in view of the fact that numerous other employees had for years worked there under the same conditions, and that, too, without sustaining any injury on account of that peril.

There is still another reason why the court should not have declared as a matter of law that respondent was guilty of contributory negligence; and that is, when respondent complained of the absence of a fixed post and of the use of the device furnished by appellants in lieu thereof, he was told by Sturges that others worked with the appliances furnished and that if he did not want to do so he could quit.

In *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 297, 91 S. W. 460, it is said: "A servant has a right to agree to use implements which are not in perfect order, if he desires. To hold otherwise abridges unnecessarily the freedom of contract. On the other hand, courts should be careful about presuming that a servant accepts a particular risk. Unless the conclusion is inevitable, whether he freely consented to the risk or was constrained in some manner, such as the fear of losing employment, is a question for the jury."

In *Stephens v. Hannibal & St. Joseph Ry. Co.*, 96 Mo. 207, 9 Am. St. Rep. 336, 9 S. W. 589, this court said: "It is held in many cases where the servant knowingly incurs the risk of defective machinery, still, if not so defective as to threaten immediate injury, it is for the jury to determine whether there was negligence on his part." In that case, the following language from 2 Thompson on Negligence, 975, is also quoted approvingly: "If the master orders the servant into a situation of danger, and he obeys and is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even ²⁰³ where, like the servant, he was not entirely free to choose."

"There may be cases where the servant is ordered to do a particular act, and the order is so unreasonable, and the act so manifestly dangerous to life and limb, that the court, on the evidence, should declare the servant guilty of negligence in obeying the order of the master. . . . The general rule, however, is that the question is one for the jury. It cannot be said that the servant and master are on an equal foot-

ing, even where they have equal knowledge of the danger. *Stephens v. Hannibal & St. J. Ry. Co.*, 96 Mo. 207, 9 S. W. Rep. 336, 9 S. W. 589.

"If a danger is not so absolute or imminent that it must almost necessarily result from obedience to a master's order and the servant obeys the order and is injured, the master must not afterward be allowed to defend himself on the ground that the servant ought not to have obeyed the order": 1 *L. R. 10 Q. B. 330*, Master and Servant, sec. 439, p. 1241.

In the case of *Richmond & D. R. R. Co. v. Norman*, 10 Va. 167, 10 Am. St. Rep. 827, 4 S. E. 211, it is said that the third instruction of the defendant is to the effect that the employer is released from all liability for negligence, as long as he is aware of its continued existence, if the injured employee continued to work for him after he knew of the negligent and dangerous manner in which the employer allowed his business to be conducted. . . . It was palpably improper to sanction neither by reason, justice, nor law. The master and legal duty of every employer is to provide all means and appliances reasonably necessary for the safety of those employed in his employment. It is a cruel, an inhuman doctrine that an employer, though he is aware that his own neglect to furnish proper safeguards for the lives and limbs of those in his employment puts them in constant hazard of injury, is not to be held accountable to those employees who, serving him under such circumstances, are injured by his negligent acts and omissions, if the injured parties, ²⁰⁴ after themselves being cognizant of the peril occasioned by their employer's negligent way of conducting his business, continue in his employment and receive his pay, though they may be voluntarily compelled to remain by the stern necessity of earning their daily food essential to keep away starvation itself."

And the Indiana supreme court has directly passed upon the question. In the *Brazil Block Coal Co. v. Hood*, 100 Ind. 327, 27 N. E. 741, it is said, in dealing with the question that the plaintiff assumed the risk: "The complaint charges that he did this by the express command of the employer. But it may be said he need not have obeyed the command [that] he was free to quit the service and thus avoid the danger, and that by voluntarily continuing in the service after obeying the command, it must be presumed that he consented to take the additional risk. While in theory the employee whose master furnishes appliances which both know and intend to use, is at liberty to quit the service, and refuse to be subjected to the enhanced danger, we cannot close our eyes to the fact that the necessities of the struggle for existence strongly tend to deprive the employee of that theoretic independence and freedom of action. While the service is not compulsory in the sense that the employee can

pelled to work against his will, yet the very nature of the relation existing between the parties carries with it the irresistible inference of dependence upon the one side."

The same doctrine is declared by the supreme court of North Carolina in the case of *Mason v. Richmond & D. R. R. Co.*, 111 N. C. 482, 32 Am. St. Rep. 814, 16 S. E. 698, 18 L. R. A. 845, where a brakeman had been injured in obeying an order of his conductor, which violated a rule of the defendant company. The court said: "If the servant acts upon a well-grounded fear of losing his place, the reason of the rule would be met, and he should be declared free from culpability, unless plaintiff recklessly exposed himself to manifest peril, or ²⁰⁵ chose to subject himself to danger when another [and a] safe mode of discharging his duty was open to him."

Judge Holmes of the United States supreme court expressed a like opinion while upon the Massachusetts supreme bench in *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792, where he says: "It may be that a case like *Thomas v. Quartermaine* comes very near the line; because, if the servant is acting within the scope of his regular employment, or in obedience to special orders, the fear of losing his place may take away his choice so far that he cannot be said freely to take the risk upon himself."

While the respondent was not by direct words ordered to continue in the performance of his duties in the absence of the post, yet the language of Sturges, addressed to him when he complained that he thought it dangerous to work as a catcher without the post, was more emphatic than if he had so ordered respondent to continue his work. In substance, he told the respondent that others worked there without the post, and if he did not wish to do so he knew what he could do. That language of course meant that respondent must either continue his work without the post or he would have to throw up his job.

Now, if we apply the rule before stated, which is so well settled in this state and elsewhere, we must hold that respondent did not voluntarily assume the perils caused by the absence of the post, and that his conduct in remaining at his post of duty under the circumstances detailed in the evidence was not such as to have warranted the trial court in declaring as a matter of law that he was guilty of such contributory negligence as would bar his right of recovery. Under the evidence disclosed by this record, the court should have submitted, under proper instructions, the question of contributory negligence to the jury.

Because of the errors before mentioned, we are clearly of the opinion that the action of the circuit ²⁰⁶ court in giving the peremptory instruction on behalf of the appellant com-

pany was reversible error, and for that reason that court erly sustained respondent's motion for a new trial.

4. It is finally insisted by counsel for appellant Sturges that the action of the trial court in giving the peremptory instruction in his behalf was proper, even though it should have been conceded or held that said action of the court was erroneous in so far as it related to the appellant company, and for that reason the subsequent action of the court in granting a new trial as to him was erroneous.

This insistence is predicated upon the contention that Sturges was an employee and foreman of the appellant company, and that the respondent had charge of the milling department, and that the respondent's evidence fails to show that he was guilty of any positive wrong or misfeasance toward respondent. If that contention is sustained, then, clearly, Sturges would not be liable to respondent. The law is well settled in this state that the foreman is liable in damages for personal injuries sustained by a servant of the master in consequence of the foreman's nonfeasance or mere neglect of duty: *McGinnis v. Chicago etc. Ry. Co.*, 118 Mo. 347, 118 Am. St. Rep. 661, 9 L. R. A., N. S., 880, 90 Cas. 656; *Harriman v. Stowe*, 57 Mo. 93; *Edge v. Southwest etc. Ry. Co.*, 206 Mo. 471, 104 S. W. 90.

The difficulty with this contention of appellant Sturges is that the evidence not only tends to show that he was guilty of misfeasance toward respondent, but also that he was an independent contractor in manufacturing the iron bars mentioned in the evidence, and that in consequence of his negligence respondent sustained the injuries complained of. We will now discuss this phase of the case under three subdivisions:

First. There was evidence introduced which tends to show that Sturges ordered respondent to perform his duty as catcher or quit his job, when informed of the existence of the peril caused by the absence of the protecting post mentioned in the evidence. So ordering ²⁰⁷ respondent to go to such a place of danger, if it was a dangerous place, was a positive wrong or misfeasance on the part of Sturges, even though it be conceded that he was not an independent contractor, but simply an employee representing the appellant company in the mill department. For that wrong, if wrong was, he is jointly liable with the company to respondent for the injuries sustained by him in consequence thereof: *Harriman v. Stowe*, 57 Mo. 93; *Edge v. Southwest etc. Ry. Co.*, 206 Mo. 471, 104 S. W. 90; *McGinnis v. Chicago etc. Ry. Co.*, 118 Mo. 347, 118 Am. St. Rep. 661, 9 L. R. A., N. S., 880, 90 Cas. 656.

Second. If Sturges was an independent contractor in manufacturing the bars mentioned, as there was evidence tending to show, then he would be liable to respondent if the jury should find that it was true, as the evidence further tends to

to prove, that the piles of iron of which the billets were made were negligently constructed.

Third. If Sturges was such independent contractor, and he negligently failed to trim the ends of the bars when needed, as there was evidence tending to show, and in consequence thereof the bar which injured respondent caught in the rollers, and in consequence thereof he was injured, then he would be liable in this cause. This would be true whether the shears were out of order or not, for the reason that he had no right to run a bar in that condition through the rollers.

In passing it might be well to state that, if Sturges was an independent contractor, as contended by appellant company, then it would not be liable to respondent for any injuries sustained by him in consequence of the facts mentioned in subdivisions 2 and 3, for the reason that they were caused by acts over which the company had no control.

We are, therefore, of the opinion that the court properly granted a new trial as to Sturges also.

For the foregoing reason the judgment should be and the same is hereby affirmed.

All concur.

One of the Duties Which an Employer Assumes toward his employee is to exercise reasonable care and diligence to provide a reasonably safe place at which the employee is to work: *Hume v. Fort Halifax Power Co.*, 106 Me. 78, 138 Am. St. Rep. 332.

The Liability of a Master to His Servant for Injuries Resulting from Defective Machinery and Appliances is the subject of a note to *Brazil Block Co. v. Gibson*, 98 Am. St. Rep. 289; and see *Peterson v. Merchants' Elevator Co.*, 111 Minn. 105, 137 Am. St. Rep. 537; *Noble v. John L. Roper Lumber Co.*, 151 N. C. 76, 134 Am. St. Rep. 974.

The Right of an Employee to Recover for Injuries Received While Obeying the Orders of the Master is considered in the note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Lowe v. Southern Ry.*, 85 S. C. 363, 137 Am. St. Rep. 904, and see cases cited in the cross-reference note thereto.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

BECK v. BECK.

[77 N. J. Eq. 51, 75 Atl. 228.]

HUSBAND AND WIFE—Gifts Between—Presumption.—The husband and wife in humble circumstances conducted saloon business in common, and she kept boarders, while he worked the part of the time as a laborer, she taking all the money realized from the business, and he turning over to her all his earnings, it will not be presumed that he intended a gift of the moneys so received. (pp. 535, 541.)

HUSBAND AND WIFE—Joint Earnings and Funds.—The wife, among people of humble circumstances, acts as treasurer of the family, receiving and hoarding the income from all sources, including the wages of the husband, it will be presumed that the intention is to have and hold such money, and any property purchased therewith, jointly, whether the title to property so purchased be taken in the name of one or both of them. (p. 540.)

Fred Dieffenbach, Jr., and Mr. Squier, for the complainant.

August Ziegener and J. Merritt Lane, for the defendant.

52 GARRISON, V. C. The parties are Germans and were married in 1885, at which time the man was employed for small wages in a brewery and the woman was a domestic servant. He was then aged twenty-six and she was twenty. They went to live in modest quarters in a flat in New York, and he gave to her each week all of his wages earned in the brewery. They only paid eight or ten dollars a month rent. The husband had about \$350 at the time of their marriage, and the wife says that she had \$100, although the husband denies this.

Still living in New York, they next moved into little quarters, where they paid \$12 a month rent, and continued there until 1892, when they moved to a house in which there was a saloon, at Fifty-seventh street, between Second and Third Avenues.

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Third avenues. Here the rent was either twenty-five or twenty-seven dollars a month.

In the place in which they lived immediately before they moved to Fifty-seventh street, and in Fifty-seventh street, there were boarders. All told, some boarders were kept during a period of about four years.

The husband opened a saloon in the premises on Fifty-seventh street, having purchased the business for \$1,300, \$600 of which he paid in cash, and gave a mortgage for the \$700 balance. Of this \$600 the wife contributed \$200, and, subsequently, got it back by taking it from time to time out of the earnings of the business.

⁵³ The earnings from this saloon went partly, if not wholly, to the wife, as did also all of the money that was taken in from the boarders. This continued until 1895, when they sold this business for \$1,300, the money going to the wife. The \$700 mortgage was taken over by the purchaser, so that what they got was clear.

They then purchased a saloon business at Morrisania, New York, he putting up \$450 and the wife \$300, which \$300 was subsequently taken back by her out of the earnings of the business. The license fee for this saloon was raised from \$200 to \$800, and this was more than the business could stand, and they only stayed there for ten months, and practically lost the money that was put into that business. The fixtures of this saloon, when they took it, were encumbered by a mortgage held by one Stevenson.

They then lived in New York, not carrying on any business for some months, until, finally, in August of 1896, the husband met a friend who told him that he owned a property in Jersey City which had a saloon in it, and the husband came over to see it, and subsequently took his wife to see it, and they determined to take it. They purchased this property for \$2,300, all cash. There is a dispute between the parties as to how this sum was made up. It is undisputed that \$400 was borrowed from a Mrs. Opell, and \$200 from the sister of the husband. The husband's testimony is that he furnished \$600 and his wife \$1,100. Her testimony is that she furnished the whole \$1,700 that was not borrowed as above stated. They both agree that whatever money she furnished was what she had saved out of keeping boarders and the receipts of the previous saloon business, and his earnings given by him to her from time to time, as he always had given them to her up to this time, and continued to do down to the time of the separation between them, which will hereafter be described.

They immediately moved over to this property, No. 169 Columbia avenue, Jersey City, and opened a saloon. At first, the license was in the name of the husband. The wife at one time sought to have the license put in her name; but by reason

of a rule of the excise commissioners of Jersey City forbids ⁵⁴ the issuance of licenses in the names of women, this was impossible, and, as the complainant r to the excise commissioner, that it made no difference name the license was, it continued to be taken in his

The saloon business, in 168 Columbia avenue, was on the first day of December, 1896, and did not at first enough profit to support the family. The husband, then sought work elsewhere, and secured a position at the A Lead Pencil Company, at Hoboken. His hours there from 7 in the morning until 6 at night, and he has been there from 1896 to date. His wages began at \$5.50 per week and have gradually advanced until he is now receiving \$10.00 per week. All of these wages were turned over every week to him to his wife, saving the following amounts, which he turned back for his personal expenses: At first, \$1.25; then \$2.00; and finally, \$3 a week.

The man would go to his work, as above stated, at 7 o'clock in the morning, after having first opened the saloon at 6 o'clock. He would return about 6:30 and attend to the saloon while his wife got her supper, and would then be in and out of the saloon until it was closed. During the rest of the week the wife and the older children ran the saloon.

As the children grew up and became able to earn wages, they went out to work and turned their wages over to the wife.

The \$400 borrowed from Mrs. Opell and the \$200 borrowed from his sister Lizzie Beck were repaid to them out of the earnings of the saloon business—or out of those plus his other earnings and the earnings of the children, because they were mingled.

This practice of mingling the earnings, and the wife keeping all the money, continued down to the time of the dissolution of the parties on the 8th of November, 1908. They had been living unhappily together for some little time before this, and finally quarreled, and she refused to permit him to enter the house, and since that time has kept him out.

The saloon business was sold in December, 1907, for \$1,000, which was paid to the husband and which he handed over to the wife. Later, at Christmas, she gave him \$500 in cash.

⁵⁵ About five years after they opened the saloon on the 1st of July, 1901, a vacant lot at 39 Nelson street, which adjoined the saloon property on the rear and to which access could be gained to a street, was purchased in the wife's name for \$625, which was paid in cash out of the joint hoard in the hands of the wife.

On the 18th of December, 1905, 171 Columbia avenue was purchased, and \$1,500 cash was paid out of the same fund, and the deed taken in the wife's name. On the 4th of December, 1906, No. 169 Columbia avenue was purchased out

earnings of the business, and \$2,200 cash was paid for it out of the same source, and the title was taken in the wife's name.

The husband testifies, with respect to the first purchase of property, namely, 168 Columbia avenue (that in which the saloon was), as follows: "We spoke together before we bought the house, and my wife says 'It is better I bought the house in my name on account of the mortgage that David Stevenson holds in Morrisania for that saloon.' The mortgage was about \$900, and she says 'It is better I buy the house in my own name on account of the \$900 mortgage of David Stevenson,' and she says 'It belongs just the same to you and to me.'"

She denies that she suggested that the title be taken in her name on account of the Stevenson mortgage, and I think it likely that she is telling the truth with respect to this, because the Stevenson mortgage was not given by Beck, and he was not in any way liable upon it. It is, of course, possible that people as ignorant as these people are may have thought that they were liable on a mortgage which was on the fixtures when they bought them. The wife does not give us what actually happened at this time, but here, and throughout the case, tries to suggest that the man was drunken, shiftless and lazy, and that she was the earner, and that he recognized this and acquiesced in her going into business by herself for herself. This is opposed by every proven fact in the case. The man, from the earliest record we have of him to date, has been hard-working and saving.

56 There was practically no difference in the family custom from the beginning of their married life to the time of the separation. Whatever he earned in outside occupations went to the wife; the money from each saloon they ran was taken charge of by the wife; the children's earnings likewise went to her, as did the money paid by the boarders.

A curious and illuminating incident occurred during the cross-examination of the husband: The wife's lawyer was endeavoring to show, by subtle and clever methods, that a distinction existed between the way the parties treated the business in Jersey City and those theretofore carried on elsewhere. He said to Beck: "When you were up at Morrisania you ran it [the saloon] yourself?" And the answer was, "Yes, sir; no, me and her ran it all the time."

With respect to the vacant lot on Nelson avenue, it appears that the husband agreed that that should be bought to benefit the property that they already had; and when his wife consulted him about it, he agreed that it should be bought. He denies that he knew of the purchase of the other two pieces of property until after they were accomplished facts. The wife and one of the children testify that he did know, because they told him. They testify that he said, when the mother

spoke of buying this property, or these properties, "All do as you like."

Upon this state of facts, the contention of the respondent is, on the part of the complainant, that since the money was either earned by him, or by a business belonged to him, or by his minor children living with him, or by his wife in keeping boarders at his home, he is entitled to the property purchased with such money; on behalf of the defendant, that since the properties stand in her name, and were purchased with money which was in her hands at the time of the purchase, she must be held to be the owner thereof. In other words, each of the parties claims the ownership of the property to the exclusion of the other.

In the case of *Fretz v. Roth*, 68 N. J. Eq. (2 Robb. 59 Atl. 676, I had occasion, in considering one of the questions which I thought involved in that suit, to investigate the state of the law with respect to the ownership of money earned by the husband and by the wife in a nonindependent business and accumulated in her hands. This case was reviewed in the court of errors and appeals—70 N. J. Eq. (4 Robb. 764, 64 Atl. 152—but not upon any point touching the subject matter now being dealt with.

The reversal was upon the ground that since there was no direct conveyance from the husband to the wife, the presumption of gift was not overcome by the proofs and there was no legal evidence of a trust. The wife's contention was that the money arising as aforesaid from her husband's earnings and her own in a nonindependent business, being in her hands, she owned the same, and the original purchase of the property and estate having been made with such money, the property was hers, even though the title was taken in her husband's name. My examination into this subject was to ascertain whether that contention was sound, and I reached the conclusion that it was not, and upon this point the decision of the court of errors and appeals, *sub silentio*, would seem to have been correct. Because, if this contention was sound, then she would be the equitable owner of the property from the beginning, and the subsequent deed of the husband to her would not be evidenced, as the court of errors and appeals held it to be, as a gift to her, but would have been merely the transfer of legal title to the equitable owner. Unless, therefore, the court is correct in holding that the moneys were his and the equitable and legal title his before he deeded to her, both the court of errors and appeals and I erred as to what the point of the case was, because we each conceived the point to be whether he gave to her, or did not intend a gift. As before stated, the property, by reason of the source of the money, was already in equity hers, his subsequent deed could not be considered in any view as a gift.

I made my investigation as to the law relating to the ownership of moneys accumulated as aforesaid with as much care as possible, and the conclusions which I then reached have since been confirmed by my experience in many similar cases.

My views are so fully expressed (at page 528 et seq.), and the authorities which I was able to find are so fully cited and quoted in that opinion, that I shall not attempt to restate at any length my view, as a reading of that case will disclose the same.

⁵⁸ Among people of the class of which these people are—the man a laborer, and the woman a servant—I cannot possibly believe that it is proper to find that the usual customary habit of such people, which is to constitute the wife the treasurer and to turn all money from every source over to her, should be held to constitute a gift of such moneys to her.

The court of errors and appeals, in the case of *Farrow v. Farrow*, 72 N. J. Eq. 421, 129 Am. St. Rep. 714, 65 Atl. 1009, 11 L. R. A., N. S., 389, 16 Ann. Cas. 507, held that “a gift of personal property from husband to wife must be clearly proved. There must be clear and convincing evidence of a delivery of the property by the husband with the intention of divesting himself of all dominion and control of it, and of vesting title in the wife.” I cannot find from such custom or habit any such intention as the court in the above case just cited requires to be found to constitute a gift. I do not find that the husband intended to divest himself of all dominion and control of such moneys.

I do find an intention of a character hereafter defined and enforced.

In the case at bar the wife never engaged in any business apart from her husband. All the money that went into the purchase of these properties was either earned by the wife in keeping boarders or by the husband in whatever business he was engaged in, or in saloons jointly attended to; and the question to be determined is whether the fact that the title to the real estate thus purchased was taken in the wife's name is determinative of the question.

In *Fretz v. Roth* it was held to be such, because, as before pointed out, the court of errors and appeals found that the husband, having conveyed directly to the wife, there was no evidence of any kind which rebutted the presumption of a gift, and the principle of improbvidence did not apply. But this case is clearly distinguishable from *Fretz v. Roth*, because the conveyances to the wife in every instance here were from strangers and not from the husband. No citations are needed for the principle that presumptions of a gift from husband to wife may be rebutted.

There is no doubt in my mind that among the class are low wage-earners, where the wife is almost invariably the treasurer, and all money from every source is taken over by her, there is no intention to be inferred therefrom that she is the sole ⁵⁹ owner of all such money. On the other hand, it will invariably be found (and has in many similar cases been found by me) to be the fact that such people intend the wife to have an interest in the money thus placed in her hands, or in that into which such money is put. And I believe to be legally proper, because while the husband does not, in handing the money to the wife, intend to make it over to her of all of it, he undoubtedly intends that she should benefit therefrom; and while he does not specifically discuss it with her concerning the matter, there is, I think, a perfectly clear implication from their conduct that they are each jointly entitled to what is thus jointly made, saved and invested. And I think it perfectly clear, as I set forth more at length in the opinion in the Fretz case, that the real intention in such cases is a joint hoard, and that when real estate is purchased with such money, and title taken in the wife's name, I believe the perfectly clear intention of the parties is that the property should be held by the entireties.

They undoubtedly intend, with respect to such money, to hold such real estate, to enjoy it in common during their lives, and to have it go to the survivor at death. And I know of no reason why a court of equity, when called upon to pass upon this question, should not give that intention effect.

One cannot read the testimony in this suit without reaching the conclusion that this man and wife were laboring together for a joint purpose, to accumulate what they could for the future of their other. There is no doubt that the husband's strict common-law right is to take all of his earnings and all of the earnings of his wife and children, and, subject to his duty to support her and them, to do as he pleases with the balance. There is, similarly, no doubt that if a husband passes personal property to his wife it is presumably a gift to her. But I believe beyond peradventure true that, among people of the husband's class, the usual course is neither one of these two. The husband does not even keep his own earnings. All money, from whatever source, goes to the wife. And all through this suit it will be found that the husband speaks of the wife as "the money," "that the money was given to her to save," "he never calls her to account for the money that she receives personally from the boarders, or from any other source," "himself." ⁶⁰ I believe that it would be rank injustice to hold, in such cases, that all of the money, as against the wife, belonged to the husband; or that all of the money, as against the husband, belonged to the wife. I believe, as above stated, that it is the thorough understanding of such people

therefore their intention, that such moneys are theirs jointly; and wherever it is possible for a court of conscience to give effect to this understanding and intention, I think it should do so.

I, therefore, in this case find that the presumption of a gift of the whole of this property to the wife is rebutted, and that it was the intention of the husband at the times that he permitted his wife to have all of the money, and the property in which the money was put, to vest her jointly with himself with an interest therein; and I therefore find that the properties in question are held by the wife as if she and he held by entireties, and will advise a decree accordingly.

The form of the decree will be settled upon notice. In determining upon the form the case of *Duvale v. Duvale*, 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440, should be consulted, since somewhat similar relief was therein granted.

If, by reason of the nature of the equity found in favor of the complainant an amendment of his bill is necessary, his counsel should move for and obtain leave so to amend.

Where a Husband purchases a note and mortgage with his own money, has them assigned to himself and wife jointly, and retains possession of them and receives the interest until his death, this amounts to a gift of a one-half interest therein to the wife: Abegg v. Hirst, 144 Iowa, 196, 138 Am. St. Rep. 285. Where the purchase money is paid by the husband, who causes the conveyance to be made to his wife, the transaction is presumed to be a gift by him to her: Stonecipher v. Kear, 131 Ga. 688, 127 Am. St. Rep. 248. Where land is purchased by husband and wife jointly, but the conveyance is made to her alone, and afterward the property is sold to one who executes deferred payment notes to the husband and wife jointly, the husband's estate is prima facie entitled to one-half the money due thereon: Brown v. Orr, 110 Va. 1, 135 Am. St. Rep. 912.

PENNSYLVANIA RAILROAD COMPANY v. KELLEY.

[77 N. J. Eq. 129, 75 Atl. 758.]

MANDATORY INJUNCTIONS are Barely Granted before final hearing or before the parties have had full opportunity to present all the facts in such manner as will enable the court to see and judge what the truth may be. A preliminary mandatory injunction will be ordered only in cases of extreme necessity. (p. 544.)

MANDATORY INJUNCTIONS—Extreme Necessity—Dangerous Building.—The existence and maintaining of a brick building in so dilapidated a condition that it is likely at any time to fall upon the adjoining right of way or passing trains of a railroad company to the danger of the public, presents such a case of extreme necessity as warrants a preliminary mandatory injunction for its removal either by tearing down or repair. (p. 545.)

NUISANCE—Public—Dangerous Building.—A building by reason of its inherent weakness or its dilapidated condition liable to fall into a highway and injure passers-by or persons on it is a public nuisance. (p. 546.)

NUISANCE—Private—Dangerous Building.—A building by reason of its inherent weakness or its dilapidated condition liable to fall and injure adjoining property, is a private nuisance. (p. 546.)

INJUNCTIONS—Bond on Issuance of Preliminary.—On the issuance of a preliminary mandatory injunction requiring removal of a building, it is appropriate to require a bond conditioned to pay the defendant such damages as he may sustain if it is ascertained the complainant was not entitled to the writ. (p. 546.)

Application for preliminary mandatory injunction. Bill on bill and affidavits annexed, and affidavits in reply.

Gaskill & Gaskill, for the complainant.

John H. Hutchinson, for the defendants.

¹²⁹ **LEAMING, V. C.** The bill is filed to compel defendant to tear down a certain building which is adjacent to the railway of complainant company. The bill alleges that the building is in such condition that the lives of persons traveling over complainant's railway are imperiled by the probability that the building will collapse and fall in from above on a passing railway train.

A hearing has been had on the bill and annexed affidavits and affidavits filed in behalf of defendant Kelley at the foot of an order to show cause why a mandatory injunction should not be issued restraining defendant from longer maintaining the building in its present dangerous condition.

The bill avers that the line of railway adjacent to the building is being operated by complainant as a common carrier of passengers and freight; that the right of way of complainant was acquired in the year 1831 from one Snowden, who, at that time, also owned the adjacent land on which the building now complained of stands—the building having been erected by a vendee of Snowden in the year 1833; that the railway was constructed and in operation; that the line of railway of complainant at the point opposite the building complained of is depressed twenty-two feet seven inches below the level of the adjacent land, and the adjacent building is laterally supported by buttressed stone walls constructed by the company for that purpose; that the building of which complaint is now made is distant twenty-three feet two inches from the gauge line of the railroad track; that the building is a three-story brick building with an attic, and so that the side wall of the building extends in a line parallel with the tracks of the railway a distance of sixty-two

cluding a brick shed annex; that the main building is forty-seven feet above the level of the ground, and the brick shed annex thereto is twenty-three feet in height. These several averments of the bill are not denied. The bill further avers that the building is so structurally defective that it is likely to collapse at any time and will fall on the tracks of the railway. The condition of the building is set forth in the bill in specific detail. It is averred that the foundations of the building were improperly constructed and have sunk and given way under the weight of the building, and large cracks exist in the brick wall of the building next to the railway which extend the entire distance between the windows of the second and third stories; that in the rear of the east wall a large crack extends two-thirds the height of the building; that a long diagonal crack extends across the front of the building between the window frames of the second and third stories; that these cracks show in places a separation of bricks and mortar along the lines of joints, sometimes perpendicularly and sometimes horizontally, and in other places the cracks show that the bricks have broken; that the cracks vary from mere ¹³¹ separation of bricks and mortar to crevices of at least three inches in width; that the rear third-story window on the side of the building overlooking the railway tracks protrudes five or six inches from perpendicular, and is so weakened by a large crack between it and the second-story window below it, that the upper corner of the building is likely to drop at any time; that the whole side of the building overlooking the railway is so much out of the plumb as to overhang the foundation wall and so weakened by cracks as to be in danger of falling at any moment, and that the condition of the building grows noticeably worse from week to week. The bill also sets forth that in the year 1889 the building became so unsafe that the common council of the city of Bordentown, on the report of the building inspector of that city, declared the building unsafe and required it to be strengthened, but the city now refuses to take any present action in the matter; that complainant now employs a watchman to guard the railway track opposite the building by day and another watchman by night, to warn approaching trains in the event of the collapse of the building. These several averments of the bill are fully verified by affidavits annexed thereto, and the affidavits of the engineers touching the structural weakness of the building and its danger of collapse disclose that the engineers have adequately acquainted themselves with the facts concerning which they have testified and are well qualified to testify touching the matters stated by them.

Defendant Kelley has filed and read two affidavits in defense of the claim of complainant. In these affidavits no

denial is made of any of the averments of the bill and accompanying affidavits, except by a general statement of the affidavits that "the danger of collapse is not imminent." This affidavit is made by Charles H. Fennimore. After stating that he is engaged in business in Bordentown as tractor and builder and is "well acquainted" with the building in question, he says: "While the property is in need of some repair, yet it is not in such condition that it cannot be repaired; that while the building might collapse if not repaired yet the danger of collapse is not imminent. The danger to the building is caused to a great extent and continues to be caused by the increase in large traffic due to the growing and continually ¹³² increasing business of the road company. . . . The trains cause the building to shake and vibrate, thereby causing the damage to the building."

The other affidavit is made by Joseph M. Higgins, also a contractor and builder of Bordentown. He states: "That he is well acquainted with the property known as the Cain property; he knows the three-story brick building thereon erected can be repaired so that it would be perfectly safe and would be strong and lasting for many years. That the building at the present time is cracked in some places and that the condition of the building at the present time is due to the shaking and vibration caused by the trains of the railroad company which run by it through the cut and adjoining the said building on the south; that the traffic of the railroad has increased greatly in the last thirty years both in amount and weight and continues to increase from time to time." The other defendant is mortgagee of the property. She has made no opposition to the relief sought.

The accepted rule in this state touching mandatory injunctions, as stated by our court of errors and appeals in *Wright v. Schnitzius*, 45 N. J. Eq. (18 Stew.) 178, 184, is that a mandatory injunction "is rarely granted before final hearing or before the parties have had full opportunity to present all the facts in such manner as will enable the court to see and judge what the truth may be. It is always granted cautiously, and is strictly confined to cases where the remedy at law is plainly inadequate. A preliminary mandatory injunction will be ordered only in cases of extreme necessity. Substantially the same rule touching preliminary mandatory injunctions is stated by Chancellor Runyon in *Carroll v. Michenor*, 37 N. J. Eq. (10 Stew.) 6, and quoted with approval, in *Hodge v. Giese*, 43 N. J. Eq. (16 Stew.) 11 Atl. 484, as follows: "The court is always very reluctant to grant a mandatory injunction on an interlocutory application, ¹³³ but where extreme or very serious damage would ensue from withholding it, as in cases of interf-

with easements, or other cases demanding immediate relief, it will be granted."

In the present case there is not in my mind the slightest doubt touching the truth of the averments of the bill to the effect that the safety of the traveling public is seriously endangered by the maintenance of the building in its present condition. The affidavits filed in behalf of defendant, when considered as affidavits intended to meet the averments of the bill, may be said to practically admit the danger. One of the affidavits, without denying the existence of a present danger, simply says that the building can be made perfectly safe by repairs. The other affidavit, without denying the existence of the detailed structural weakness of the building, as pointed out by the bill and its accompanying affidavits, says: "That while the building might collapse if not repaired, yet the danger of collapse is not imminent," and then proceeds to point out that the present weak condition of the building is due to the shaking of the building by the traffic over the railway, and that this traffic is constantly increasing. It may therefore be said that there is no substantial denial of the truth of any of the averments of the bill except the single averment to the effect that the building cannot be made safe by repairs.

It is a matter of little concern at this time at whose ultimate expense this threatening danger shall be removed. Complainant company is compelled to operate its road and to supply to the public safe means of transportation. The maintenance of this building by defendant Kelley in its present condition undoubtedly renders it impossible for the railroad to be operated with safety to the public. The precaution of maintaining watchmen at the point of danger is wholly inadequate, for the collapse of the building is most likely to occur at the moment a train is in the act of passing, and thereby causing the very vibrations which are said to have created the structural weakness of the building. The primary consideration at this time is the safety of the public, and that safety must be secured at once. That safety can be secured at once in but one way—the immediate removal of the source of danger. Whether the danger is removed ¹³⁴ by adequate repairs to the building or by the building being wholly torn down is at this time immaterial, but the danger must be removed at once. The conditions presented are clearly those of extreme necessity. As owner of the dangerous building, the primary duty of the removal of the danger falls on defendant Kelley. His refusal to remove the danger calls for the exercise by this court of its undoubted power to compel him to do so. It is well recognized that a building which, by reason of its inherent weakness or its dilapidated condition, is liable to fall into a highway and

injure passers-by or persons lawfully thereon, is a nuisance: *Joyce on Nuisances*, sec. 238. Such a building is also a private nuisance where it is liable to fall and injure adjoining property: *Timlin v. Standard Oil Co.*, 54 H. 7 N. Y. Supp. 158. Complainant is equally entitled to an injunction against the maintenance of the structure here in question, whether it be viewed as a private nuisance or as a public nuisance from which complainant suffers private, direct and special injury.

As the material facts are not in substantial dispute, the operation of complainant's railway cannot be continued with safety to the public or with safety to complainant's property without the immediate removal of the danger which is occasioned by the continued maintenance of defendant's building in its present condition, I will advise an order for the issuance of a mandatory injunction directing defendant immediately to remove the building or immediately to repair the building in such manner that all danger of its falling on the track of complainant's railway may be removed. Should defendant assume to remove the danger by repairing the building, the adequacy of the repair so made may be appropriately inquired into at any time.

Under the circumstances presented, I think it appropriate to require complainant, before the writ issues, to execute a bond to defendants, in an amount to be ascertained at the time the order for the writ is signed, conditioned to pay to defendants such damages as may be sustained by them by reason of the issuance of the writ, in the event of its being set aside, ascertained at final hearing, or on appeal in the event of appeal, that complainant was not entitled to the relief at the time awarded.

As to the Nature of Mandatory Injunctions, see the note to *M. Case*, 20 Am. Dec. 389; *Lawrence v. Ingersoll*, 88 Tenn. 52, 10 St. Rep. 870; *Orne v. Fridenberg*, 143 Pa. 487, 24 Am. St. Rep. 567; *Allen v. Stowell*, 145 Cal. 666, 104 Am. St. Rep. 80; *Lawrence v. R. R. Co. v. Pittsburg etc. Co.*, 111 Ky. 960, 98 Am. St. Rep. 447. A mandatory injunction is a drastic remedy and ought to be applied with caution, but in cases proper for its exercise it is not to be withheld merely for the reason that it will cause pecuniary loss: *Stewart v. Finkelstone*, 206 Mass. 28, 138 Am. St. Rep. 10. For the purpose of determining whether the effect of an injunction is mandatory or prohibitory, the result of the enforcement of it on the defendant must be considered; and if it compels him to actively to surrender a position which he holds and which, under the facts alleged by him, he is entitled to hold, it is mandatory. *Superior Court*, 155 Cal. 15, 132 Am. St. Rep. 56. Where the owner of land adjoining a private court or right of way consents to erect a building, and projects his foundation beneath such court, and is notified by the owner of the fee after the foundation has been put in, but before the superstructure is built, that no enlargement will be allowed, nevertheless proceeds with his building.

is compelled to project the foundation as essential to its support, a mandatory injunction will issue for the removal of the foundation, though it may impose expense on the defendant disproportionate to the apparent benefit to the plaintiff: *Curtis Mfg. Co. v. Spencer Wire Co.*, 203 Mass. 448, 133 Am. St. Rep. 307.

CITY OF BAYONNE v. BOROUGH OF NORTH ARLINGTON.

[77 N. J. Eq. 166, 75 Atl. 558.]

HIGHWAYS—Ownership of Fee.—A person who owns lands across which a highway has been constructed owns the fee simple of the highway, subject only to the public easement. (p. 549.)

HIGHWAYS—Public Easements in Highways Extend not only to the use of the surface of the earth for the purposes of passage, but also to the portion which lies beneath the surface whenever it is needed for water-pipes, gas-pipes or any other legitimate street use. (p. 549.)

HIGHWAYS—Rights of Owner of Fee.—In the absence of an interfering statute or ordinance the owner of the fee has a right, without a permit from anyone, to lay pipe-lines under a highway, so long as he does not unduly interfere with public travel or with the subsurface use to which the highway, as such, is subject. (p. 549.)

EQUITY.—The Validity of Municipal Ordinances will not be passed upon by a court of equity, that being the peculiar province of the courts of common law. (p. 550.)

LIMITATIONS—Highways.—A Municipal Corporation has No Right to impose conditions in an ordinance regarding the use of its highways which do not tend toward the protection of the interest which it has as guardian of the public easement in its highway. (p. 550.)

MUNICIPAL CORPORATIONS.—Guarding the Potable Waters of the State is no part of the duty of a municipal corporation nor within the power of its chief executive. (p. 551.)

MUNICIPAL CORPORATIONS—Highways—Permit to Cross by Pipe-line.—The denial of a permit to the owner of the fee of a highway to cross it by pipes or pipe-lines beneath the surface except upon conditions which the borough had no right to impose, and which in no way tend to protect its interests, must be held a mere capricious exercise of a discretion, and an injunction may issue to restrain the interference of the borough with the laying of such pipes, notwithstanding the denial of such permit. (p. 551.)

MANDAMUS.—Exercise of Discretion by municipal officers cannot be compelled by mandamus. (p. 551.)

INJUNCTIONS.—Illegal and Excessive Use of Authority may be restrained by injunction. (p. 551.)

Gilbert Collins, for the motion.

John M. Bell and Warren Dixon, contra.

¹⁶⁶ HOWELL, V. C. This suit was brought by the city of Bayonne and the New York and New Jersey Water Company to restrain the borough of North ¹⁶⁷ Arlington from interfering with the action of the water company in laying of water-pipe across three streets of the borough. The company is under contract with the city of Bayonne to furnish it with a supply of potable water, and in order to do so, it finds it necessary to lay a pipe-line from the Passaic river across the borough and thence to Bayonne. It has acquired title to or a right in a strip of land running across the borough, and by virtue of its ownership of land on both sides of the three streets in question, it claims to own the fee in the streets subject only to the public easement therein, or, in other words, it claims the title to and possession of the streets adjacent to its pipe-line route in so far as the same does not in any manner affect the public user, and the consequent right to lay its water-pipes under the surface thereof. There is an ordinance of the borough passed in 1900 by which it is ordained that no person or corporation shall dig up or open over or through the public places, avenues, streets or highways of the borough, or open the same at any place, at any time for any purpose whatever without a permit so to do first obtained and signed by the mayor, and attested by the clerk of the borough, and requiring every person who desires to so dig up or open under or through said places to apply to the mayor in writing describing the place or street for which the permit is desired, and the object of opening the same, and providing that the mayor shall have power to grant a permit for such purpose whenever in his judgment it might seem proper. It further provides for inspection of the work under the supervision of the mayor, and directs that the expense thereof shall be paid by the applicant. On January 4, 1910, the water company made three separate applications to the mayor of the borough for permits to dig up and open the three streets for the purpose of laying its water-pipe across and under the same at the points and in the manner shown in a plan which accompanied the applications. The applications stated that the pipe would be of steel, thirty inches in diameter, and would be laid more than three feet below the surface of the avenue, in such manner as not to interfere with the public travel or with any present constructions in or under the avenue, which application was accompanied ¹⁶⁸ with the fee required by the ordinance. On January 14th, the mayor of the borough delivered to the water company a writing in which he stated that he had come to the conclusion that he could not grant the permit requested for two reasons:

"(1) Because the resolution of the city of Bayonne which you claim to be working, which provides that the capacity shall be of an estimated capacity sufficient for the present

needs and for other requirements of the city of Bayonne, as well as for the proposed service to the borough of Richmond (New York) clearly indicates to my mind that the city of Bayonne has a sufficient supply of water for its present and future needs, and that the real object of the contract entered into with Bayonne for an alleged emergency supply is to enable you to convey potable waters of this state through the said pipe-line across the river road, Kearny avenue and Schuyler avenue to the city of Bayonne and thence to the Kill-von-Kull and under the same to the borough of Richmond in the city of New York and state of New York, contrary to the laws of this state, and it is my duty as the mayor of the borough of North Arlington to see that the laws of the state are faithfully executed; (2) Because your company has entered into a contract to sell water to the Roman Catholic diocese of Newark within the borough of North Arlington without the consent of the corporate authorities of said borough and without the consent of the corporate authorities to the incorporation of your said company or to the laying of pipes by it beneath the surface of the public roads and streets of said borough, contrary to the laws of this state."

The water company then filed its bill to restrain the borough from in any manner interfering with its work in the laying of its water-pipes under and across said highways, and offering to submit to any reasonable regulation for the doing of the work that this court might prescribe. On the return of the order to show cause why the injunction should not issue, the defendants (the borough and its mayor) appeared and filed an answer, the burden of which is a repetition of the two reasons given by the mayor for declining to permit the water company to lay its pipe-line across the three streets in question. On the argument, it was likewise objected that if the complainants had any remedy whatever, it was by way of mandamus and not by injunction.

There seems to be little doubt but that a person who owns lands across which a highway has been constructed owns the fee simple of the highway, subject only to the public easement, and ¹⁰⁰ that the public easement extends not only to the use of the surface of the earth for purposes of passage, but also to the portion which lies beneath the surface wherever it is needed for water-pipes, sewer-pipes, gas-pipes, or any other legitimate street use. It was so held in the case of *Winter v. Peterson*, 24 N. J. L. (4 Zab.) 524, 61 Am. Dec. 678, a case cited by complainants' counsel, and it is so recognized generally by the bar and bench: *Borough of Brigantine v. Holland Trust Co.*, 37 Atl. 438. If there was no ordinance or other interfering statute, it would seem as if the water company had a right without a permit from anyone to lay its pipe-line across the three streets in question, so long as it did not unduly

interfere with public travel or with the subsurface use to the highway as such is subject. Question is made in this as to the legality of the ordinance above referred to. The borough act, which gives authority to boroughs to pass ordinances, in section 28 provides that the council of the borough shall have power "to prescribe the manner in which corporations or individuals shall exercise any privilege granted them in the use of any street, road or highway, or in digging up the same for any purpose whatever."

It is argued on behalf of the complainants, that the ordinance in question was not authorized by that statute, inasmuch as the ordinance did not prescribe the manner in which corporations or individuals should dig up the highway for any purposes, but quite on the contrary thereof, left it with the mayor of the borough to prescribe the manner in which it should be done, committing each individual case to his discretion, which might be exercised in one way on one day and in another way on the next one. The question of the validity of this ordinance, however, I must decline to pass upon, that being the peculiar province of the courts of common law.

About two months ago the water company filed its complaint against the borough for the same relief which the complainants now ask in this suit on behalf of the water company.

The water company had then sought permission from the mayor and council of the borough and they had refused to give consent, ¹⁷⁰ except upon conditions which embraced the reasons which are given by the mayor for his refusal to grant the permit in the case in hand, and I held that the conditions which they attempted to impose upon the water company were unreasonable, and that the conditions which might be imposed in granting an application under that ordinance were conditions which were necessary for the proper protection of the borough and its public highways; and I still think, after having heard a second argument on the same point, that the borough has no right to impose conditions which do not tend toward the protection of the interest which the borough has as guardian of the public easement in its highways. It seems reasonably clear from the opinion of the supreme court in *Cook v. North Bergen*, 72 N. J. L. (43 Vroom) 119, 5 Atl. 135; affirmed, 73 N. J. L. (44 Vroom) 818, 65 Atl. 885.

In my opinion, the reasons assigned by the mayor for refusing the permit are not sound in law, nor do I find that they are well founded in fact. Having attempted to give the same reasons as reasons for his refusal, he thereby excluded from consideration any other reasons which may have influenced him, and he has therefore elected to stand or fall by the reasons which he has presented. There may be other good and sufficient causes which moved him to his determination

they are not apparent, nor am I able to hazard a guess as to what they might be. He has undertaken, on behalf of the borough of which he is mayor, to safeguard the potable waters of the state upon the theory that it is his duty as the chief executive officer of his borough to see to it that no potable waters which originate in New Jersey shall be transported beyond its borders. In the former case, I held that such an arrogation of power was not within the scope of the duties of the chief executive officer of a borough; and in so far as his refusal is based upon this reason, it stands without foundation. His other reason, viz., that the water company intends to supply water to the Catholic cemetery, seems to be quite as devoid of a foundation. If, under the law, the water company shall eventually find that it has no right to sell water to anyone within the limits of the borough, it will not be permitted to do so, but it will be soon enough to make this inquiry when the attempt is made. ¹⁷¹ I, therefore, am of opinion that the second reason given by the mayor is quite as fallacious as the first, and that his refusal must therefore appear to be without reason, and, consequently, void as a mere capricious exercise of a discretion which the ordinance clothes him with, and not a discretion which is based upon an examination of pertinent and relevant facts, and which flows from the exercise of a judgment that considers the legal rights of all interests involved.

I have no doubt of the jurisdiction of this court to act in the premises. The borough claims that if the water company has any remedy it is by way of mandamus. The position was well answered by the statement that mandamus will not lie to compel the exercise of a discretion. The reason is quite obvious. The only judgment that could be rendered in an action of mandamus would be that the officer should exercise his discretion. The court would not attempt to do so for him. This he claims he has done; hence the mandamus could be of no avail: *Roberts v. Holsworth*, 10 N. J. L. (5 Halst.) 57; *Benedict v. Howell*, 39 N. J. L. (10 Vroom) 221.

The case appears to me to be an ordinary one of an attempt to use an authority unreasonably and without a due consideration of the rights of the water company. Its effect is to practically destroy its right in the subsurface of the highway upon avowed grounds that appear to me to be untenable, and hence to cause to the water company an injury which, if permitted to continue, would work an irreparable damage to it. An injunction may always go to restrain an illegal and excessive use of authority: 2 High on Injunctions, sec. 1309.

I, therefore, am of opinion that an injunction should issue in accordance with the prayer of the bill.

The Rights, Obligations and Remedies of a Person Over Whose a Highway Runs are considered in the notes to *Wright v. Austin*, 102 Am. St. Rep. 102, and *Mayhew v. Norton*, 28 Am. Dec. 302.

The Ownership of Land Beneath Highways is considered in *E. v. City of St. Louis*, 46 Am. St. Rep. 495. Subterranean water not acquired by the public upon taking land for a public highway, *Wright v. Austin*, 143 Cal. 236, 101 Am. St. Rep. 97. The land over which a highway is laid retains his right in the land for all purposes consistent with the full enjoyment of the easement required by the public: *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423.

KOCH v. GORRUFLO.

[77 N. J. Eq. 172, 75 Atl. 767.]

BUILDING RESTRICTIONS.—A Covenant Prohibiting the erection of anything but a Private Residence is violated by the erection of an apartment or community house, designed and intended for occupancy by two or more families. (p. 554)

Frank Voigt and Frank E. Bradner, for the complainant.

Charles M. Mason, for the defendant.

¹⁷² **HOWELL, V. C.** This suit is brought for the purpose of enforcing a covenant restrictive of the use of the land by The Mutual Land and Improvement Company owners of the lands on both sides of a street in Newark called H. Terrace, the whole of which they have now sold. The complainant and defendant, respectively, own parcels of land. They derived their titles through different intermediary grantees so that there is no privity of estate between them. The covenant is sought to be enforced by the plaintiff of what Vice-Chancellor Green called the right of appurtenance in the case of *De Grey v. Monmouth Beach Club House*, 50 N. J. Eq. (4 Dick.) 329, 24 Atl. 388. The covenant sought to be enforced reads as follows:

"That the said party of the second part, his heirs and assigns, shall not at any time prior to the first day of January, which will be in the year nineteen hundred and ten, carry on, procure, cause, permit or suffer to be carried on, prosecuted, employed or maintained upon said lands, or any part thereof, any saloon or place for the sale, storage, or ¹⁷³ other disposal of beers, wines or liquors, any manufacturing or other business of any kind whatsoever, nor use said premises for any other purposes except for a private residence and such stables and other outbuildings as may be needed or proper for use in connection with the said land for a private residence; and further, the

house or dwelling shall be erected upon said lands to cost less than thirty-five hundred dollars, nor shall any house or other building be erected thereon of more than two and one-half stories in height, nor shall any dwelling or other building be erected thereon including any piazza or erection whatsoever within fifteen feet of the line of said Hedden Terrace, nor shall any outbuilding other than a dwelling-house, be erected upon said lands within seventy feet of the line of said Hedden Terrace, and further, that not more than one house shall be erected on said lands herein described; and further, that the foundation wall of any house to be erected hereon shall not be raised to a height of more than seven feet above the curb line of said Hedden Terrace; and it is further expressly understood and agreed that the said several covenants on the part of the said party of the second part above specified, shall attach to and run with the land, and it shall be lawful not only for the said party of the first part, its successors or assigns, but also for the owner or owners of any lot or lands adjoining or in the neighborhood of the premises hereby granted, deriving title from or through said party of the first part to institute and prosecute any proceedings at law or in equity against the person or persons violating or threatening to violate the same."

The complainant erected a dwelling-house upon the lot owned by him, taking care to preserve the restrictive covenant by the terms of which he claims always to have abided.

The defendant erected a dwelling-house upon her lot, and she and her witnesses claim that it was designed and constructed for occupation by two families, and that it is now and always has been what is known as a two-family house. Sometime in the early part of 1909, and only a short time before the filing of the bill, she leased the first floor of the premises to a man named Fitzgerald, as a tenant. Fitzgerald subsequently moved out, and pending the suit a lease was made for the same portion of the premises to a man named Farrand, who is now occupying the same as tenant, and the question is whether the defendant has violated the restrictive covenant.

It was testified to that all the lots which were owned by the Mutual Land and Improvement Company were sold subject to the same set of restrictions, and that the restriction in question was contained in the titles of both the complainant and defendant.

¹⁷⁴ I think it is quite clear that the defendant has violated the covenant contained in her deed. There is a very broad distinction between a private residence and a flat or apartment house. This distinction was very clearly made by Chancellor McGill in the case of Skillman v. Smath-

urst, 57 N. J. Eq. (12 Dick.) 1, 40 Atl. 855. There covenant provided that the premises conveyed should be used for any other purpose than a private dwelling private dwellings. The defendants began the erection three-story frame flat house with five rooms on a suitable for three families. The chancellor held that buildings, which were in course of erection, were not private dwellings, and were therefore violative of the covenant which restricted the use of the land to the erection private dwellings. This was followed by Vice-Chancellor Garrison in the case of *Lignot v. Jaekle*, 72 N. J. Eq. 65 Atl. 221. It has been held in England that an effect way of prohibiting every kind of business is to stipulate that buildings to be erected on the land shall not be otherwise than as private dwelling-houses. A restriction of this character will prohibit a school (*Johnstone v. [unclear]* (1856), 2 Kay & J. 414); or a charitable institution (*[unclear] v. Chapman*, 7 C. D. 271); or a boarding-house for scholars (*Hobson v. Tulloch* (1898), 1 Ch. 424); or a school (*Patman v. Harland*, 17 C. D. 353). In *Rogers v. [unclear]* (1900), 2 Ch. 388, 69 L. J. Ch. 652, it was held that where the covenant was that every house to be erected should be adapted for and used as and for a private dwelling only, it is broken by the erection of a block of residential flats. In *Gannett v. Albree*, 103 Mass. 372, it was held that where a lease provided that the premises should be used strictly as a private dwelling, the condition was violated by the use of the premises as a public boarding-house; and in New York, in *Levy v. Schreyer*, 27 N. Y. Div. 282, 50 N. Y. Supp. 584, it was held that a building constructed so that it can be occupied by three families living separate and apart is not a private dwelling within the provisions of a covenant not to erect any tenement house or any houses except private dwellings, and where it was intended to be used by more than one family the restriction is immaterial.

The distinction between a private dwelling-house and a private residence on the one hand and a house built and occupied as a residence ¹⁷⁵ for two or more families is quite obvious. The house occupied by two or more families was called by Chancellor McGill, in the case *[unclear]* cited, a community house; the families living there occupied apartments separate and distinct from each other, and the house becomes not a private residence, as the term is used in its ordinary meaning, but a collection of apartments leased to different tenants, and if the defendant made it allowed to put two families in her house, where shall she stop? She would be as well entitled to put a family in each room and then claim that her property was built

occupied as a private residence. The covenant in question gives no such privilege. It must be enforced in accordance with the principles above stated.

An injunction will issue to prevent the further violation of the covenant.

The Validity of Building Restrictions is considered in the note to *Wakefield v. Van Tassel*, 95 Am. St. Rep. 219; *Stewart v. Finkelstone*, 206 Mass. 28, 138 Am. St. Rep. 370. The erection of a public garage is a violation of a covenant or representation that land purchased will be used for the erection of dwelling-houses: *Adams v. Gillig*, 199 N. Y. 314, 92 N. E. 670, 32 L. B. A., N. S., 127.

WASHINGTON NATIONAL BANK v. BEATTY.

[77 N. J. Eq. 252, 76 Atl. 442.]

FRAUDULENT CONVEYANCES—Existing Creditors—Intention.—The statute for the prevention of frauds and perjuries, approved March 27, 1874, has the effect to make a voluntary deed fraudulent as against existing creditors, without regard to the intention with which it was executed. It is fraudulent in law. (p. 557.)

FRAUDULENT CONVEYANCES—Subsequent Creditors.—When a voluntary conveyance is attacked by a subsequent creditor, the question to be determined is whether the conveyance was fraudulent. (p. 558.)

FRAUDULENT CONVEYANCES—Existing and Subsequent Creditors—Evidence.—The question is the same whether a voluntary conveyance is attacked by an existing or a subsequent creditor; the only difference is the method of proof. When an existing creditor attacks the conveyance and shows that his debt was incurred before, and was existing at the time when the conveyance was made, the law, without further proof, raises a conclusive presumption of fraud so far as that creditor is concerned; but where the conveyance is attacked by a subsequent creditor, he must prove fraud as a fact, that is, "an actual fraudulent intent to defraud some creditor." (p. 558.)

FRAUDULENT CONVEYANCES—Subsequent Creditors—"Showing" Necessary.—In order to set aside a conveyance a subsequent creditor must prove: A voluntary conveyance; an existing creditor or other person having a lawful claim or debt within the meaning of the statute; and an actual intent by means of the conveyance to delay or hinder some creditor, existing or subsequent. (p. 558.)

FRAUDULENT CONVEYANCES.—Tort Claimants, as well as those whose claims arise on contract, are protected by the statutes against fraudulent conveyances, but a tort claimant, in order to render himself competent to maintain an action to set aside a conveyance as fraudulent, must reduce his claim to judgment, and thus establish a legal debt against the fraudulent grantor. (p. 559.)

FRAUDULENT CONVEYANCES—Existence of Claim.—A Subsequent Creditor who attacks a voluntary conveyance as in fraud

of a person at the time of the conveyance, claiming damages based on the tort of the grantor, must make legal proof of the verity and legality of the claim. As against claims and demands, the verity of which is never established by any judgment or competent proof, the statute does not forbid conveyances or assignments or declare them to be void. (p. 559.)

Oscar Jeffery, for the appellant.

Elmer King, for the respondents.

²⁵² DILL, J. This appeal from the court of chancery brings up for review a judgment dismissing the bill in a creditor's action to set aside ²⁵³ a voluntary conveyance of real estate. The bill charges the transaction as being "in violation of the statute entitled 'An act for the prevention of frauds and perjuries,' approved March 27, 1874."

There is no element in the case, either by way of pleading or proof, that the complainant bank gave any credit to the defendant relying upon his ownership of the property in question. The answer, denying the material allegations of the bill, specifically raises the issue that the firm of commission merchants, hereinafter referred to, were not, at the time of the conveyance or subsequently, creditors of the defendant within the purview of the statute.

The essential facts of the case are within a narrow scope. In 1894 David C. Beatty, a farmer, consigned certain farm produce to a firm of commission merchants in New York. They failed to remit the proceeds. Beatty, in his wrath, exposed to public view a card on which he had written "All fruit shippers beware of" (naming the commission merchants). "They are damned frauds."

Two days later the commission merchants wrote, threatening to sue him for one hundred thousand dollars damages. This so alarmed the farmer that he put his property out of his hands, transferring the farm which he owned and the mortgages he held on another farm to his son, without consideration, and at once duly recorded the conveyances. The complainant offered no evidence to controvert Beatty's statement that the commission merchants were frauds in that they converted to their own use proceeds due him. The case shows affirmatively that the commission merchants never did more than to threaten Beatty, and never proceeded, in any way, to establish the verity of their claim for damages, never sued him and never obtained any judgment against him, but were content to let the matter stand in statu quo until the statute of limitations had intervened. Admittedly, Beatty made the transfer for the purpose of making himself judgment-proof against these commission merchants, if they should sue him and if the judgment should go against him.

There is no evidence of any other claims or debts against Beatty.

²⁶⁴ The bank, which was not organized until five years after the conveyance by Beatty, obtained a judgment against him on an accommodation note twelve years after the transfer, and to collect this judgment it now seeks to set aside the deed.

The vice-chancellor below dismissed the bill, holding: First, that, under the evidence, the commission merchants whose threat to bring suit induced the transfers were, within the meaning of the statute of frauds, creditors at the time the transfers were made, and that the deeds were fraudulent as to them; second, that a conveyance made for the purpose of defrauding a single existing creditor is not void as against subsequent creditors, the incurring of the debts to whom was not within the contemplation of the debtor at the time when the conveyance was made.

We concur in the action of the vice-chancellor in dismissing the bill, but not with his conclusions of law.

Taking them in their inverse order, the first legal question is whether a creditor whose debt is contracted subsequent to the execution of a deed, which is fraudulent as against a single existing creditor, in order to have such deed set aside, must show not only that the deed was fraudulent as to such existing creditor, but also that it was made with intent to defraud such persons as should, subsequent to its date, become creditors of the grantor. The vice-chancellor held to the affirmative of this proposition, relying to some extent upon the statement of Vice-Chancellor Pitney in *Gray v. Folwell*, 57 N. J. Eq. (12 Dick.) 446, 41 Atl. 869, and following the rule laid down by Vice-Chancellor Van Fleet in *Gardner v. Kleinke*, 46 N. J. Eq. (1 Dick.) 90, 18 Atl. 457.

In our judgment the rule laid down by Vice-Chancellor Van Fleet in *Gardner v. Kleinke*, and the holding of the vice-chancellor in this case below, in accordance therewith, were erroneous.

The effect of the statute is to make a voluntary deed fraudulent as against existing creditors, without regard to the intention with which it was executed. It is fraudulent in law. This was settled in 1879 by this court in *Haston v. Castner*, 31 N. J. Eq. (4 Stew.) 697.

²⁶⁵ The effect of a voluntary conveyance upon the rights of subsequent creditors was decided by us in 1889: *Hagerman v. Buchanan*, 45 N. J. Eq. (18 Stew.) 292, 14 Am. St. Rep. 732, 17 Atl. 946.

It is true that it was considered by the court of chancery in *Gardner v. Kleinke*, that *Hagerman v. Buchanan* established the principle that a subsequent creditor was not

entitled to have a voluntary conveyance set aside if he could show that it was made with intent to defraud such persons as should, subsequent to its date, be creditors of the grantor.

The following language of Mr. Justice Reed, in his opinion, was cited by Vice-Chancellor Van Fleet as reaching that conclusion: "A voluntary settlement can be attacked by a subsequent creditor only upon the ground of the existence of an actual intent in the minds of the parties at the time of the execution of the conveyance to hinder, delay or defraud creditors by means of the deed." The citation does not justify the conclusion. In fact, it declares that the test is an actual intent in the mind of the grantor to defraud creditors—not subsequent creditors but any creditors; and that this is the principle intended to be established by that decision is made plain by the subsequent language of the opinion where Mr. Justice speaking of subsequent creditors, says: "An actual fraudulent intent to defraud some creditors must be proved."

The true rule is that when a conveyance is attacked by a subsequent creditor, the question to be determined is whether the conveyance was fraudulent.

The question is the same when attacked by an existing creditor; the only difference is the method of proof. If an existing creditor attacks the conveyance, and shows that his debt was incurred before, and was existing at the time when the conveyance was made, the law, without further proof, raises a conclusive presumption of fraud so far as the creditor is concerned.

When, however, the conveyance is attacked by a subsequent creditor, he must prove fraud as a fact—that is, actual fraudulent intent to defraud some creditor. If some creditor is meant any creditor, either existing at the time when the conveyance is made or subsequently. If it be shown, the conveyance is proven to be fraudulent, it may be set aside at the ²⁵⁶ instance of any class of creditors, without regard to the time when the debt came into existence.

The next question is whether, under the evidence, the mission merchants, who asserted the claim for damages on an alleged liability, were proven to be existing lawful creditors or other persons named in the statute entitled to set aside the conveyance as fraudulent against them.

It was necessary for the bank, as a subsequent creditor, to prove—first, a voluntary conveyance; second, an existing creditor or other person having a lawful claim on the bank within the meaning of the statute; third, an actual fraudulent intent on the part of the defendant by means of the deed to hinder or defraud some creditor, existing or subsequent.

Conceding that an actual intent on the part of the defendant to defeat any judgment which the commission merchants might have obtained is proven, the question still remains whether they come within the purview of the statute.

The rule, both in England (*Twyne's Case*, 3 Coke, 82) and in this state, is, that the statute extends its protection to all persons having a valid cause of action arising from torts as well as from contracts: *Boid v. Dean*, 48 N. J. Eq. (3 Dick.) 193, 21 Atl. 618; *Post v. Stiger*, 29 N. J. Eq. (2 Stew.) 554; *Scott v. Hartman*, 26 N. J. Eq. (11 C. E. Green) 89; *Thorp v. Leibrecht*, 56 N. J. Eq. (11 Dick.) 499, 39 Atl. 361.

Nevertheless, a tort claimant, to place himself in the position of a lawful creditor or person competent under the statute to set aside a voluntary conveyance, must reduce his claim to judgment, and thus establish a legal debt against the fraudulent grantor. When his claim has thus been liquidated and established as a lawful debt, he may attack a voluntary conveyance made after the liability arose and before suit was brought, to defeat his debt, on the theory that such judgment when once obtained relates back and establishes a debt as of the time when the original cause of action accrued.

The complainant failed to bring this case within the rule that if after a person has incurred a liability for a tort, and before suit brought upon it, he makes a voluntary conveyance or settlement of his property, and judgment afterward goes against ²⁵⁷ him for the tort, the conveyance is void as against that judgment: See *Boid v. Dean*, 48 N. J. Eq. (3 Dick.) 193, 21 Atl. 618.

A subsequent creditor, who attacks a voluntary conveyance as in fraud of a person at the time of the conveyance claiming damages based on the tort of the grantor, must make legal proof of the verity and legality of the claim: See *Baker v. Gilman*, 52 Barb. (N. Y.) 26.

A judgment in favor of the claimant and against the tortfeasor would be conclusive evidence. What further or other proof would be equivalent thereto, we are not called upon in this case to decide, for the complainant, upon this point, offered no evidence.

The verity of the claim of the commission merchants has not been established by any judgment or competent proof, and the complainant bank therefore failed to prove that the commission merchants were lawful creditors or other persons within the meaning of the statute, the intent to defraud whom would vitiate the conveyance.

As against claims and demands, the verity of which is never established by any judgment or competent proof, the

statute does not forbid conveyances or assignments or d
them to be void.

Therefore, upon the ground stated in this opinion
judgment of the court below dismissing the bill of com
is affirmed.

The Presumption That Voluntary Conveyances are in Fraud of
itors is the subject of a note to *Pedley v. Freeman*, 119 Am. S
556. When voluntary conveyances are subject to attack by
itors is the subject of a note to *Hagerman v. Buchanan*, 1
St. Rep. 739; conveyances by husbands to wives in fraud of
itors are discussed in the note to *Adone v. Spencer*, 90 A
Rep. 497; and proof of fraud in actions to set aside conveyan
the subject of a note to *Brown v. Mitchell*, 11 Am. St. Rep. 75.

Claims in Favor of Which Voluntary Conveyances may be A
is the subject of a note to *Greer v. Wright*, 52 Am. Dec. 1
conveyance may be fraudulent as to subsequent creditors o
grantor as well as to existing creditors: *Spuck v. Logan & U*
Md. 152, 99 Am. St. Rep. 427, and see the cases cited in the
reference note thereto. A conveyance intended to defraud
creditors is voidable as to both them and existing creditors:
v. Pierce, 163 Ala. 612, 136 Am. St. Rep. 92. If a conveyan
merely colorable, and a secret trust and confidence exists f
benefit of the grantor, it is subject to attack by subsequent s
as prior creditors: *Spuck v. Logan*, 97 Md. 152, 99 Am. St. Re
Under the Wisconsin statutes a transfer of property cann
general, be impeached for fraud upon subsequent creditors
transferrer unless there was at the time of the occurrence a
intent to defraud them: *Atlanta etc. Cheese Assn. v. Smith*, 14
377, 135 Am. St. Rep. 42.

NEW YORK AND NEW JERSEY LUBRICANT PANY v. YOUNG.

[77 N. J. Eq. 321, 77 Atl. 344.]

TRADE MARKS AND NAMES—Descriptive Words.—N
the adjective "nonfluid" nor the noun "oil" is capable of ex
appropriation by any manufacturer, if used in their proper
(p. 562.)

TRADE MARKS AND NAMES—False Representation
junction.—Where the owner of a trademark applies for an inju
to restrain the defendants from injuring his property by r
false representations to the public, it is essential that he shou
in his trademark, or in his advertisements and business, be l
guilty of any false or misleading representations. (p. 562.)

TRADE MARKS AND NAMES—False Statements by
ant.—If one seeking to protect a trademark makes any materia
statement in connection with the property he seeks to prot
loses his right to claim the assistance of a court of equity. (p

TRADE MARKS AND NAMES—False or Misleading
ments.—Where a symbol or label claimed as a trademark is s

structed or worded as to make or contain a distinct assertion which is false, no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be claimed. (p. 563.)

TRADE MARKS AND NAMES—False or Misleading.—The rule which denies relief in equity to the claimant of a trademark which is in itself false or misleading is of universal application, and does not apply to any particular class of cases. The courts will deny their aid to every attempt to mislead the public as to the real character of the thing to be sold. (p. 564.)

TRADE MARKS AND NAMES—False and Misleading.—"Non-fluid Oil."—A label designating a composition of grease as a "non-fluid oil" and advertisements asserting the composition to be an oil and not a grease will bar any right to an injunction to prevent the use of the term "nonfluid oil" by another, it being in itself false and misleading. (p. 565.)

TRADE MARKS AND NAMES.—False and Misleading Advertisements of an article sought to be protected by a trademark will bar relief against infringement in a court of equity, and the frequency and extent of the advertising is immaterial. (p. 565.)

TRADE MARKS AND NAMES—Actions for Infringement—Costs.—Where relief is denied in an action for infringement of a trademark upon the ground that it is false and misleading, but it is found that the defendant has also been guilty of false and misleading statements, costs will be denied him. (p. 566.)

Edward M. Colie, for the complainant.

Chandler W. Riker, for the defendant.

322 STEVENS, V. C. This is a bill to enjoin the defendant corporation from selling or offering for sale their lubricating compositions or greases under the name of "Nonfluid oil." The bill charges that immediately after its incorporation, in 1896, the complainant began the business of manufacturing and selling lubricants, and that for the purpose of identifying certain lubricating compositions, originated and manufactured by it from similar wares sold by others, on or about March 29, 1900, it adopted and made use of, and since then has continued to make use of, a certain distinguishing mark or trade name, to wit, the words "Nonfluid oil," and that it has affixed the same as a label upon its boxes, packages and cans ever since the date named. The evidence sustains this allegation.

The answer denies that the defendant has counterfeited, copied or colorably imitated any trade mark or name of complainant, in violation of complainant's rights, or that in the manner of placing its name and the name of its goods upon its boxes, it has counterfeited, copied or imitated the manner of placing the name of the complainant upon complainant's goods or boxes. The evidence does not sustain this averment. In the case of some, at least, of defendant's cans and packages there is undoubtedly a design to imitate the make-up of complainant's cans and packages. The principal controversy,

however, hinges upon the use by defendant of the "Nonfluid oil." As to this, defendant says that it was employed as a descriptive designation of the goods it manufactured and sold; that the words composing it are words in general use in the English language, having a definite and well established meaning, and that as such they may be used by anyone who manufactures and sells goods of which the words are properly descriptive. This insistence would, no doubt, be sound if the lubricant that both parties make be, in fact, an oil. The undisputed evidence, however, shows that neither party manufactures an oil, properly called. What they do ³²³ put out is a grease. The two instances are so dissimilar that complainant founds his case upon the admitted difference. Were it not for the similarity, it is conceded that complainant would have an exclusive right, for the reason that neither the descriptive adjective "nonfluid," nor the noun "oil," are capable of exclusive appropriation by any single manufacturer, if used in their proper sense.

The complainant in his bill charges that the term "nonfluid oil" is an arbitrary, fanciful and distinguishing trademark or trademark, applied by it to lubricating compositions the first time. It does not tell us, however, where the term is arbitrary or fanciful. It does not allege that its "lubricating compositions" are really greases and not oils, and that when applied to these compositions, the name is arbitrary, fanciful and therefore capable of appropriation by the user. In order to make out its case it had to show some proof. Standing by themselves, the words do not appear to be either arbitrary or fanciful. They apply to a well known article of commerce, some of whose varieties are, at ordinary temperatures, solid. Nonfluid, as applied to them, is descriptive. On its appearing that complainant's lubricants were greases, defendant took the ground that the term "nonfluid oil" applied to such greases was a falsehood calculated to deceive the public, upon which complainant could base a claim even as against defendant, guilty of the same falsehood.

This brings us to the point of the case. Can the complainant have an injunction to protect its use of a label that is this untruth?

The law has been settled by courts of the highest authority. In *Worden v. California Fig Syrup Co.*, 187 U. S. Sup. Ct. Rep. 161, 47 L. ed. 282, the supreme court of the United States, speaking by Mr. Justice Shiras, thus states the rule: "When the owner of a trademark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trademark, or in his advertising and business, be himself guilty of any false or mis-

representation; that if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses his right to claim the assistance of a ³²⁴ court of equity; that where any symbol or label claimed as a trademark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained."

In *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129, Mr. Justice Andrews said: "Any material misrepresentation in a label or trademark as to the person by whom the article is manufactured, as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. The courts do not, in such cases, take into consideration the attitude of the defendant, although the defendant's conduct is without justification. This, in the view of a court of equity, affords no reason for interference. . . . And although the false article is as good as the true one, the privilege of deceiving the public even for their own benefit is not a legitimate subject of commerce."

And Lord Westbury, in *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S. 137, said: "When the owner of a trademark applies for an injunction to restrain defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trademark or in the business connected with it, be himself guilty of any false or misleading representation; for if he makes any material false statement in connection with the property he seeks to protect, he loses and very justly, his right to claim the assistance of a court of equity." The statement of the law, by Lord Westbury, was approved on appeal by the house of lords: 11 H. L. Cas. 523.

I have cited these passages for the purpose of showing that the rule as laid down by courts of the highest authority is of universal application. It is not, either in terms or because of its declared reason, confined to particular classes of cases. The classification suggested by counsel finds no support in the above utterances or in any case to which he has referred me.

There is no such limitation as counsel suggests to be found in the language of our own decisions, so far as they have dealt ³²⁵ with the subject. In *Johnson & Johnson v. Seabury & Johnson*, 71 N. J. Eq. (1 Buch.) 750, 124 Am. St. Rep. 1007, 67 Atl. 36, 12 L. R. A., N. S., 1201, 14 Ann. Cas. 840, Mr. Justice Swayze thus expresses himself: "There is no question about the principle that a false representation in a trademark will prevent equitable relief for its protection. The

cases cited by defendants are, with one exception, cases in which the false representation was contained in the trademark. In such a case it is quite impossible to determine to what extent goodwill, for which protection is sought, has been injured by the false assertion and to afford protection to a trademark containing a false representation would perpetuate the injury by the decree of the court." To the same effect in *Bear Lithia Springs Co. v. Great Bear Spring Co.*, 71 Atl. 383, 101 Eq. (1 Buch.) 595. It is manifest that a trademark such as counsel contends for ought not to exist. The court should be free to deny its aid to every attempt to mislead the public, as to the real character of the thing to be sold.

Counsel, arguing further, deduces the following principle from the decided cases: "Where an article is marketed under a title which is unusual, self-contradictory, inconsistent or for any reason such that the public would not naturally take the title in its literal sense, no fraud on the part of the seller is committed." This statement would have, perhaps, been qualified by what Lord Westbury said in the case cited: "I cannot receive it as a rule that a plaintiff is answerable for a falsehood because it may be so grossly palpable as that no one is likely to be deceived by it. If there be a willful false statement, I shall not stop to consider whether it be too gross to mislead."

And it would, moreover, be subject to the provision that what was "unusual, contradictory and incongruous" should not also be deceptive in a material particular.

The trade names, cited by counsel, that have been held to be valid have not in themselves been calculated to mislead a sensible person would imagine that "grape nuts," as applied to a cereal (*Postum Cereal Co. v. American H. F. Co.*, 1898), "swan down," as applied to a complexion (*Tetlow v. Tappan*, 85 Fed. 774), "tuberoses," as applied to tobacco (*Lorrillard v. Peper*, 86 Fed. 956, 30 C. C. A. 100), "cough cherries," as applied to a confection (*Stoughton v. Woodward*, 39 Fed. 326 902), "elastic," as applied to bookcases (*Globe Wernicke Co. v. Brown*, 121 Fed. 100), were anything but fancy names. In *Societe Anonyme v. Western Distillery Co.*, 43 Fed. 416, the decision was expressly based upon the ground that a label which contained the Latin and French words there passed upon were susceptible of a sensible meaning consistent with the truth of the other cases cited by counsel.

On the other hand, *Ginter v. Kinney Tobacco Co.*, 1882, is a good illustration of the rule in its application to the case in hand. Complainant sought protection for a "straight cut" cigarette. It appeared that the words "straight cut" had a perfectly definite meaning in the trade. They meant that the plant had been so cut and tre-

to preserve the fibers long, even, straight and parallel. The defendant was, like the plaintiff, selling a cigarette under the name "straight cut." In point of fact neither was using "straight cut" tobacco. Mr. Justice Wallace said: "Complainant now insists that the term was selected and has been used by his predecessors and himself as an arbitrary designation of the particular article and that neither his cigarette nor the defendant's are made of straight cut tobacco. All this, if true, does not help the complainant's case, but furnishes an additional reason why he should be denied the assistance of a court of equity. Not only has he employed a name to which he could not acquire an exclusive use, but he has used it in a manner calculated to mislead the public, although perhaps not intentionally on his part."

Counsel says that the term "Nonfluid oil" is incongruous bizarre, novel, and, in its popular acceptance, a contradiction in terms. Being such, he argues that it can be exclusively appropriated. But in view of the admitted fact that some oils are solid, it does not, on its face, appear to deserve the epithets applied to it. It would have been novel when solid oils were first discovered, but it is not so now. Taking nothing but the words, the label informs the intending purchaser that what he is buying is an oil and that that oil is solid. Some of complainant's lubricants are solid and some of them are liquid. If they ³²⁷ are liquid, and the purchaser is informed that they are, either by something on the label or in some other way, it is possible to maintain that the words, so applied, are nondescriptive, and therefore fanciful and capable of appropriation, just as, for example, "liquid ice" might be, or as "hole proof," as applied to stockings, has been adjudged to be: *Holeproof H. Co. v. Wallach Bros.*, 172 Fed. 860.

But the material misrepresentation in this case is, under the evidence, to be found in the word "oil." Complainant's product in its liquid form greatly resembles oil and would, by the majority of persons, be mistaken for oil, if complainant so described it. Now, complainant knew that it was a grease and that it would be so mistaken, and it knew, too, that at the time it adopted it, its competitors were calling their very similar product "grease." What was its object in misdescribing it, if not deception? By the name alone, complainant was representing to the public that it was furnishing a superior article, an oil for automobile and other lubrication, while its competitors were only able to sell a grease. But it did not stop at the name. It advertised the product, and this is what some of the advertisements say:

"Nonfluid oils are not greases as some have supposed. They are fine mineral oils, so treated as to become partially solidified."

"Nonfluid oils represent a distinct advance over fluids and greases for automobile lubrication. Being nonfluid they do not spatter and drip to waste like fluid oils. . . . oils they do not have to be softened by frictional heat. Caution. Inspired by our success others are offering greases in imitation of nonfluid oils under similar names."

"We presume it is on this account that certain makers, for example, one in Newark, New Jersey, and one in Baltimore, Maryland, have taken advantage of a technical loophole in the trademark law to offer for sale oils and greases which they boldly label 'Nonfluid oil.'"

It is said in extenuation of the false assertions contained in these extracts that they were only occasionally put forth and that they any the less material misrepresentations on that score or do they indicate any the less clearly the purpose of affixing the label?

It would seem plain, therefore, that complainant should have obtained denied relief. Inasmuch as defendant has been guilty of a similar misrepresentation, the Leather Cloth Company v. De Gex, J. & S. 137) is a precedent for denying it completely.

Trademarks and Their Infringement are discussed in the *Partridge v. Menck*, 47 Am. Dec. 284; *Kyle v. Perfection Co.*, 85 Am. St. Rep. 83; and in the recent case of *Wescott Co. v. Oneida Natural Chuck Co.*, 199 N. Y. 247, 139 Am. St. Rep. 907. As to whether equity will refuse to protect a trademark on account of the owner's fraud, see *Johnson v. Johnson*, 71 N. J. Eq. 750, 124 Am. St. Rep. 1007; *Solis Cigar Co. v. Colorado Cigar Co.*, 388, 25 Am. St. Rep. 279; *Pratt's Appeal*, 117 Pa. 400, 10 Am. St. Rep. 676.

SHEEHAN v. SHEEHAN.

[77 N. J. Eq. 411, 77 Atl. 1063.]

DIVORCE—Validity of Agreements Respecting.—The law of the State favors marriage and disfavors divorce. Parties are not to be permitted to make agreements with respect to divorce which would be perfectly proper to be made in other litigation. (p. 573.)

DIVORCE.—Collusion in Divorce Suits is a definite and well established principle of law. It is not to be permitted to a corrupt bargain to impose a case upon the court, either by suppression of evidence or the manufacture thereof; it includes an agreement of the parties as the result of which no defense is made. (p. 573.)

DIVORCE—Collusive Agreement—Advancement of Money.—An agreement between husband and wife that she will bring a suit for divorce and he will not defend is within the definition of collusion, and such an agreement may be inferred from the fact that he advanced her money for the purpose of bringing the suit.

Patrick J. Dooley, for the petitioner.

⁴¹¹ GARRISON, V. C. The petition in this cause is for a divorce on the ground of desertion. The evidence discloses that there is a child and that the wife is wholly without means of support. The petition does not mention the fact that there is a child, and does not pray for any support for the wife or child.

The testimony showed that the husband gave the lawyer of the wife one hundred and twenty-five dollars before this suit was brought for the purpose of compensating him for bringing a divorce suit against the husband on the wife's behalf and securing a decree against the husband.

⁴¹² Shortly after the marriage the husband failed to support the wife and was proceeded against by the poor master and compelled to pay her a weekly sum by the order of the police court. He gave bond, absconded, the bond was forfeited, and the wife was paid the amount thereof by the bondsman. Subsequently, the husband returned to this state and he and the wife agreed that she should obtain a divorce, he agreeing to furnish the money to her for this purpose. He did not keep this promise, and she again proceeded against him, and he was arrested and placed in jail. While in jail he and she again agreed that she should proceed to obtain a divorce, and that he would furnish the money. He procured friends or relatives to raise the amount agreed upon (one hundred and twenty-five dollars), and this sum was paid to a lawyer who, on behalf of the wife, filed this petition.

The petition was filed after the divorce act of 1907, and has appended the necessary affidavit in which the petitioner avers that "her said petition is not made by any collusion between her and the said defendant, but in truth and good faith, for the causes set forth in the petition."

A casual reference by the wife in giving her testimony to the payment of money to her lawyer by her husband did not, of course, escape the observation of the astute special master who was hearing the case, and further questioning by him brought out the testimony which I have summarized in my findings of fact just above stated. The master proceeded to give this question the care and consideration which its importance required, and he reached the conclusion that the case was governed by the principles laid down in *Pohlman v. Pohlman*, 60 N. J. Eq. (15 Dick.) 28, 46 Atl. 658, and *Drayton v. Drayton*, 54 N. J. Eq. (9 Dick.) 298, 38 Atl. 25, and that, applying those principles, there was no collusion.

In passing, it should be noted that each of the cited cases was before the 1907 divorce act, and that the requirements are materially different in that act and the previous act. The subject is one of such importance that it was thought best that

⁴¹³ there should be a reported decision on the subject involved.

The doctrine of connivance is not involved at all; no suggestion that there was any "consenting" (spouse) "to evil conduct in the other whereof he afterwards complains," which is the definition of connivance given by Bishop: 2 Bishop on Marriage, Divorce and Separation of 1891, p. 110, sec. 203.

The doctrine of collusion, however, is directly involved. Bishop (2 Bishop on Marriage, Divorce and Separation of 1891, sec. 249) says that collusion "in divorce law is a combining of married parties to procure a sentence or order by some false practice; as, for one of them to appear, in fact, do what otherwise would be ground for divorce or in any way to deceive the court in a cause, thus see the interposition as for a real injury."

And in section 252, on the same page, he says: "In divorce cases there is ordinarily no motive for collusion. But sometimes parties think they may gain something by it; and if it is more frequent, there is a collateral motive for suppressing the truth and substituting a false case in its stead. And it is never just a cause may be, if parties collude in its management so that in real fact both are plaintiffs, while by the record one appears as plaintiff and the other as defendant, it goes forward. It is so even where material facts are not suppressed while their production would not have produced the result. All conduct of this sort, disturbing to the administration of justice, falls within the general idea of fraud on the court and of contempt of court. Such is the doctrine of public policy everywhere. In England, perhaps, this conclusion is supported by divorce cases aided by the terms of the divorce act, which provide that the petition shall be dismissed when 'presented and executed in collusion with either of the respondents.' " (In support of the text are cited in the notes.)

The whole of this ninth chapter deals with this subject. In paragraph 254 instances in point are given, in one of which, *Barnes v. Barnes*, L. R. 1 P. & D. 505, the court is quoted as saying that the arrangement between the parties amounted to this, in substance: "The petitioner said to the respondent, 'If you do not oppose, I shall get a divorce cheaper than you can do. Therefore, keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to you or your respondent.' "⁴¹⁴ If this is not collusion, I do not know what it is. It is said that she had no defense to offer, and certainly seems that she had not, as far as her own advantage was concerned. But if she had brought to the knowledge of the court the facts which have now been proved as to the petitioner's conduct in exposing her to temptation, it would have been a grave question whether the court would have

a divorce." The decree nisi, which had been rendered in favor of the petitioner, was rescinded, and the petition dismissed.

In section 258 it is stated: "If the suit is carried on by a plaintiff, not from his own desire for a divorce, but for the benefit and at the request of the defendant, any one of several reasons will prompt its dismissal. And as a fraud on and contempt of the court it is classed as collusion."

Chapter 21 (at page 284) is devoted to the matter of the consenting of the parties, their bargainings, and the law respecting the same.

In section 696 it is stated: "Any agreement for divorce or any collateral bargaining promotive of it, is unlawful and void." And section 698 cites an opinion from *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313, as follows: "It may be that if an action for divorce is pending, or if in anticipation of such an action, the parties meet and agree upon the amount of alimony to be allowed to the wife in case a divorce is granted, and the arrangement is just and equitable, and confining strictly to the matter of alimony, it will be sustained. But if the agreement is broader in its terms and its tendency is to interest the husband in procuring a divorce, or in foregoing resistance to an effort by his wife to that end, then it is contrary to public policy and void." And in the same section other cases are cited which are said to hold that where the bargaining is to suppress a part of the evidence and take the judgment to which the other party entitled them, it is void. And so a wife's undertaking to accept five hundred dollars in full for all her claims as wife or widow in her husband's property, coupled with her promise not to resist his divorce suit, was held to be a mere nugatory attempt to defraud the court in which he afterward should bring his suit.

⁴¹⁵ And in section 699 there is the following: "In Connecticut after a husband had committed adultery and contracted venereal disease, he and the wife covenanted through a trustee that they would dissolve, as far as they could, the obligations of the marriage; that he would provide for her a separate maintenance, and that she should be no further chargeable to him, and that, seeing he had offended, he would furnish money and testimony to procure a divorce, she instituting the necessary proceedings, to be under his direction, and a majority of the supreme court of errors held this agreement to be fraudulent and void as tending to mislead the court and interfere with the administration of justice. All were of opinion that had it been to procure false testimony, or impose upon the court, it would have been void. But the dissenting judges contended that no fraud appeared in the facts; that it being the duty of the husband to furnish his wife, who had no money, with the means to procure a divorce, and afterward to pay alimony, there was no fraud in his promising what he

was under a legal duty to perform; and that the object of placing the control of the divorce suit in his hands having been merely to prevent the fact of his having had venereal disease becoming public, there was no imposition upon the court in the omission of an incident which could not influence the result, the other proofs being ample. It was not contended that a suit for divorce gotten up solely by the defendant under his own control and for his own benefit, would, on the facts appearing, be dismissed." (Another case is also cited from Wisconsin, in the note.)

In paragraph 700 it is stated that no harm will come to the plaintiff or the public simply from the defendant's not attempting to make and not making a defense. "But a bargain that there shall be none is not permissible, and no principle founded upon such an undertaking can be enforced."

In section 702 it is pointed out that it is not against public policy for the parties to a divorce suit to enter into an agreement as to what alimony shall be allowed and how their property should be divided, and the like, on the rendition of a decree, "but if the contract is of a sort to stimulate a desire to discourage any defense, or in any way to impose upon the court, it will be void; for example, it will be void if so framed as to have effect only on condition that a divorce is granted without alimony."

The American and English Encyclopedia of Law, 8th edition, volume 9, page 832, defines collusion as follows: "416 conspiracy of the husband and wife to obtain a divorce by suppression of the facts or by false or manufactured evidence." A very different definition, it will be seen, from that of Bishop.

On page 833 of the same authority, it is said: "Where collusion is disclosed the court will not proceed to examine the evidence to see whether there was in fact a meritorious ground for divorce, for it would be unsafe to act upon further evidence. The case will not be dismissed, however, where the person discloses all the facts to the court and contests the case in good faith. It is, therefore, immaterial, that the facts suppressed were insufficient to have changed the result."

At page 834: "Where collusion appears or is disclosed by the evidence, the court will refuse all relief and will not enforce any contract of the husband and wife for the purpose of obtaining a divorce. Collusion will be presumed where it is disclosed that . . . the parties . . . have agreed to let the case go by default without an appearance or answer by the defendant, or agreed that the innocent party would procure a divorce for the guilty party, the latter to pay the fee and a sum of money when the decree is obtained."

I do not think that I have made an absolutely exhaustive search of the authorities outside of New Jersey, but I

made some, and have found the following cases dealing with the general subject.

Ham v. Twombly, 181 Mass. 170, 63 N. E. 336: "If a wife in good faith undertakes to procure a divorce to which she legally is entitled upon the ground of adultery already committed by her husband, and to prevent unnecessary publicity or scandal her husband agrees with her as to the amount of alimony and the expense to be incurred for witnesses, this does not make a divorce so obtained collusive or fraudulent."

Gentry v. Gentry, 67 Mo. App. 550: "Where husband and wife by an agreement stipulate that they mutually agree to make application for a legal separation, etc., and one of them thereupon sues for a divorce, the suit cannot be maintained."

Branson v. Branson, 76 Neb. 780, 107 N. W. 1011: "An agreement between the parties to a divorce suit for a divorce for the collusive rendition of a decree therefor will ⁴¹⁷ defeat the action, and it is immaterial that one of the parties may have supposed the agreement to be free from legal or moral wrong."

The term "collusion" in New York has been defined as follows: "An agreement between husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the court would not grant": *Doeme v. Doeme*, 96 App. Div. 284, 89 N. Y. Supp. 215. The application of the foregoing definition to proven facts will be found in this case, and in *Cowan v. Cowan*, 23 Misc. Rep. 754, 53 N. Y. Supp. 93, and *Dodge v. Dodge*, 98 App. Div. 85, 90 N. Y. Supp. 438.

Latshaw v. Latshaw, 18 Pa. Sup. Ct. 465: "Where it appears that the application for divorce is simply that the parties may be freed and separated from each other, or that the libel is not founded on motives of sincerity and truth, but demanded from light reason, or in a matter smacking of collusion, the decree must be invariably refused." It appearing in that case that the wife met her husband and told him that she was going to get a divorce for nonsupport and abuse, and that he agreed to it and to make no defense.

Erwin v. Erwin (Texas), 40 S. W. 53: "The fact that the parties to a divorce suit, a few days before the trial, agree as to a division of the property in case a divorce is granted, and that defendant desires to withdraw his answer and allow plaintiff to have a decree, was not alone sufficient to show a collusion."

The following are the cases in New Jersey dealing with collusion:

Costill v. Costill, 47 N. J. Eq. (2 Dick.) 346, 21 Atl. 35: In this case the fact that the defendant husband voluntarily appeared so that he might be served, and that the wife, the petitioner, obtained five hundred dollars from him after the suit

had begun, led the chancellor to believe that a collusive agreement had been entered into between the parties, and investigated to ascertain the facts.

⁴¹⁸ *Drayton v. Drayton*, 54 N. J. Eq. (9 Dick.) 298, 25: In that case the suspicions of the chancellor were as to whether the suit was not collusive because the defendant had originally made accusations against his wife which he did not in any way seek to prove at the trial, allowing the case to go upon the testimony produced by the petitioner; and furthermore, the petitioner failed to demand the custody of the children. He took proofs and satisfied himself, he said, that there was no collusive agreement nor understanding between them.

Pohlman v. Pohlman, 60 N. J. Eq. (15 Dick.) 28, 658: In that case the suspicions of the vice-chancellor were aroused because there was a voluntary appearance of the defendant. In his own language he states it as follows: "The next question is as to whether the fact that the wife is desirous of having a divorce, and one that shall be valid, induce her to voluntarily appear in a court where she is obliged to appear, amounts to collusion?" He expressed the opinion that there were no facts suppressed, and that the desertion was not committed nor persisted in by the defendant. He cites three or four definitions of collusion, and from his treatment of them it is obvious that from these extracts the principle that the essence of collusion is an agreement to suppress facts or manufacture a case. It is suggested in his opinion that there was any agreement between the parties that the case should be brought, or that the defendant should submit herself, or that the defendant in a case made an agreement with the petitioner; his suspicions were been entirely aroused by her voluntary appearance, and his decision going, in my view, no further than to hold that the fact alone is not sufficient either to find collusion or to dismiss the suit upon any ground of public policy.

Griffiths v. Griffiths, 69 N. J. Eq. (3 Robb.) 689, 1090: In this case we have an ex parte divorce proceeding on the ground of desertion. After a review of the facts were produced by the petitioner to prove the desertion, pressing his inclination toward an opinion that they were sufficient, the vice-chancellor says that he does not put his decision upon that ground, then proceeds as follows: "The law of this state deprives this court of jurisdiction unless the petitioner shall make oath, to be annexed to the petition, that her complaint is not made by any collusion between her and the defendant for the purpose of dissolving their marriage, and it necessarily follows, that if at any time during the proceeding it shall appear that the jurisdictional condition is not present, the petition should be dismissed." In *Pohlman*

Pohlman, 60 N. J. Eq. (15 Dick.) 28, 46 Atl. 658, the vice-chancellor held "that the desire of a defendant to be divorced, and her voluntary appearance in a court where she is not obliged to appear in order that the decree may be valid in a foreign jurisdiction, does not amount to collusion, but the facts offered for consideration in the case just cited differ in a very marked degree from those appearing in this case. Collusion in cases of this class is not only a corrupt agreement between the parties whereby one shall commit the matrimonial offense, or under the terms of which evidence of an offense committed is fabricated, but also includes any agreement whereby evidence of a valid defense is suppressed, and, in my judgment, such an agreement, if not expressed, may be implied from the acts of the parties." He then goes on to show that public policy is always involved in divorce suits, and he finds that the defendant appealed to the petitioner to bring a suit for divorce and agreed that if she would do so he would give her a lump sum of money provided she obtained a divorce. And after discussing this, he says: "If arrangements between parties providing for the institution of divorce suits, in consideration of a large sum of money, are to receive the sanction of this court, every legal restriction against the voluntary dissolution of the marriage tie can readily be avoided by designing and unprincipled parties." He therefore finds that there was collusion, and dismissed the suit.

In some of the authorities above cited it will be found that the court, being satisfied that the defendant and complainant had agreed that the suit should be brought, had dismissed the suit without prejudice to the right to bring another one not the result of such collusion.

My own view of the situation, briefly stated, is this: The policy ⁴²⁰ of our law favors marriage, and disfavors divorce. Parties may be permitted to make agreements with respect to divorce suits which would be perfectly proper to be made in other litigations. In divorce suits public policy requires that certain agreements shall not be made between the parties and when such interdicted agreements are made they are termed "collusive."

What is termed "collusion" in divorce suits is a definite kind of agreement of parties concerning the divorce. If collusion is to be limited (as some of the definitions would limit it) to "a corrupt bargain to impose a case upon the court," that is, either by the suppression of evidence or by the manufacture thereof, then, each case where there was an agreement between the parties would have to be investigated to see whether such an agreement came within the interdiction of the definition of collusion. But if collusion is given an ampler definition, so as to include any agreement between the parties as a result of which no defense shall be made, then the case will

not be investigated after the ascertainment that there is an agreement, because that agreement itself would fall within the definition of collusion and would defeat the suit.

I cannot escape the conviction that our statute requires an affidavit by the petitioner that "the said agreement was not made by reason of any collusion" indicates that "collusion" must be given the broader and ampler meaning. It seems to me to be perfectly clear that if a man and a woman agree that one of them shall bring a suit for divorce against the other, and that no defense shall be made, such an agreement should be included in the definition of collusion. It also seems clear to me that when they have thus agreed, one party making the petition certainly makes it by collusion.

This definition, of course, would not include cases where the defendant was willing the suit should be brought, or even anxious or desirous that it should be brought, nor would it include cases where the defendant and the petitioner agree that it should be brought and that no defense shall be made. *Fortiori*, where he not only agrees that it should be brought, but also be undefended, but advances money to induce its bringing.

My reason for thinking that the definition should be a ⁴²¹broader one is that it would then be clearly and entirely in keeping with the public policy which we maintain in this respect. Because, if we limit the term "collusion" to a narrow definition (which only includes the suppression of evidence or the manufacture thereof), and permit a suit to be brought that suits shall be brought in which no defense shall be made, we are creating by such permission a situation in which the chances of our ever finding out the truth concerning the suit are almost zero.

If the parties agree that one of them shall bring a suit against the other and the other will not defend, it is impossible to escape the conclusion that the court will have practically no opportunity to ascertain whether evidence is suppressed, or manufactured, or no evidence is offered. I do not wish to be understood as including within the definition of collusion agreements by which a husband contracts to pay a certain amount of alimony to his wife without the intervention of the court. I do think, however, that within the definition of collusion should be included cases in which the husband agrees with the wife that he will furnish a sum of money with which she is to procure a divorce against him.

I think that what has been done in some courts is to do as is done in such cases; that is, where the court is convinced that there is not manufactured testimony or suppressed evidence, but that the suit is collusive because of the agreement, the suit should be dismissed without prejudice to the bringing of another suit which shall not be collusive.

I am clearly of opinion that if it be held that an agreement between husband and wife that suit shall be brought and no defense entered is within the definition of collusion, the court should infer such an agreement from the fact that the husband has, before the suit was begun, advanced money to the wife, or to a lawyer for the wife, for the purpose of bringing the suit.

As is pointed out by Chancellor McGill, Vice-Chancellor Bergen and other judges, it is a shallow pretense that there is any intention to defend if the defendant furnishes money for the prosecution of the suit. And it certainly is not a violent inference for the court to find an agreement in consonance with the defendant's act in furnishing the money to enable a suit to be brought against him.

⁴²² The result is that the petition in this case will be dismissed without prejudice to the right of the petitioner to bring any suit free from collusion.

A Contract Between a Husband and Wife whereby she agrees to dismiss a pending suit for divorce and to condone the cause thereof, and that, in the event of his subsequently giving her a cause for divorce and her prosecuting and maintaining a suit therefor, he will pay, and she will accept, a specified sum in full satisfaction of her property rights, is against public policy, and will not be enforced: *Periera v. Periera*, 156 Cal. 1, 134 Am. St. Rep. 107. The question of collusion in the case of a divorce against a person under guardianship should not be tried out by affidavits upon a collateral issue raised by the motion of the guardian to set aside a decree ordering him to pay alimony and suit money: *Sturgis v. Sturgis*, 51 Or. 10, 131 Am. St. Rep. 724.

What Constitutes Connivance sufficient to bar a suit for divorce is considered in the note to *Noyes v. Noyes*, 120 Am. St. Rep. 520.

KEARNS v. KEARNS.

[77 N. J. Eq. 453, 76 Atl. 1042.]

WILLS—Specific or General Legacies.—A bequest of "my household goods, cash on hand or in bank, life insurance and all other personal property of every description, is a specific legacy so far as the household goods, cash and insurance are concerned, and a general legacy so far as any other property passing by it is concerned. (p. 576.)

WILLS—Specific Legacies.—If a Thing Bequeathed is, by the terms of the will, individuated, so that it is distinguished from all others of the same kind, it is a specific legacy. (p. 576.)

WILLS—Title to Property.—In a Proceeding for the Construction of a Will, questions of the title of property bequeathed will not be adjudicated, in the absence of some special reason therefor. (p. 576.)

WILLS—Payment of Debts—Abatement of Legacies.—It must be first made to the personal property not specifically for the payment of the debts of the decedent, and if that is insufficient, then the specific legacies will abate proportionately (p. 576.)

Ernest Watts and Eckard P. Budd, for the complainant.

Reginald Branch and Joseph H. Gaskill, for the defendant.

453 LEAMING, V. C. It seems entirely clear that the second paragraph of his will testator bequeathed to him all his personal property except his stock in Stuart & Peterson Company; and by the third paragraph of his will bequeathed, in trust, his stock in that company.

The bequest of "my household goods, cash on hand in bank, life insurance and all other personal property of the above description," is a specific legacy so far as the household goods, cash ⁴⁵⁴ and insurance are concerned; a general legacy as any other property passing by the bequest is concerned. The bequest of "my stock, right, title and interest in Stuart & Peterson Company," in trust, is also a specific legacy. *Norris v. Executors of Thompson*, 16 N. J. Eq. (1 C. E. Green) 218, the essential elements of a specific legacy are defined. If the thing bequeathed is, by the terms of the will, individuated so that it is distinguished from all others of the same kind, it is a specific legacy. "All my household goods," "all my cash on hand or in bank," and "all my stock in Stuart & Peterson Company" are alike specific legacies. As to money in bank, see *Prenn v. Walsh*, 58 N. J. Eq. (13 Dick.) 149, 42 Atl. 1049. The rule as defined by *Norris v. Executors of Thompson*, 16 N. J. Eq. (1 C. E. Green) 218, has since been repeatedly applied in both this court and the court of errors and appeals.

I do not think that this court should assume to adjust the title to the bonds, in the absence of some special facts therefor. The controversy as to whether these bonds are a part of the estate of testator at the time of his death in any way enters into the construction of the will and is a question which should be determined by the orphans' court, unless some special circumstance arises by reason of which that court is precluded from disposing of the question.

The property which must first be utilized by the executor in the payment of debts is the personal property other than that already referred to as included in the specific legacies. If such property be found insufficient then the specific legacies will abate proportionately: *Harris v. White*, 5 N. J. Eq. (South.) 422; *Executor of Shreve v. Shreve*, 10 N. J. Eq. (Stock.) 385, 17 N. J. Eq. (2 C. E. Green) 487.

I think the cross-bill should be dismissed, without costs, and also without prejudice to a new bill, should it be found

sary for defendant to hereafter assert in this court rights touching the bonds in controversy.

I will advise a decree in conformity to the views herein expressed.

**SPECIFIC, DEMONSTRATIVE, AND GENERAL BEQUESTS
DEFINED AND DISTINGUISHED.**

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V. The Test of the Quality of the Bequest is the Testator's Intention, 613.

I. Gifts of Real Property.

a. Whether Devises are Specific or General.—Such a discussion as comes within the scheme of an annotated law report hardly calls for any going into first principles, and a treatise on the present topic need therefore begin with a statement no more elementary than that, of testamentary dispositions, that referring to real property is called a devise and that referring to personal property a bequest or legacy. And this statement, being made, is at once to be confessed as submitting no infallible rule either, for in the reports—even those that reflect the learning of the long-departed sages—to which we turn as to the fountains of the law, we find often an indifference to applying those words according to their strictness. Perhaps, then, the statement should be that a testamentary disposition of real estate is usually called a devise, and one of personal estate usually a bequest. These devises and bequests are not all of a single character, but admit of distinctions.

"Every specific devise, by its very nature and form, plainly shows that the testator means that the devisee shall have the land given free from liability to contribute to charges not fastened upon it": *Anderson's Exrs. v. Anderson*, 31 N. J. Eq. 560. To define a gen-

eral devise would be, of course, to state the converse of the position.

The importance given by the courts to specific devises and is mainly on account of the immunity—not absolute, of these dispositions enjoy from the payment of the debts of the testator and the charges under the will. The order of resort for payment in this connection under the common law is thus stated by Lord C. J., in an old Massachusetts case, he giving as his authority the English case of *Donne v. Lewis*, 2 Brown C. C. 257: “The rule in equity for the marshaling of assets is thus settled: (1) The personal estate, excepting specific bequests, or such of it as is appropriated from the payment of debts; (2) The real estate appropriated in the will as a fund for the payment; (3) The descended estate, whether the testator was seised of it when he died or it was acquired afterward; (4) The rents and profits of it received by the heir after the testator's death; (5) The real estate specifically devised, although they may be generally charged with the payment of the debts, but not specially appropriated for that purpose”: *Hays v. Jackson*, 6 Mass. 149.

Another thing is to be said about the common law in this connection, and that is that, agreeably to it in the administration of estates, a simple contract debt could not be enforced against the lands, the latter, unless so charged under the will expressly, being susceptible to be made a fund for satisfying only special debts. Another preliminary remark is that under the common law a devise of land were specific.

b. All Devises Specific at Common Law.—At common law the doctrine obtained that a will was in the nature of a conveyance, the first principle of land transfers was couched in the old phrase, “No man can convey that which he hath not.” At the time of its making, wherefore after-acquired lands were presumed not to be in a testator's mind, and certainly not what he had. The doctrine did not come from the civil law, it seems to have been wholly insular. Lord Mansfield, to whom the doctrine made a reproach that he dragged the civil law into English law, made a prudent exception on the slightest emergency, was helpless here. In *Will v. Riccardson*, 3 Doug. 361, speaking of the will before the testator he said the rule might as well have been declared the other way, but the doctrine could not be shaken.

To take up an American case: “The soundness of this doctrine and its logical correctness—is manifest when reference is had to the rule of the common law by which wills were held to speak as of the date of their execution, and to embrace only such property as belonged to the testator and was within the terms of the devise. Under that rule, as has been well said, ‘a devise of lands is in the nature of an appointment upon the lands held by the testator at the time of its execution. Hence, whether the land devised is described specifically or only by way of residue, for practical purposes it was equally well ascertained,’ since the residue devised by the testator was capable of identification, and was already as fully identified in his mind and intention as the part so devised therefrom by particular description, he being held to know the property he is seised of. And therefore the doctrine we have that even residuary devisees are specific, because it is to be

the testator had the residue of the land then held by him in his mind, and to have intended it to go to the residuary devisee as specifically as he had intended the lands particularly described to go to other devisees. Some modification of this doctrine has been admitted in American courts, in view of statutory provisions which have the effect of making wills speak from the death of the testator instead of from their execution. Our statute on the subject is the following: 'Every devise made by a testator, in express terms, of all his real estate, or in any other terms denoting his intention to devise all his real property, must be construed to pass all the real estate he was entitled to devise at the time of his death': Code, sec. 1948. Considering that testators could not have had property acquired after the execution of their wills in their minds at that time, and that it is only by force of statute, and wholly apart from the testator's intent that such property passes at all, and hence that they could not and did not specifically intend that residuary devisees should take such property, the tendency of American decisions has been—though the rule is different under similar statutory provisions in England—to hold that no devise of after-acquired real estate is specific unless the land is described with sufficient particularity to enable the devisee to identify it": *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785. Citing *Farnum v. Bascom*, 122 Mass. 282; *In re Woodworth's Estate*, 31 Cal. 595.

c. **American Tendency to Treat Devises and Bequests by One Rule.** The English rule that all devises of real estate are specific, the Massachusetts court has said, probably never obtained in this state, and certainly has no present existence here: *Farnum v. Bascom*, 122 Mass. 282. In the very late case of *Wilts v. Wilts* (Iowa), 130 N. W. 906, the controversy was whether the debts of the estate should be paid from the proceeds of the land generally or of that portion that descended to the heirs, the will having provided for the payment of the testator's debts, devised and bequeathed one-third of all his real and personal property to his wife, and stopped there. The debts were not inconsiderable, there being nearly a thousand acres of land in the estate, and much of it encumbered with mortgages. The court said: "Here the language of the will leaves no doubt but that the testator intended to dispose of after-acquired real estate, and the evidence fails to show whether that left was acquired before or after the execution of the will. In executing the will then he could not well have known the real property in which he undertook to dispose of an undivided third, and in such a case the reason for saying all devises are specific fails. Necessarily the disposition of after-acquired land might be general, and would be in a case like this. The subject was considered in *Re Estate of Woodworth*, 31 Cal. 595, the court, after quoting a statute authorizing the disposition of after-acquired real estate, saying: 'Now, a will made under this provision, by which a party should devise all the land of which he should die seised or possessed, it is obvious, would have none of the characteristics before stated of a specific devise. A party might sell and convey land owned at the date of the will, and with the proceeds purchase others, and repeat the operation continually, and those lands owned at the moment he should happen to die would pass by the will; would take the place of those conveyed. Personal and real estate would stand upon the same footing in this respect; a devise

of all one's personal and all one's real estate of which he die possessed would be equally general and operate precisely. The grounds upon which a devise of real estate was held to be a specific have ceased to exist."

The court further quotes the California case as adopting the of Judge Redfield, in his work on Wills, to the effect that that all devises of real estate are specific prevails only where the law that one may not by will pass real—as he may personal property acquired, after executing the instrument; also that, late English statutes and those of most of the states here, that no longer stands in the old country and only exceptionally in. The court also cites *Blaney v. Blaney*, 55 Mass. (1 Cush.) 107.

We need go no further, then, than to the Alabama case also cited for the rule in vogue generally here in this connection—that is, that all devises are specific unless they are of after-acquired lands, and as to these they are general unless the property devised so described as to admit of identification by the devisee. Every residuary clause may carry a specific devise: *Kelly v. Richardson*, Ala. 584, 13 South. 785; to the same effect, see *In re Estate of Woodworth*, 31 Cal. 595; *Corrigan v. Reid*, 40 Ill. App. 404; *Henderson v. Green*, 34 Iowa, 437, 11 Am. Rep. 149; *Wilts v. Wilts* (Iowa), N. W. 906. And in *Walker v. Parker*, 38 U. S. (13 Pet.) 166, 10 109, it was held that a devise of "the balance of my real estate believed to consist of lots number six," etc., was a specific devise.

d. American Cases of Devise of Real Estate.—It was held in Maine that the devise of the residue of real estate, after the opening of a contingency or after certain objects have been accomplished by the disposition or appropriation of a portion of it, is specific but general: *Bradford v. Haynes*, 20 Me. 105. A man devised "the use, improvement and income" of a certain lot of land on condition the devisee pay all taxes, etc., and devised a remainder over. This was held to be a specific devise: *Farnum v. Bascom*, Mass. 282. To the same effect, generally, see *McFadden v. H*, 28 S. C. 317, 13 Am. St. Rep. 675, 5 S. E. 812. The doctrine of a life estate may be the subject of a specific devise is that of an old case of *Long v. Short*, 1 P. Wms. 403. A testatrix gave and bequeathed her home and lot in the village of Dundee if, as she was in the will, she should be possessed of one at her death; or, if she was not possessed of one, ordered her executors to pay to the devisee two thousand dollars on condition that said devisee pay an annuity of sixty dollars to her brother. There followed seven bequests of one hundred dollars each and a provision that if her estate exceeded the amount of these the executors should divide the excess among "said persons pro rata," and that in case of a deficiency each of "the above bequests" should share it in the same proportion. It was held that the devise of the house and lot was specific: *White*, 125 N. Y. 544, 26 N. E. 909. A testator devised a part of his field to an adopted daughter, and another field to his nephew, the latter subject to the devisee's paying a bequest of five hundred dollars to a niece; and devised and bequeathed the rest of the land and estate to his wife, subject to a bequest of one hundred and fifty dollars to his adopted daughter. All those devises were held to be specific: *In re Pitman's Estate*, 182 Pa. 355, 38 Atl. 133. A testator devised a house and such ten adjacent acres of land as his executors should allot to go with it. It was held to be a specific

devise: *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198. A testatrix stated in her will that she was or might be entitled to an interest in the estate of a deceased person, and thereupon devised such interest. It was held that the devise was specific, notwithstanding it was indefinite as to value: *In re Tillinghast*, 23 R. I. 121, 49 Atl. 634.

II. Specific Gifts of Personal Property.

a. *In General.*—The classification of legacies under the earlier English decisions seems to have been into two sorts—specific and general. It was said by Lord Eldon, in *Sibley v. Perry*, 7 Ves. 522, with reference to the bequest there under consideration, "He gives first one thousand pounds stock specifically; so that the legacy would fail if he should sell out the stock, though nothing could be more contrary to his actual intention than that if he had sold out the stock and placed the money upon a mortgage the legacy should have failed. I have no doubt in private that directing a transfer of stock he means to give what he has; but there is no case deciding that it is specific without something marking the specific thing, the very corpus; without describing it as standing in his name or by the expression of 'my stock.'"

In *Purse v. Snaplin*, 1 Atk. 414, a testator having, in fact, five thousand pounds Old South Sea annuity stock, bequeathed that amount of that description of stock to each of two persons. There were ample funds in the estate. The case came up before Lord Chancellor Hardwicke, and it is toward the latter part of his decision that the words occur most pertinent to the point now in discussion: "In 2 Domat., title Legacies, p. 159, sec. 18, devise of a thing not in rerum natura during the testator's life held good. These resolutions are grounded on the rule of the civil law in regard to legacies consisting in quantity and number; and there is a great difference between the testator's describing the quantity in general and his determining and particularizing it by the word 'mine.' The third objection is that this legacy to Robert Purse is a specific legacy, and therefore if not found among the testator's assets must fail. To this I answer that there are two kinds of gift which by us are reckoned under the name of specific legacy. First, where the particular chattel is specifically described and distinguished from all other things of the same kind: *Lawson v. Stitch*, 1 Atk. 508. Something of a particular species which the executor may satisfy by delivering something of the same kind, as a horse, etc. The first kind may be more properly called an individual legacy, and if such so bequeathed is not found among the testator's effects it fails (*Drinkwater v. Falconer*, 2 Ves. 624); or if given first to A and then to B, they must divide it; or if it is disposed of in the life of the testator it is an ademption of such legacy. But this gift is not confined to the particular five thousand pounds Old South Sea annuity stock, but the second, which is of a more liberal nature; it is a legacy consisting in quantity and number, and not confined to the strictness of the first rule." The lord chancellor rather confused the subject by his execution of "two kinds of gift which by us are reckoned under the name of specific legacy," for later in the case he declares the legacies there to be general. It is said in *Williams on Executors* (section 1021), "A legacy of quantity is ordinarily a general legacy, but there are legacies of quantity in the nature of specific legacies,

as of so much money with reference to a particular fund for ment. This kind of legacy is called by the civilians a demonstrative legacy." In *Ashburner v. Macguire*, 2 Brown C. C. 108, a case according to Arden, M. R., in *Chaworth v. Beach*, 4 Ves. J. Lord Thurlow took two years to decide, the latter, referring to the bequest under consideration, spoke of whether it "was given in specific legacy, which depends on this, whether the manner in which the sum is mentioned turns it to a pecuniary legacy or, as the civilians call it, a demonstrative legacy; that is, a legacy in its nature a general legacy, but when a particular fund is pointed out to it." To the same effect, see *Nusly v. Curtiss*, 36 Colo. 464, 10 St. Rep. 119, 85 Pac. 846, 7 L. R. A., N. S., 592, 10 Ann. Cas. 10. As Lord Cranworth said of a demonstrative legacy, "it is in its nature general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be disappointed of his legacy but be permitted to receive it out of the general fund; yet the legacy is so far specific that it will not be liable to abatement with general legacies upon a deficiency of assets": Lord Cranworth in *Tempest v. Tempest*, 7 De Gex, M. & G. 470.

As would be the case with any other thing under discussion, the first point to be determined refers to nature and quality. In what is a specific bequest? A bold answer to the question would be "nobody seems to know," and yet it would not be an answer far astray; but perhaps it would be safer to say it has been difficult by the judges to define it so closely as to make it absolutely unmistakable. Said Sir George Jessel, speaking on this subject in *Bothamley v. Sherson*, L. R. 20 Eq. 304, "In the first place, it is a part of the testator's property; a bequest may or may not be such. A testator who gives one hundred pounds money or one hundred pounds stock may not have either money or the stock, in which case executors must raise the money or buy the stock; or he may have money or stock to discharge the legacy. A general legacy has no reference to the actual state of the testator's property, it being only supposed that he has sufficient property with which to satisfy it, while in the case of a specific bequest it must be a part of the testator's property itself. In the second place, it must be a part emphatically as distinguished from the whole. It must be what sometimes has been called a severally distinguished part. It must not be the whole in the mean time, being the totality of the testator's property, or the totality of the general residue of his property after having given legacies out of it. But if it satisfy both conditions, that it is a part of the testator's property itself, and is a part as distinguished from the whole of the residue, then it appears to me to satisfy even the definition which is required to treat it as a specific legacy. I hope the definition which I have attempted to give will be more satisfactory than those that have been attempted before, but I can only say that I hope with some degree of trepidation": Sir George Jessel, in *Bothamley v. Sherson*, L. R. 20 Eq. 304. The master of the court cites many of the later English cases as giving warrant for the view above set forth.

In *Robertson v. Broadbent*, 8 App. Cas. 812, Lord Chancellor Macnaghten defined a specific legacy to be "something which a testator identifies it by a sufficient description and manifesting an intention that it shall be enjoyed in the state and condition indicated by that description, separates, in favor of a particular legatee

the general mass of his estate." In the same case Lord Fitzgerald, speaking of the bequest there under consideration and at the same time of the words last above quoted, said: "The gift is not specific within the definition so carefully expressed by the lord chancellor," as if, to the knowledge of his colleagues, that officer had labored with his words to make them conform precisely to what it was he was attempting to define. Lord Blackburn, who sat in the case with the others, said that if it was necessary to give a definition of a specific legacy, he did not know if he could come any nearer than what the lord chancellor had said, but he added, "I do not, however, like to bind even to saying that this is a precise definition." These efforts are two only out of the numerous ones put forth by the English judges to give a clear outline of just what is meant by the term.

In America the courts, some of them, have been content to adopt here and there from this numerous store, while others, less diffident than Lord Blackburn, have worked out fresh definitions. Thus, in Alabama: "A specific legacy is one that can be separated from the body of the estate and pointed out so as to individualize it and enable it to be delivered to the legatee as a thing *sui generis*. The testator fixes upon it, as it were, a label by which it may be identified and marked for delivery to the owner, and the title to it as a separate thing vests at once, on the death of the testator, in the legatee": *Harper v. Bibb & Falkner*, 47 Ala. 547. In California the subject has been made a matter of statute. "A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator is specific; if such legacy fails, resort cannot be had to the other property of the testator": Cal. Civ. Code, sec. 1357. In Colorado: "A specific legacy is a gift by will of a specific article or particular part of the estate, which is identified and distinguished from all others of the same nature and is to be satisfied only by the delivery and receipt of the particular thing given": *Nusby v. Curtiss*, 36 Colo. 464, 118 Am. St. Rep. 113, 85 Pac. 846, 7 L. R. A., N. S., 592, 10 Ann. Cas. 1134. In Iowa: "To be specific, a gift, whether of real or personal property, must be of a designated article or specific part of the testator's estate which is identified and distinguished from all other things of the same kind which may be satisfied by delivery of the specific thing or portion": *Wilts v. Wilts* (Iowa), 130 N. W. 906. In Kentucky, "A specific legacy is defined to be the bequest of a particular thing specified and distinguished from all other things of the same kind": *Hill v. Harding*, 92 Ky. 76, 17 S. W. 199, 437, quoting from *Lilly v. Curry's Exr.*, 69 Ky. (6 Bush) 590, which quotation was a quotation in turn from *Wills on Executors*, defining the subject; *Wills on Executors*, 944. In Maine, "A specific legacy is a bequest of a specific thing or fund that can be separated out of all the rest of testator's estate of the same kind so as to individualize it and enable it to be delivered to the legatee as the particular thing or fund bequeathed": *Palmer v. Palmer's Estate*, 106 Me. 25, 75 Atl. 130, 19 Ann. Cas. 1184. In Rhode Island, "A specific legacy, as the term imports, is a gift or bequest of some definite, specific thing, something which is capable of being designated and identified": *In re Martin*, 25 R. I. 1, 54 Atl. 589, quoting from *Dean v. Rounds*, 18 R. I. 436, 27 Atl. 515, 28 Atl. 802. The American and English Encyclopedia of Law gives as a definition: "A specific legacy or devise

is a gift by will of a specific article or part of the testator's estate which is identified and distinguished from all other things of the same kind and which may be satisfied only by the delivery of the particular thing": 18 Am. & Eng. Ency. of Law, 2d ed., 77. This language has been adopted by the courts of many of the states in preference to framing definitions out of words of their own making to the English decisions. Among the cases where the courts have either so adopted or so resorted are: *Kelly v. Richardson*, 584, 13 South. 785; *Broadwell v. Broadwell's Admr.*, 4 Met. 290; *In re Matthews*, 122 App. Div. 605, 107 N. Y. Supp. 36; *In re Ford v. McCarthy*, 159 N. Y. 519, 54 N. E. 277; *Smith's Appeal*, 1 Pa. 559; *In re Snyder's Estate*, 217 Pa. 71, 118 Am. St. Rep. 11 L. R. A., N. S., 49, 66 Atl. 157, 10 Ann. Cas. 488; *In re C. Estate*, 27 Utah, 361, 75 Pac. 851; *Morriss v. Garland's Admr.*, 1 Va. 215. To this much they all go, that to create a specific bequest the testator must identify the property bequeathed: *Dryden v. Dryden*, 49 Md. 356; *United States Fidelity & Guaranty Co. v. Douglass*, 134 Ky. 374, 120 S. W. 328.

From so many expressions as to what the thing is, no one can attempt definitions departing in sense very far from another. The idea on the subject, more or less clear, must remain in the mind of the reader; but it must have been seen meantime that these bequests are not all of the one sort.

The passage in *Roper on Legacies* (volume 1, page 149) is the one used by the court in *Broadwell v. Broadwell's Admr.*, 4 Met. (61) 1. It went for its definition is, "A regular specific bequest may be made of the bequest of a particular thing or money, specified and distinguished from all others of the same kind, as a horse, a piece of plate, a share in a purse, stock in the public funds, a security for money, &c. which would immediately vest with the assent of the executor or administrator. It is evident that these bequests cannot all be embraced by one term. We have seen that Lord Hardwicke held bequests to be of two kinds, 'individual bequests,' which were specific, and 'bequests of a thing in kind and quantity,' which were general.

And yet there are instances of bequests of number and quantity being held to be specific bequests. In fact, as was said in *Balliet*, 14 Pa. 451, "the distinction between a specific bequest of pecuniary legacy and a specific and a demonstrative legacy is sometimes very nice." For an illustration let us turn to a modern case: *Island case*: "The legacy, in the twelfth clause, of two hundred and thirty shares in the Ashland Cotton Company, although not designated by the testatrix as 'my' two hundred and thirty shares, is held to be a specific legacy. It is true that the law does not require specific legacies, and that, where stocks, bonds and other securities are disposed of by the will but it does not designate them as being a part of the testator's estate and the legacy may be satisfied by delivery to the legatee of any securities of the kind and amount specified, a preponderance of authority favors the view that it is a general legacy, though the testator owned securities of the kind specified, and corresponding exactly to the number of shares or amount bequeathed: 18 Am. & Eng. Ency. of Law, 2d ed., 77. The authorities, however, are by no means uniform: 1 *Roper on Legacies*, s. pp. 204-224. The cardinal rule is to ascertain and follow the intention of the testator, and, inasmuch as wills vary so much in

rounding circumstances, each will has to be judged largely by its own attendant circumstances. In *Pearce v. Billings*, 10 R. I. 102, the testator gave away of certain bank stocks largely in excess of what he owned at his death or had ever owned of such bank stocks. The court decided such legacies were general, and not specific, and that the number of shares given away merely furnished a standard of measurement of the amount of a pecuniary gift which was to be fixed by the value of the stated number of shares at the time the legacies would become payable, viz., a year after the testator's decease—an appraisal then to be made. Undoubtedly the fact of the testatrix having an odd number of shares of the Ashland Cotton Company at the date of her death, exactly corresponding with the number given away, was a circumstance to be taken into account; and that, taken in connection with all the circumstances of this particular will, satisfies us that the testatrix intended that the legatee under the twelfth section was to have that particular stock. In our opinion the legacy under the twelfth section was a specific one": In *re Martin*, 25 R. I. 1, 54 Atl. 589.

And yet similar reasoning did not lead Lord Eldon to a similar conclusion in *Sibley v. Perry*, 7 Ves. 522, already cited. There the testator having, in the will, directed a transfer of three per cent consols three months after his decease, gave several other legacies of stock "as aforesaid." The lord chancellor expressed himself thus: "I have no doubt in private that, directing a transfer of stock, he means to give what he has; but there is no case deciding that it is specific without something marking the specific thing, the very corpus; without describing it as standing in his name or by the expression, 'my stock.'"

There was another specific legacy, so decided to be, in *Re Martin*, which we shall come to presently, the subject matter of which must be said to have been quite intangible, which quality certainly cannot comport with the idea of an article at all, much less an article that can be fixed upon, which, as intimated in *Barton v. Davidson*, 73 Ill. App. 441, is indispensable. It must be, then, that in cases here and there something is to be considered outside of the plainly expressed intent of the testator, his use of "my" or his minutely descriptive words. There seems to be no escape from the position that here and there a legacy crops out that is not quite definite enough to come within the strict rule of an "individual legacy," and yet too definite to be ranked as either demonstrative or general. We shall consider specific legacies here, therefore, as either "individual" or "unclassified."

b. Individual Bequests.

1. Identification of Subject of Bequest by Ownership.—Notwithstanding the stress laid upon the word "my" or the expression "in my name" by such authorities as Lord Hardwicke and Lord Eldon, following the spirit of the civil law, as being almost essential to a testator in naming the subject of his bounty so as to impart to it the strictly specific quality, that quality can be imparted otherwise. The use of possessives is one method of indicating the subject matter, but there are others. There may be unmistakable marks about the thing, mention of which will accomplish the purpose; or the thing may be described sufficiently by stating, if with due minute-

ness, whence it came into the testator's ownership or just is to be found.

To take up these indicia in turn, and beginning with the referring to ownership, we will cite, first, cases where the thing is of a miscellaneous nature, and afterward cases where it is or a share or shares of stock or something of that kind.

A bequest of "all my books, historical and geographical, of Rome," etc., was held to be specific: *Mayo v. Bland*, 4 484. A testatrix devised and bequeathed to her brother her real estate, her household furniture and all the rest of her real estate. The described land and the household furniture were held to be specific gifts: *In re Corby's Estate*, 154 Mich. 353, 117 N. W. 2d 1042. A bequest of all my household goods, cash on hand or in bank, life insurance, is specific: *Kearns v. Kearns*, 77 N. J. Eq. 4 p. 575, 76 Atl. 1042. A bequest was in words, "all the money possessed of in several banks and bonds." Investigation brought out money and bonds belonging to the testatrix in incorporated banks and a sum of money on deposit also with an individual. It was held that all went as a specific bequest: *In re Beckett's Estate*, 15 N. Y. St. Rep. 716. A bequest of all money belonging to the testator and uninvested at his death, whether in bank, in personal custody or in the hands of his agents, is specific: *In re Estate*, 12 Pa. Co. Ct. 133. A testator gave by his will all the grain of which he was the owner, stored on land belonging to him, all grain that might be raised on such land during a year starting from his death was held to be a specific legacy: *Rock v. Zimmerman*, 25 S. D. 126 N. W. 265.

A bequest of a particular bond is specific, of course: *Hook's Admr.*, 39 N. C. 188. A bequest of an amount distributed forth of certain bonds testator held is specific: *Gilmer's Lessee v. Gilmer's Exrs.*, 42 Ala. 9. So, also, a bequest of "my East Bank stock": *Brainerd v. Cowdery*, 16 Conn. 1. A bequest of the testator's insurance stocks and other personalty was held: *Connecticut Trust etc. Co. v. Hollister*, 74 Conn. 228. 750. A clause affecting a bequest of money, "the latter to be taken from my other property not mentioned in the foregoing," and bonds bequeathed in the foregoing clause as bonds belonging to the testator, and the bequest of these is specific: *Douglass v. Loring*, 13 App. D. C. 21. A bequest to testator's wife was of "the stock which I now hold in the bank," and it was held to be specific: *Johnson v. Goss*, 128 Mass. 433. "The balance of my stock in my stock-book," employed as words in a will, imports the possession of "ten shares of the stock of the W. & N. R. Co." bequeathed in a preceding clause, and the bequest of these is specific in consequence: *Harvard Unitarian Society v. Tufts*, 176, 7 L. R. A. 390, 23 N. E. 1006. A bequest of "all the money and bank stock remaining in my name after the decease of my wife" is specific: *Tomlinson v. Bury*, 145 Mass. 346, 1 Am. 464, 14 N. E. 137. So, too, is a bequest of "all notes of bank which are payable to me at the date of this codicil": *Ford v. Ford*, 212. Also a bequest of "one-half of all my stock in the named railroads, to wit," etc., "and one-half of my stock in the W. Bank": *Loring v. Woodward*, 41 N. H. 391.

A reference by a testator in his will to certain stocks and particular bonds as being possessed by him is a sufficient expression of ownership to render his bequest of such stocks and bonds specific: *Norris v. Thompson's Exrs.*, 16 N. J. Eq. 542. A testator bequeathed the income of bonds, mortgages, etc., up to a stated amount, the executors to select these from property of testator of that sort, there being enough of it to satisfy the bequest over and over again. The bequest was held to be specific: *Blundell v. Pope* (N. J. Eq.), 21 Atl. 456. So was a bequest of "ten shares of my Essex County National Bank stock: *Moore's Exr. v. Moore*, 50 N. J. Eq. 554, 25 Atl. 403. A direction by a testator to pay to his wife the interest to be derived from a bond described, and after her death to his son, with the principal to go to the son's children, is specific: *Baldwin's Exrs. v. Baldwin*, 7 N. J. Eq. 211.

When making his will the testator owned certain securities and they remained his up to his death. The will contained a bequest to his wife of seventeen thousand dollars, "to be paid to her out of securities which I now hold, instead of cash." It was held that the bequest was specific: *Allen v. Allen*, 76 N. J. Eq. 245, 139 Am. St. Rep. 758, 74 Atl. 274. So, also, was a bequest of "my stock, right, title and interest" in a company named: *Kearns v. Kearns*, 77 N. J. Eq. 443, ante, p. 575, 76 Atl. 1042. So, also, a bequest of a named sum "in notes, to be taken out of my notes as soon after my death as it can be done": *Perry v. Maxwell*, 17 N. C. 488. A testator made bequests of bank stock, and subsequently in the will expressed himself thus: "In case there should be any deficiency in the bank stock which I hold at my death, as compared with the amount bequeathed in my will and testament," etc. The bequests were specific: *McGuire v. Evans*, 40 N. C. 269. In another case the bequest was of all the shares, standing in the testator's name, of the stock in a corporation named in the will, to those certain persons as trustees, they to distribute the dividends, as they should come in among the beneficiaries the will pointed out. The bequest was held to be specific: *In re Noon's Estate* (Or.), 88 Pac. 673. Decree affirmed on rehearing: *In re Noon*, 49 Or. 286, 90 Pac. 673.

In another case the bequest was of "one thousand dollars of the United States six per cent stock or loan of the year 1812, standing in my name on the books of the loan office, Pennsylvania, as per certificate No. 269." It was specific: *In re Ludlam's Estate*, 13 Pa. 188. A woman by will left her daughter expressly all she possessed and then gave her "the bond held by me." The estate consisted of some cash, some furniture and a bond. The bequest of the bond was specific: *In re Weller's Estate*, 2 Woodw. Dec. (Pa.) 191. "My stock" in a named bank was, it was held in another case, sufficient, with apt words of bequest, to make a specific legacy of all the stock of the bank standing in the name of testatrix at the time of her death: *In re Martin*, 25 R. I. 1, 54 Atl. 589. A testator directed by his will that the executors should not sell the stock he had in a named corporation, but should hold it and pay the dividends to persons named in the will. The bequest was specific as to both stock and dividends: *McFadden v. Hefley*, 28 S. C. 317, 13 Am. St. Rep. 675, 5 S. E. 812.

A testator gave by will "Twenty thousand dollars out of the six per cent stock of the corporation of Washington in my name, if

so much should remain out of my personal estate after satisfying all previous bequests." It was a specific bequest: *Larned v. Adams*, Fed. Cas. No. 8092, 1 Hayw. & H. 384. A will contained a gift of eighty-two shares of stock "whereof," so the phraseology went thereafter, "fifty shares which are now pledged as collateral for a note, shall be released by my executors from said pledge immediately on my death, if they shall not have been released before my death." Here was a strong implication of ownership, but no direct assertion to that effect; nevertheless it was held, and it would seem very properly, that the bequest of the shares was specific: *In re Lyle*, 41 Misc. Rep. 596, 85 N. Y. Supp. 290.

2. Identification of Subject of Bequest by Unmistakable Marks.—"A legacy is specific when it is the intention of the testator that the legatee shall have the very thing bequeathed": *Wallace v. Wallace*, 23 N. H. 149. "In order to constitute a bequest of personal estate specific, there must be a segregation of the particular property bequeathed from the mass of the estate, and a specific gift of a specified portion to the legatee": *Mayo v. Bland*, 4 Md. Ch. 484. It would appear that the two quotations just given express all that is indispensable in the way of pointing out the subject matter of the bequest, and the intention of the testator that the bequest shall be specific. "To constitute a legacy specific, it is necessary that such intention be either expressed by the testator in reference to the thing bequeathed or that it otherwise clearly appear from the will. This is not, however, a technical, arbitrary rule, to be answered only by the use of particular words and expressions, but is an embodiment of the general principles by which the character of legacies should be determined, each will resting for construction on the language employed and on established surrounding significant circumstances, if such exist": *Morris v. Thompson's Exrs.*, 16 N. J. Eq. 542.

As we have seen, the old English courts insisted on a rule in this connection that they found necessary to depart from time after time. Even as to specific bequests of stock the clearly expressed "my" is no longer a *sine qua non*. "The general rule is that if stock be bequeathed and the testator owns the stock described at the time of making the will, the bequest must be considered specific": *White v. Winchester*, 23 Mass. (6 Pick.) 47; and the court cited as authority *Selwood v. Mildmay*, 3 Ves. 310. Under a will certain cattle, "except one pair of yearling steers," were given to one son of the testator and to another "one pair of yearling steers," at the time the will was made, the testator having just one pair of yearling steers. The bequest of these steers was specific: *Stickney v. Davis*, 33 Mass. (16 Pick.) 19. Where a clause of a will, standing all by itself, bequeathed certain shares of stock, the bequest was specific: *Waters v. Hatch*, 181 Mo. 262, 79 S. W. 916. A bequest of one carriage when, as a fact, the testator had only one, was specific: *Everitt v. Lane*, 37 N. C. 548.

A devise so framed as to make a gift of a crop growing on the land results in the gift's becoming a specific legacy: *Stall v. Wilbur*, 77 N. Y. 158. A bequest of two certain policies of insurance is specific: *Platt v. Moore*, 1 Dem. Sur. (N. Y.) 191. A bequest of life insurance, the amount and the company being named in that connection, is specific: *In re Gan's Will*, 60 Misc. Rep. 282, 113 N. Y. Supp. 259; decree modified, 114 N. Y. Supp. 975. A devise

of land with directions that it be sold and the result in money divided between named persons is a specific bequest: *In re Brown's Estate*, 1 Am. Law Reg. 126 (Pa.)

Although the thing bequeathed be not owned by the testator when making his will, if susceptible of being pointed out and distinguished from the rest of the estate at the time of testator's death, it is enough. The bequest is specific: *Appeal of Fidelity Ins. etc. Co.*, 108 Pa. 492, 1 Atl. 233. A will provided that the homestead of testatrix be sold and the price invested for her son's benefit; after the son's death the principal to go to others named. It was a specific bequest: *In re Martin*, 25 R. I. 1, 54 Atl. 589. If the things falling within the terms of a legacy when enumerated (or if they had been enumerated by the testator) are in their nature specific, if capable of individuality, or if it be an assemblage of things, or something capable of being separated by sensible distinctions as the property in a particular estate, then the legacy is specific: *Bailey v. Wagner*, 2 Strob. Eq. (S. C.) 1.

3. Identification of Subject of Bequest by Stated Derivation.—That is to say, by the testator's reference to the source from whence the property bequeathed became his to give. And first let us take the case where the reference was to a derivation from the estate of another. In *Young v. McKinnie*, 5 Fla. 542, the words in the will were: "I direct that all the property, real or personal, that I obtained from the estate of B. K., deceased, be returned to R. K., minor heir of B. K., deceased, or such portion thereof as I now have in my possession." The gift was held to be specific. So, in the same case, a restoration to the minor heir of another deceased person from whom the testator declared he had received the property given was held to be a specific gift. In Iowa it was held that a bequest of a sum of money described by the testatrix as being that received by her from an estate named was specific: *Smith v. McKitterick*, 51 Iowa, 548, 2 N. W. 390. In Maryland there was a devise of "my Bland Air plantation, with all the slaves, and their increase, which I derived from my uncle T., and all the personal property thereon not slaves, and used with the same at the time of my death." This was a specific bequest of the slaves and other personal property: *Mayo v. Bland*, 4 Md. Ch. 484. In another Maryland case the testator had bequeathed one thousand dollars to a brother and sister each "out of the portion or share of my father's estate that may come to me." These legacies also were held to be specific: *Gelbach v. Shively*, 67 Md. 498, 10 Atl. 247. So, too, in New York a legacy of "the five hundred dollars," stated in the will as having been bequeathed to the testatrix by her brother: See *In re Getman*, 128 App. Div. 767, 113 N. Y. Supp. 67.

A legacy held in South Carolina to be specific was expressed thus: "I give to my wife the whole of the property she brought me": *Warren v. Wigfall*, 3 Desaus. 47. In a case in Virginia where the testatrix had bequeathed two thousand dollars to each of two persons named "of the ten thousand and fifty-two dollars which I received from my uncle F. C.'s estate," it appeared that her husband had invested the ten thousand and fifty-two dollars in Virginia bonds, and these were transferred to her by his executor. It was held that the two bequests of two thousand dollars each were not specific, but money, legacies: *Skipwith v. Cabell's Exr.*, 19 Gratt. 758.

Next, as to reference by the testator to derivation by payments looked to from persons under duty to make such. A bequest of a note and the mortgage securing it, to hold on trusts stated, reduce the obligation to cash and invest the latter as may seem best to the trustee, is a specific bequest: *Farnum v. Bascom*, 122 Mass. 282. A bequest to a mortgage debtor of the testator of the principal of the debt and a direction in the will to the executor to assign and transfer the mortgage to him amount to a specific bequest: *Wheeler v. Wood*, 104 Mich. 414, 62 N. W. 577. The legatee of "all the money due on a bond against P. and I." has a specific legacy: *Stout v. Hart*, 7 N. J. L. 414. So has the legatee of "the money now owing to me from A": *Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. 634. A gift of the proceeds of a bond and mortgage described is specific: *Gardner v. Printup*, 2 Barb. 83. A will contained a provision that "a certain bond and mortgage of seven thousand dollars, the present amount of principal due, and which I hold against J.," be held by the executors in trust to pay the interest to a named person for life, and afterward reduce the obligations to cash and divide and distribute. It was a specific bequest: *Abernethy v. Catlin*, 2 Dem. Sur. (N. Y.) 341.

A will provided for the taking of tolls upon a road in trust to pay a sum therefrom monthly to a named person. It was a specific, and not a demonstrative, legacy: *Morris v. Harris*, 19 Ohio St. 15. A testator bequeathed a debt stated to be owing him. It was a specific bequest: *In re Souder's Estate*, 15 Pa. Co. Ct. 285, 3 Pa. Dist. 495. So where a testator bequeathed promissory notes: *In re Martin*, 25 R. I. 1, 54 Atl. 589. And where one bequeathed "the amount of the following notes," describing those meant: *Tipton v. Tipton*, 1 Cold. (41 Tenn.) 252. A will recited, among other things, "I give and bequeath to my son . . . the sum of one thousand dollars to be paid as follows, said sum to be credited on a promissory note I now hold against him for the sum of thirteen hundred dollars." At the making of the will and the testator's death, one thousand dollars was the balance due on the note. This was a specific legacy to which the legatee's right of property became fixed by the testator's death, so that from then on the maker of the note was not accountable for interest to either the estate or its assignee: *Martin v. Badger* (Wash.), 114 Pac. 505.

Next, as to reference by the testator to derivation by anticipated proceeds of sale, etc.: A testator made sundry general bequests of money, and then, referring to his stock of goods, directed his executors to sell these and his real estate and divide the proceeds between his brother and two sisters equally. By a further clause in the will he disposed of the residue of the estate. The bequest to the brother and sisters was held to be specific: *Kaiser v. Bandenburg*, 16 App. D. C. 310. A will provided for the sale of the testator's household furniture and that the balance of the proceeds, after payment of the funeral expenses, should go to a named church. In ensuing clauses the will provided for certain legacies, after which it directed that the residue, if any, should be divided among "the said legatees in the same proportion that the several legacies bear to each other," while, on the other hand, they, in case the "sale of my property should prove insufficient for the payment of all said legacies in full," should bear, in respect of such legacies, the deficit in like

proportion. The bequest of the balance of the proceeds of the sale of the furniture was held to be specific: *In re Brett*, 57 Hun, 400, 10 N. Y. Supp. 871. Another will provided for the sale of the testator's real estate and the application of the proceeds to the payment of debts, funeral expenses, inheritance and other taxes, and all the costs, etc., of administration, so that the legacies under the will should suffer no deductions; it then provided for the payment of the balance of the proceeds to a niece of the testator. It was held that the niece took a specific bequest: *In re Wilson's Estate*, 15 Phila. 528. Certain described personalty was set apart by a will for raising a fund for the legacies, and it was directed in the will that "the surplus, after paying the legacies, if there should be any," was to be divided among named grandchildren of the testator. This surplus was a specific bequest: *Bailey v. Wagner*, 2 Strob. Eq. (S. C.) 1.

Next, as to reference by the testator to derivation in respect of negotiations, or suits in process at the time of the making of the will: A will provided that if the testator prevailed in a certain litigated claim, his wife should have one-half net of the amount recovered, and that ten thousand dollars of the other half, provided the half should amount to twenty-five thousand dollars, should be given to Q., to complete the cathedral; but if the half should be less than twenty-five thousand dollars, only two-fifths of it should so go for the cathedral, while of the rest, two thousand dollars should be given to each of five named persons and the remainder to the testator's daughter. A further provision was that if the fund failed in amount sufficient to pay "said special legacies" in full, the legatees should take pro rata. The bequests were held to be specific rather than demonstrative or general: *Maybury v. Grady*, 67 Ala. 147. The bequest of money to be received under a decree in a suit mentioned in that connection is specific: *Chase v. Lockerman*, 11 Gill & J. 185, 35 Am. Dec. 277. A bequest of that portion of the purchase money of an estate named as shall be on hand at the testator's death is specific: *Starbuck v. Starbuck*, 93 N. C. 183. A will provided: "I give and bequeath to my wife Mary all the amount of moneys and interest that may be recovered of and from Dr. Kirker for the purchase of the Penrose estate, to her and her assigns." The bequest was specific: *Gilbreath v. Alban*, 10 Ohio St. 64. A pecuniary bequest charged, wholly or in part, upon another bequest or devise, so that an intent is apparent thus to burden such bequest or devise with the payment, is specific: *Walls v. Stewart*, 16 Pa. 275.

1. Identification of Subject of Bequest by Its Location.—The reference here is to the testator's mentioning in connection with his disposing of the particular thing, and as a means of identifying it, the place where it is to be found. And first, with reference to things in custody of banks, etc. A bequest of whatsoever sum the testator might, at the time of his death, have on deposit in a bank is specific: *Barber v. Davidson*, 73 Ill. App. 441. And when, after so disposing in his will and calling attention to the particular banks where the deposit was, the testatrix drew out money and deposited it in another bank, where it remained until her death, the bequest still was specific: *Prendergast v. Walsh*, 58 N. J. Eq. 149, 42 Atl. 1049. Testatrix bequeathed "all the money I die possessed of in several banks and bonds." It was specific: *In re Beckett's Estate*, 15 N. Y. St. Rep. 716. So, too, a bequest of shares of stock by reference to their

being pledged as collateral, the executor being directed to have them released at once after testator's death: *In re Lyle*, 41 Misc. Rep. 595, 85 N. Y. Supp. 290. And see *Appeal of Smith*, 103 Pa. 559, where money in a bank was bequeathed to two sons. And *In re Fow's Estate*, 12 Pa. Co. Ct. 133, where the bequest was of all money belonging to the testator, whether in bank, in his own custody or in the hands of his agents. And *Manlove v. Gant*, 2 Tenn. Ch. App. 410, where the bequest was, among other things, of money in bank left after paying expenses and the doctor's bill.

Next, the contents of a store, as in the case of *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785. There the testator had bequeathed to one person all his property excepting a stock of merchandise, books, accounts, notes, store fixtures and everything belonging to a certain store named, which he bequeathed to another; the latter bequest was held to be specific.

Next, as to property at home or so described virtually: *In Getman v. McMahon*, 30 Hun, 531, the bequest was of "the use and control of all my personal property whatsoever on the farm and in the house at the time of my decease, and for her to have and use and enjoy the same," etc. It was held to be specific. In *Re Delaney's Will*, 133 App. Div. 409, 117 N. Y. Supp. 838, the bequest was of all the household furniture and personal property of whatever kind in the residence of testatrix. It was held to be specific, but that as to it the will should be regarded as speaking as of the time it was made rather than as of the death of the maker. In *McFadden v. Hefley*, 28 S. C. 317, 13 Am. St. Rep. 675, 5 S. E. 812, the bequest was of all the horses, mules, cows, hogs, wagons, farming implements, and household and kitchen furniture on the plantation which the testator occupied. It too was held to be specific.

Then as to property described in the will as being in the hands of the testator's agents, as in the case of *Fow's Estate*, 12 Pa. Co. Ct. 133, where the bequest was decided to be a specific one.

c. Unclassified Specific Bequests.—It was said by Van Dyke, J., in *Morris v. Thomson's Exrs.*, 15 N. J. Eq. 493: "We have but little difficulty in understanding what constitutes a specific legacy and what a general one, but from the peculiar language so often made use of in wills, the courts have had great difficulty in determining whether it meant the one thing or the other; and while the judicial decisions on the questions have been very numerous, the one way and the other, but very few settled rules can be gathered from them. It seems to be conceded that if a testator bequeaths to a person a certain number of cows, or sheep, or shares of stock, it is a general legacy, but if he add the word 'my' cows, 'my' sheep or 'my' shares of stock, it is a specific legacy, although in both cases he may be, at the time of making the will, and thence to the time of his death, the owner of the number of cows and sheep and shares of stock mentioned in the will. This seems to be at first sight a rather remarkable distinction, but such seems to be the rule adopted by the courts and by the aid of which each tribunal has to grope its way through the unintelligible language so often found in wills. Hence another rule, admitted to be universal, is always to be resorted to in solving these difficult questions, and that is, What was the real intention of the testator? This, if it can be ascertained, is always to govern."

In that case the testator had, by the will, disposed of all his personal property except the stocks and bonds, the subjects of the bequests which were made in later parts of the will, and there being now no personal estate, other than his stocks and bonds, on which the residuary bequests could operate, the court held that his describing the residue as "my personal estate" was equivalent to saying "my" stocks or "my" bonds, and made the bequests specific and not general: *Morris v. Thomson's Exrs.*, 15 N. J. Eq. 493. So, too, in a Texas case. The testator started out in his will by declaring his intention that his wife and daughter should share his estate equally, then proceeded to make dispositions in detail looking to that end. The result of these dispositions, however, owing to the actual state of the property, was to bring the daughter into a lawsuit and subject her probably to a loss of money, and work other such confusion. It was a complicated case, and for the daughter's relief the court fell back upon the opening general expressed intention in the will and decided that what the wife and daughter took were not specific gifts, but demonstrative: *Lake v. Copeland*, 82 Tex. 464, 17 S. W. 786.

A testator gave to his wife "twenty negroes of the average value of all the slaves I may possess," and to his children, "all the rest and residue of my negro slaves." They were specific bequests: *Myers' Exrs. v. Myers*, 33 Ala. 85. Of the shares of twelve children, to whom was to go in equal shares, under the will, the price of the homestead directed to be sold at the end of the wife's life estate in it created by the will, one child bought nine. He occupied the property and at his death left by his will "one-third of the real estate of the homestead" to his wife and two-thirds to his son. It was held that the wife and son took, not devises of land, but specific bequests: *Heslet v. Heslet*, 8 Ill. App. 22. In the case of a bequest to a daughter of shares, in various amounts, of several sorts of stocks named "and also five thousand dollars of the Wilmington, Columbia and Augusta Railroad bonds," when, after testator's death, no such securities were found among the assets except the bonds named, worth thirty cents on the dollar, the daughter had a specific legacy of the bonds, and was not entitled to five thousand dollars in money: *Kunkel v. Macgill*, 56 Md. 120.

Gray, C. J., says, in *Metcalf v. Framingham Parish*, 128 Mass. 370: "If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication and so mold the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared." Accordingly, the testator having made several bequests of shares of stock named, when, at the date of the will and also of the death he held of such stock shares largely in excess of those bequeathed, it was held that the bequests were specific. There were legacies of money to the same persons, and the court regarded that as indicating intent as to the other legacies so held specific, on the authority of *Lord Cairns*, in *Kermode v. Macdonald*, L. R. 3 Ch. 584; *Metcalf v. Framingham Parish*, 128 Mass. 370. Words in a will were these: "I give to my son negroes to the amount of \$3,350, negro men at \$800 and the women at \$600, and smaller negroes in the same proportion." It was held that this was a specific bequest of negroes, and not a

money bequest with a designation of the negroes as the fund from which it was to be taken: *Malone v. Mooring*, 40 Miss. 247.

A testator gave his wife "five hundred dollars in personal property such as she may select," and it was held to be a specific bequest. The court said: "By our law the executor, except when he is the residuary legatee, is bound to return an inventory of the personal property, the value of which is estimated by appraisers. The personal property does not, as in England, go to the executor, but, if undisposed of by the will, descends to the heir at law. As the personal property is all inventoried and belongs to the estate after the death of the testator, a reference to it in connection with a legacy would seem to make the legacy more specific than it might be considered by the use of the same words in England": *Wallace v. Wallace*, 23 N. H. 149. Where a testator made bequests as of sums of money, but "in bonds" of a named class, and the amounts and names tallied exactly with bonds he owned, the bequests were specific, the court saying: "The question is, What did the language of the will mean to the testator?" *Jewell v. Appolonio*, 75 N. H. 317, 74 Atl. 250. A bequest of a mortgage, "subject to the payment of the income from it to testator's wife during her life," was held to be specific: *In re Robinson*, 37 Misc. Rep. 336, 75 N. Y. Supp. 490. The case of *Perry v. Maxwell*, 17 N. C. 488, was one where the character of the bequest was described by—as it were—reference. The bequest was contained in a clause of the will preceding a clause, to wit, "all the notes that will be remaining after paying of the legacies hereinbefore given." It was held to be specific. A bequest to the testator's wife of a named number of horses, oxen, etc., with the designation "her choice," after each, is rendered specific by such designation: *Everitt v. Lane*, 37 N. C. 548. A lessee exercised a standing option to purchase the demised premises, but before the expiration of the option the lessor had died leaving a will whereby his wife had a life estate in those premises, with remainder to her children. The wife and children took the purchase money as a specific bequest: *Buckwalter v. Klein*, 5 Ohio Dec. 55. Where a clause in a will provided expressly for the payment of all debts, funeral expenses, inheritance taxes, and all expenses of administration, to the end that legacies made in subsequent clauses should suffer no deductions, and then directed the rest of his estate to be given to a named person, it is a specific legacy: *In re Wilson's Estate*, 15 Phila. 528. A man bequeathed eighty shares of a named stock to his stepson, after his wife's life estate in it, bequeathed to her, and fifteen hundred dollars; he gave his daughter some insurance stock and, saving what he had bequeathed to the stepson, all the stock in which, under the will, the wife was to have for life. There were no funds to satisfy the money legacies and the widow elected to take against the will. Both bequests were specific and possession was accelerated by the election: *In re Klenke's Estate*, 210 Pa. 575, 60 Atl. 167.

A woman provided by will that her son be allowed to live on a farm named instead of receiving the income of it, the farm to be sold after his death and the proceeds to go to other certain beneficiaries. The son took a specific legacy: *In re Martin*, 25 R. I. 1, 54 Atl. 589. *In Manlove v. Gant*, 2 Tenn. Ch. App. 410, the gifts were of rents yet to accrue, the proceeds of the sale of a storehouse, less the mortgage to be paid on it, and what might be left of money in the bank

after paying funeral expenses, etc., and doctor's bills. The legacies were specific.

In closing this branch of the subject it is not out of place, perhaps, to quote at some little length from a Massachusetts case where the characteristics of a specific bequest are put forth very clearly. The case was one of a bequest of a certain mortgage deed and the note mentioned in the mortgage to a person in trust to hold the same on certain trusts, collect when payable the debt secured by the instruments, and sell the same whenever he should deem best, and invest the proceeds. Devons, J., said, among other things: "When the intent is to bequeath a certain sum and the circumstance that it is then out on mortgage or any other security is incidental merely, and does not constitute an ingredient in the gift, the legacy is general: *Le Grice v. Finch*, 3 Mer. 50. But if the gift be of the sum due upon a mortgage of particular premises, or upon a certain note described, the legacy is specific: *Sidebotham v. Watson*, 11 Hare, 170; *Gillaume v. Adderley*, 15 Ves. 384; *Chaworth v. Beech*, 4 Ves. 555; *Innes v. Johnson*, 4 Ves. 568; *Giddings v. Seward*, 16 N. Y. 365. So if the gift is of the proceeds of a certain mortgage or all the money due on the bond of A. B. or all the money standing to the testator's credit in a particular bank, such legacy is specific: *Giddings v. Seward*, 16 N. Y. 365; *Stout v. Hart*, 2 Halst. 414; *Towle v. Swasey*, 106 Mass. 100. When the bequest is not of the sum of money due on a particular security, but of a particular security described, the gift is not less specific, for nothing will fulfill the terms of the bequest but the thing itself. The legacy we are now considering was of the mortgage deed, note and debt. The fact that the testatrix mentions the amount due from the promisor is for its convenient identification only. This does not constitute any ingredient in the gift. It would belong to the legatee if it should have been reduced by payment, but there would not be any claim, on account of such reduction, against the general estate. As long as it can be identified, the legatee may have it; but he receives it in the condition in which it is when the gift takes effect by the death of the testatrix. The security was the essential thing. If the money due thereon had been collected and invested in a new form the legacy would have been adeemed, as that which was given would have ceased to exist": *Farnum v. Bascom*, 122 Mass. 282.

When a bequest is held to be specific, rather than demonstrative or general, the fact may be of advantage to the legatee or otherwise according to circumstances.

"The rules as to specific legacies are known; in several things they are preferred to pecuniary legacies, in others not. They are entitled to this advantage, that if there is not a penny for the pecuniary, a specific legatee shall take the whole, if that exists": *Drinkwater v. Falconer*, 2 Ves. Sr. 623. In the case of *Masters v. Masters*, 1 P. Wms. 421, it was admitted that both the real and personal estate of the testatrix were deficient in value to pay the legacies and annuities given by the will. "It was decreed by the master of the rolls that, the personal estate not being sufficient to pay the legacies and the real estate being liable to the legacies by the will, the estate should be so marshaled that as far as possible the whole will might take effect and all the legacies be paid. And therefore that the legatees should be paid out of the real estate, and if that should be deficient they must be paid out of the personal estate; and, there being ad-

mitted to be a deficiency that the land should be forthwith sold to prevent a greater deficiency, but that the specific legacies must be all paid, and not abate in proportion."

And in *Blaney v. Blaney*, 55 Mass. (1 Cush.) 107, it was said: "By the established rule of marshaling assets, specific devises and legacies are not to be taken for payment of the testator's debts until the general devises and legacies are exhausted." And in *Cooch's Exr. v. Cooch's Admr.*, 5 Houst. 540, 1 Am. St. Rep. 161. "Every testator is presumed to know the law with respect to the liability of his estate for his debts, and consequently to make disposition of it in accordance with such knowledge. Therefore it is that when a testator even uses such sweeping and apparently conclusive words in disposing of his personalty as 'all my personal estate,' the law still holds that he only meant such portion of it as should be left after taking from it all that it was liable to, either as matter of legal responsibility for debts, funeral expenses and charges of administration, or on account of some further deduction which the provisions of his will require—for example, a specific legacy."

In *Drinkwater v. Falconer*, 2 Ves. Sr. 623, the court, after saying as above quoted, "If there is not a penny for the pecuniary, a specific legatee shall take the whole," adds: "But, on the other hand, if it [the thing bequeathed] does not appear on the death of the testator it is gone, and the general assets cannot be resorted to." And in *Lord Eldon's* observation in *Howe v. Lord Dartmouth*, 7 Ves. 137: "The question must be, Did he mean to dispose of what he had at the date of the will, or of that which he should have at his death? If he meant the former, then every part of that identical personal estate which is disposed of between the date of the will and the death is a legacy adeemed." An illustration is found in the case of a specific legacy of money due on a note. After making her will the testatrix received payment of the money and deposited the latter with a banker with whom she had no other funds, and it so remained, all but ten pounds which she drew out, until her death. It was held an ademption. Sir William Grant said: "The principle of ademption by receiving the thing given is certainly that the thing given no longer exists; for if after the receipt of it, it could be demanded, that would be counting it into a pecuniary, instead of a specific, legacy. It is said this is pecuniary, as it is a bequest of the money to be received. But that is the case of every bequest of a debt. If anything could be made of the circumstance of placing the money with these bankers, it is counter-balanced by the other circumstance that she drew out a part of that money. That is treating it as her own. If she meant to appropriate it and consider it as a legacy still standing and binding upon her estate, she ought not to have touched it. This is not so much to be considered as a partial ademption as an evidence of her having deposited there to be at her own command": *Fryer v. Morris*, 9 Ves. 360.

A grandchild was to have a certain sum of money and two hundred shares of a named stock, and the testator's wife was given all the rest of the property. When the will was made the testator owned shares of stock in various companies and over two hundred shares of this named stock, but at his death he held less than two hundred shares of this stock. The bequest was not general, but specific, and the legatee was entitled to only the number of shares the testator

had at his death: *New Albany Trust Co. v. Powell*, 29 Ind. App. 494, 64 N. E. 640.

A testator made a will before the settlement of his father's estate and bequeathed to certain persons sums to which he would be entitled under his father's will. He left the rest of his estate to other persons. The father's estate, upon settlement, did not produce, as the son's part, the full amounts of the sums bequeathed, as above, and the legatees, applying to have the deficit made good from the rest of the son's estate, were denied, the ground being that the legacies were specific and partially adeemed: *Gelbach v. Shively*, 67 Md. 498, 10 Atl. 247.

A testatrix provided that a sum of hers held by her brother be devoted to the payment of the funeral expenses and other bills and gave a life estate in what might be left of it to a person named. She further provided that on the death of that person six hundred dollars of the sum should go to a certain other person. The sum was, after the making of the will, received by testatrix from her brother and became mixed with her other funds. The bequest was specific and was adeemed by a failure of the fund: *In re Stilpen*, 100 Me. 146, 60 Atl. 888, 4 Ann. Cas. 158. A will gave four hundred dollars to the testator's nephew, owner of land on which the testator held a mortgage for that amount, and the direction to the executor was that the gift was to be effected by his assigning and transferring the mortgage to the mortgagor; but the mortgagor paid the mortgage to the mortgagee and after the latter's death it was held that the nephew was not entitled to four hundred dollars in money: *Wheeler v. Wood*, 104 Mich. 414, 62 N. W. 577. Testatrix when making her will had twenty shares of the stock of a certain bank and of that stock gave by the will ten shares to each of two persons. The bequest was held to be of the particular shares owned by her, and not twenty shares generally, and as she had disposed of ten shares after making the will, the legatees took only five shares each. It was a partial ademption: *Drake v. True*, 72 N. H. 322, 56 Atl. 749.

A will gave to the executors "a certain bond and mortgage for seven thousand dollars, the present amount of principal due, and which I hold against J." The executors were to hold in trust, to pay to A. the interest during his life and afterward to reduce the obligations into cash, and divide and distribute according to further testamentary directions. However, J. paid up during the testator's lifetime and the money remained on deposit with a banker. The bequest was specific, and adeemed: *Abernethy v. Catlin*, 2 Dem. Sur. (N. Y.) 341.

There was a bequest to a sister of all the testator's personal estate and a devise to her for life of the farm he occupied, with a provision that when she died the farm was to be sold and the product of the sale distributed among their nephews. The farm was sold before the testator's death, however, and a mortgage taken for the price, which mortgage was, when the testator died, only partly paid up. The bequest to the nephews was decided to be specific and adeemed: *Sharp v. McPherson*, 10 Ohio C. C. 181, 3 Ohio Dec. 468.

A man devised a tract of land to his son subject to a charge of six hundred dollars for the benefit of the children of another son. Half of this sum was to be paid in one year after the testator's death and the other half in two. But after making his will the testator sold the land to a third son, the consideration being partly in cash

and partly in deferred payments which did not mature until after the death of the testator. As the charge under the devise was the only source contemplated of payment of the amount charged, this amount was held to be a specific bequest which had been, of course, adeemed: *Walls v. Stewart*, 16 Pa. 275. A bequest of promissory notes is specific and subject to be reduced by payments made between the execution of the will and the death of the testator: *In re Martin*, 25 R. I. 1, 54 Atl. 589.

The ademption of legacies is discussed at length in the note to *Miller v. Malone*, 95 Am. St. Rep. 342.

Lord Hardwicke said in *Ellis v. Walker*, Amb. 309: "The court leans against considering legacies as specific, because of the consequences." To the same effect. see *Chaworth v. Beach*, 4 Ves. 555; *Innes v. Johnson*, 4 Ves. 568; *Kirby v. Potter*, 4 Ves. 748; *Raymond v. Broadbelt*, 5 Ves. 199; *Barton v. Cooke*, 5 Ves. 461; *Sibley v. Perry*, 7 Ves. 502; *Webster v. Hale*, 8 Ves. 410; *Deane v. Test*, 9 Ves. 146; *Wilton v. Brownsmith*, 9 Ves. 180; *Fryer v. Morris*, 9 Ves. 360; *Smith v. Pybus*, 9 Ves. 566; *Lambert v. Lambert*, 11 Ves. 607; *Guillaume v. Adderley*, 15 Ves. 384; *Apreece v. Apreece*, 1 Vern. & B. 364. Among American decisions to the same effect are *Briggs v. Hosford*, 22 Pick. (39 Mass.) 288; *Dexter v. Phillips*, 121 Mass. 178, 23 Am. Rep. 261; *Appeal of Balliet*, 14 Pa. 451.

What these consequences are we have seen, but the matter is given emphasis in the following extract from a decision in a Maryland case: "In determining this as well as all other questions involving the construction of a will, it is admitted that the intention of the testator must prevail, but inasmuch as specific legatees are not liable to contribution in case of a deficiency of assets, and inasmuch as the legacy fails entirely if the testator parts with the property or thing specifically bequeathed, courts lean against construing a legacy to be specific, and have gone so far as to say that in no case ought a will to be so construed unless the language imperatively requires it. And accordingly we find Lord Eldon saying that, according to well-settled rules of construction, he was obliged to decide a legacy to be general although according to his private opinion the testator meant it to be specific": *Dryden v. Owings*, 49 Md. 356. Among other American cases bearing this sentiment are *Morton v. Murrell*, 68 Ga. 141; *Roquet v. Eldridge*, 118 Ind. 147, 20 N. E. 733; *Malone v. Mooring*, 40 Miss. 247; *Wallace v. Wallace*, 23 N. H. 149; *Perry v. Maxwell*, 17 N. C. 488; *Balliet's Appeal*, 14 Pa. 451.

III. Demonstrative Gifts of Personal Property.

"A demonstrative legacy partakes of the nature of both a general and specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund or to evince an intent to relieve the general estate from liability in case the fund fails. A specific bequest is liable to ademption, but such is not true of a general or a demonstrative legacy": *Nusly v. Curtiss*, 36 Colo. 464, 118 Am. St. Rep. 113, 85 Pac. 846, 7 L. R. A., N. S., 592, 10 Ann. Cas. 1134. "The distinction between a specific and a demonstrative legacy involves not merely a technical question depending for its solution solely upon the precise language of the bequest, but a substantial inquiry respecting the intention of the testator as shown by the terms of the particular legacy,

examined in connection with all the other provisions of the will. A specific legacy is a bequest of a specific article or particular fund which can be distinguished from all the rest of the testator's estate of the same kind, while a general legacy is payable out of the general assets of the estate": *In re Stilpen*, 100 Me. 146, 60 Atl. 888, 4 Ann. Cas. 158. In the same opinion it is said that a demonstrative legacy partakes of the nature of a specific one, to be sure, by designating the fund out of which it is to come, but that there is a vital distinction in respect of the result in case of the failure of that fund. In such circumstances a specific legacy is adeemed or lost by the extinguishment of the specific thing or failure of the particular fund, while a demonstrative legacy is still alive after such a failure, being payable then out of the general assets. To the same effect see *Moriss v. Garland's Admr.*, 78 Va. 215.

This, in fact, is the bequest of quantity that Lord Hardwicke had reference to in the quotation above from his decision in *Purse v. Snaplin*, 1 Atk. 414. The quality of the gift is intermediate between that of a specific and that of a general bequest: *Harrison v. Denny*, 113 Md. 509, 77 Atl. 837. As was said in *Balliet's Appeal*, 14 Pa. 45: "The distinction between a specific and a pecuniary legacy and a specific and a demonstrative legacy is sometimes very nice."

A testator made a gift of a named sum to each of two nieces, stating it to be "part of the proceeds of" certain property mentioned—ground rents, insurance, etc. These were demonstrative bequests, and if such proceeds proved insufficient to satisfy them, the legatees had resort to the other property of the estate: *Harrison v. Denny*, 113 Md. 509, 77 Atl. 837. A testator provided that his widow, if outliving his mother, should take the income of property he named (which income his father by will had given to the mother for life, testator being given by the same will testamentary disposal of the principal) until his, testator's, eldest child should reach full age, at which time, if the widow still lived, his executors should "set apart out of the said property" a fund of one hundred thousand dollars for the child's benefit. Similar provision was made in respect of each of his children him surviving, the widow to continue, during life, to enjoy what was left after each setting apart. Three children were living when the testator died, and all reached maturity, testator's widow still surviving but his mother being dead. The property subjected to these dispositions amounted to only one hundred and twenty-five thousand dollars, and the testator had had the disposal, under his father's will, of two hundred and sixty-five thousand more, but had acquired no independent means. The children were held to have demonstrative bequests and could look to the general assets for having them satisfied: *Bradford v. Brinley*, 145 Mass. 81, 13 N. E. 1.

A bequest was, under the will, payable out of personal property on hand after the death of the wife of the testator and before the personal property should be divided. It was demonstrative rather than specific: *Hibler v. Hibler*, 104 Mich. 274, 62 N. W. 361. A will provided for a fund from which a certain income was to be derived for the testator's widow, this income to be paid her yearly, securities enough to produce which should be selected. This was a "general" or "demonstrative" bequest, the court said, and the full amount must be made up out of the assets generally: *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162. The selection by an executor, empowered by a

will to select securities from which named income was to be derived for a beneficiary, is not so final as that the income falls with the securities selected. On such failure of the selected securities resort would be to the corpus of the estate, this being a demonstrative bequest: *Eggleston v. Merriam*, 83 Minn. 98, 85 N. W. 937, 86 N. W. 444.

A gift in a will read: "To the three daughters of T. the sum of four thousand dollars each, to be secured to them in the best manner possible, and the interest accruing thereon to be paid to T. for their support and education; moreover, till this donation be secured, to pay T. the sum of three hundred dollars per annum; this donation to be paid to each when of age or married." Here was not a demonstrative but a general pecuniary legacy, a charge primarily upon the whole estate: *Bodley v. McKinney*, 9 Smedes & M. (17 Miss.) 339. A testator's wife was to have "the sum of eight thousand dollars invested in stocks, the interest to be paid to her during her life." The bequest was demonstrative: *Johnson v. Conover*, 54 N. J. Eq. 333, 35 Atl. 291.

By a will a trustee (who was also an executor and the residuary legatee) was given certain sums "in bonds," of corporations named, to be reckoned at their face. At the making of the will the testator owned of each kind of the bonds enough to cover all the bequests. A later clause of the will provided that if the estate should fail to show the whole number of the bonds, the trustee need not furnish them, but take just what there were. If the bequest had ever a demonstrative aspect, that last clause took it away; it was specific: *Blair v. Scribner*, 65 N. J. Eq. 498, 57 Atl. 318. And see same case in 67 N. J. Eq. 583, 60 Atl. 211. There was this language in a will: "And my said wife having now in her possession the sum of eight hundred and fifty dollars in money, I direct and request my said executors to pay her the sum of one hundred and fifty dollars more, so as to make her the sum of one thousand dollars. My meaning and intention is to give her the sum of one thousand dollars." The court said the bequest of the one thousand dollars was general rather than specific, but that that of the eight hundred and fifty was demonstrative, or specific in so far as to require it to be paid out of the fund named unless such had failed: *Enders v. Enders*, 2 Barb. 362.

The "sum of twelve hundred dollars and interest on the same, contained in a bond and mortgage," was bequeathed under a will which, by a further clause, in effect made the legatee such only for life, with remainder over. The bequest was held to be demonstrative: *Giddings v. Seward*, 16 N. Y. 365. The widow was to have *durante viduitate*, provided at the testator's death issue of the marriage should be living, an annuity of eight thousand dollars to be paid "out of the income of my estate." The will then provided that in default of such living issue she should have an annuity of seven thousand dollars, the sole provision made for her, and left "the residue of the income" to go to a brother and sisters of the testator for their lives with remainder to their children on the death or marriage of the widow. The annuity of seven thousand dollars was held to be a demonstrative bequest, to be paid out of the principal of the estate if the income from the latter was deficient; and this, although when making his will the testator thought, according to the evidence, that his estate would produce an ample income after payment of the larger annuity: *Pierrepont v. Edwards*, 25 N. W. 128.

A testatrix made certain general and specific bequests and provided then that F. be paid fifty dollars a month, during his life, out

of the rents and income of the estate. She instructed, next, her executors to keep down the interest on her realty, pay assessments on it and maintain it in repair. The personal property was not adequate fully to satisfy the general legacies. F's bequest was held to be demonstrative: *Florence v. Sands*, 4 Redf. Sur. (N. Y.) 206.

A devisee was directed, as to a named sum on deposit in his name, to pay it to another person. Here, it was held, was a specific rather than a demonstrative bequest, and if the testator after making the will used the deposit, it was not a thing to be made good to the legatee after the testator's death: *Crawford v. McCarthy*, 159 N. Y. 514, 54 N. E. 277. When the terms of a testamentary gift of money are plain and conclusive, showing an intention that the legatee shall certainly receive the amount, the gift is demonstrative: *Watrous v. Smith*, 7 Hun, 544; *M. E. Church v. Hebard*, 51 N. Y. Supp. 546.

Testatrix gave a house and lot to her infant children and directed that of the money in bank as much as necessary be used to pay off the mortgage on the house, all as soon as possible after her death. This was a demonstrative bequest, and if the money in bank did not suffice to carry out the direction and there was no personalty left in the estate after payment of administration expenses, resort must be had to the balance: *In re Bedford*, 67 Misc. Rep. 38, 124 N. Y. Supp. 619. A will contained this provision: "I give unto my youngest child, W. H. W., the sum of three thousand dollars, to be due and paid when he arrives to twenty-one years of age, out of the proceeds of the sale of my lands." It was a demonstrative bequest: *Croom v. Whitfield*, 45 N. C. 143.

An estate was by will divided into shares, and of these two, it was directed, were to be in negro property, which should be designated by the executors. These were demonstrative bequests: *Johnson v. Osborne*, 82 N. C. 59. A testator made certain bequests of four thousand dollars each to be paid in any of his stocks, bonds, notes or other evidences of debt at their market value. If such were inadequate for the purpose, the deficit was to be made good in money. The bequests were demonstrative: *Trustees of Baptist Female University v. Borden*, 132 N. C. 476, 44 S. E. 47, 1007. A bequest of a lump sum payable in shares of enumerated stocks at figures stated is demonstrative: *Rose v. Warner*, 17 Ohio C. C. 342, 9 Ohio Dec. 536. A legacy given, reference being made in the will to a stated fund so as merely to point out a convenient mode of paying it, is demonstrative: *Walls v. Stewart*, 16 Pa. 275.

A man gave realty to his son and bequeathed to his daughter three hundred dollars to be paid a year after his death by the son out of the profits of the realty so given the latter. Afterward he contracted with the son to sell him the realty, delivered the deed, but was paid no money or obligations looking to payment thereafter, though it was known the contemplated consideration was the son's supporting his father and mother and paying three hundred dollars to his sister. The bequest to the latter was held to be demonstrative: *Appeal of Welch*, 28 Pa. 363. A bequest of money to be paid by a debtor of the testator would be demonstrative: *In re Hoppel's Estate*, 5 Phila. 216. "A demonstrative legacy is a bequest of a certain sum to be paid out of a particular fund": *Appeal of Armstrong*, 63 Pa. 312.

There was a bequest of money on deposit in a named savings bank and a subsequent clause in the will bequeathing to another person "all I have deposited in banks not otherwise disposed of." At the

making of the will testatrix had money in the savings bank named, but that bank became insolvent shortly before her death. The bequest was demonstrative, to be paid by the savings bank if possible, but if not the legatee could resort for payment to the general assets: *Bowen v. Dorrence*, 12 R. I. 269. A will directed the executors to collect insurance policies and from the receipts therefrom to pay certain bequests. There was no intent expressed that the general assets should be free from resort by the legatee in case of any inadequacy of the fund appointed to pay the bequest, and so the latter was held to be demonstrative: *White v. White*, 73 S. C. 261, 53 S. E. 371.

There was a bequest to a daughter for life of five hundred and forty dollars a year, interest on the purchase money on lands the testator had sold. The bequest was demonstrative: *Corbin v. Mills' Exrs.*, 19 Gratt. 438. Testator directed certain lands to be sold and his personal property also to pay debts. He bequeathed seven hundred dollars to one son, which was to be his entire portion. The homestead was to go to another son named also as executor—who was to farm it during the widowhood of his mother, pay one-fourth of the proceeds to her and the remainder to the six heirs. The homestead was sold after the widow's death and the proceeds of the property other than it were insufficient to pay the debts and the seven hundred dollar legacy. It was held that this was a general legacy while the parts directed to go to the six heirs were demonstrative, and these legatees could not be called upon by the other: *Myers v. Myers*, 88 Va. 131, 13 S. E. 346. A bequest of bonds of a named description, when the testator at the making of the will has of such a large excess over those bequeathed, is not adeemed by a subsequent payment of the bonds during the testator's lifetime. The bequest is demonstrative: *Ives v. Canby*, 48 Fed. 718. To the same effect, see *Boykin v. Boykin*, 21 S. C. 513, and *Wheeler v. Hartshorn*, 40 Wis. 83.

From a perusal of these authorities it will be seen how true is the expression above quoted from Balliet's Appeal, 14 Pa. 451, to the effect that the distinction between a demonstrative bequest and a specific one, on the one side, and a general pecuniary one on the other, is very nice. "Ordinarily, a legacy of a sum of money is a general legacy, but when a particular sum is given with reference to a particular fund for payment, such legacy is denominated in law a demonstrative legacy": *Gelbach v. Shively*, 67 Md. 498, 10 Atl. 217. In that case the court goes on to speak of what it is that is to be looked to really in order to determine whether it is the one thing or the other, thus: "The authorities seem to be clear in holding that whether a legacy is to be treated as a demonstrative legacy or as one dependent exclusively upon a particular fund for payment is a question of construction, to be determined according to what may appear to have been the general intention of the testator: *Creed v. Creed*, 11 Clark & F. 509. For although the personal estate of the testator is the primary fund for the payment of legacies generally, particular legacies may be so provided for as to be a charge upon a particular fund or estate exclusively. As was said by the lord chancellor in *Faville v. Blacket*, 1 P. Wms. 779, 'It is possible for a legacy to be charged in such manner upon a certain fund as that upon its failing the legacy shall be lost': *Bebach v. Shively*, 67 Md. 498, 10 Atl. 247. "Whether all the cases can be reconciled or not, they all proceed upon the principle that whether a legacy is demonstrative or specific must be de-

cided by the intent of the testator as it appears from the will; and that when a legacy is held to be demonstrative, a general intent is shown to have it paid without reference to the fund on which it is primarily charged": *Stevens v. Fisher*, 144 Mass. 114, 10 N. E. 803. To the same effect see *Davis v. Close*, 104 Iowa, 261, 73 N. W. 600, and *Davis v. Crandall*, 101 N. Y. 311, 4 N. E. 721.

IV. General Gifts of Personal Property.

a. **In General.**—"A legacy is said to be general when it is not answered by any particular portion of, or article belonging to, the estate, the delivery of which alone will fulfill the intent of the testator": *Davis v. Close*, 104 Iowa, 261, 73 N. W. 600; *In re Parson's Estate* (Iowa), 129 N. W. 955; and see *Gift v. Porter*, 8 N. Y. 516, to the same general effect. "A legacy is a 'general legacy,' and not specific where so given as not to amount to a bequest of a particular thing or money distinguished from all others of the same kind": *In re Barton's Estate*, 64 Misc. Rep. 242, 118 N. Y. Supp. 1087. It is said in *Balliet's Appeal*, 14 Pa. 451, that it is a legacy of quantity. In Rhode Island it is said that gifts of stated sums of money, without specifying any distinctive money in contradistinction from any other money of like amount, are general legacies: *In re Martin*, 25 R. I. 1, 54 Atl. 587. It was well said in *Morton v. Murrell*, 68 Ga. 141, that if a will directed bequest to be yielded out of the estate and mentioned no special part of the estate in that connection, to hold the bequest specific might be to frustrate the whole purpose of the testator clearly apparent from the instrument.

A bequest of "five thousand dollars in railroad bonds" is general: *Gilmer's Legatees v. Gilmer's Exrs.*, 42 Ala. 9. And if one should bequeath all his personal estate, excepting specifically certain things therefrom, that would be a general bequest: *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785. So, too, would be a legacy expressed thus: "I bequeath all my personal estate to my brother": *In re Woodworth's Estate*, 31 Cal. 595. In another California case there was a gift to the testator's five sons of the remaining one-half of all the real property the testator had acquired since marrying his wife then living, and all the residue of his personal property after payment of the legacies. This was a general bequest: *In re Ratto's Estate*, 149 Cal. 552, 86 Pac. 1107. That was, of course, in the nature of a residuary legacy. Such cannot be treated as specific, but from their general nature must be regarded as general: *Fairer v. Park*, L. R. 3 Ch. D. 309. And this, even though some of its particulars are enumerated in the will: *Pickup v. Atkinson*, 4 Hare, 624. But a bequest of the remainder of a particular thing or fund, after the payment of other legacies, or of all one's estate in a particular locality, may be specific so long as the identity of the thing or fund is not destroyed: *Nisbett v. Murray*, 5 Ves. 149.

The rule in England is that way, and in this country the courts have not departed very much from the English doctrine in respect to these dispositions. Two testators by a joint will devised certain real estate to a nephew and two nieces on certain conditions and with certain limitations. The residuary clause provided that the residuary estate be divided equally between the nephew and nieces "or their children, on the same conditions, by the same rule and in the same manner as are detailed in the foregoing bequests." What really these

last two words had reference to was the devises of the real estate, and the residuum was made up mostly of government bonds, money in bank, etc. The bequest of the residuum was held to be general: *Hill v. Harding*, 92 Ky. 76, 17 S. W. 199, 437. A testator bequeathed more stock than he owned when making the will and much more than he died possessed of, and made a residuary bequest of "all the rest, residue and remainder of my estate." The legacies of stock were general and the executor ordered by the court to purchase stock with the general funds so as to make up the absent shares: *Slade v. Talbot*, 182 Mass. 256, 94 Am. St. Rep. 653, 65 N. E. 374. But where there was a devise and bequest to one person of described real estate of testatrix, her household furniture and all the rest of her property, the gifts of the realty and the household furniture were held to be specific, notwithstanding the general residuary clause: *In re Corby's Estate*, 154 Mich. 353, 117 N. W. 906.

A testator bequeathed domestic livestock to his daughters and charged lands, which he devised to his sons, with the furnishing of hay and pasturage for these livestock. He owned no such livestock, and so the bequest was not specific, but it was held the daughters might have the hay and pasturage for any livestock, within the number and kind mentioned, they might own during life: *Kingsland v. Kingsland*, 60 N. J. Eq. 65, 47 Atl. 69. There was a bequest to a daughter of an income for life from certain stock, with directions that if at the testator's death his estate was deficient as to any of the stocks particularly described, other similar stocks were to be purchased for the purpose with the funds of the estate. The daughter's legacy was general or pecuniary: *Langdon v. Astor's Exrs.*, 16 N. Y. 9. Plaintiff was one of several legatees under a will in which the testator had enumerated securities he owned and their amount in money, which amount was to cover the bequests. The residue of his personalty, "as shown in the foregoing statement," the testator gave to his wife. He mentioned a sum due him which, when collected, was to be the subject of further bequests—one to the plaintiff. The remainder of all his personal estate he gave to his wife. The plaintiff's bequest was general: *Glover v. Glover*, 136 N. Y. 665, 33 N. E. 335. The testator directed the reserving by his executors from his personal estate of a fund sufficient to pay certain life annuities, and on the deaths of the beneficiaries to dispose of the fund as residuary estate. The annuities were general bequests: *Turner v. Mather*, 179 N. Y. 581, 72 N. E. 1152.

A bequest of a negro, with a description of the sort intended, when the executor was directed to purchase such a one rather than divide families, was a general bequest: *White v. Beattie*, 16 N. C. 87. So, also, was a bequest to the testator's wife of "one year's provisions": *Everitt v. Lane*, 37 N. C. 548. There was a devise to a wife of particular real estate, also all the testator's "household goods and furniture, moneys, bonds, mortgages, outstanding debts due and owing to me [him], and all other my [his] personal estate of what nature or kind soever." The bequest of the personal property was general: *In re Walker's Estate*, 3 Rawle, 229. A bequest charged with the payment of debts is general: *In re Ingersoll's Estate*, 3 Pa. Dist. Rep. 339.

A testatrix gave six hundred dollars in stock described to one person and two thousand dollars in similar stock to another. After

making the will she exchanged the described stock owned by her for stock of another sort. The bequests were general: *In re Snyder's Estate*, 217 Pa. 71, 118 Am. St. Rep. 900, 66 Atl. 157, 11 L. R. A., N. S., 49, 10 Ann. Cas. 488.

A bequest of the income from a twelve thousand dollar mortgage was made to two persons during life, and, at their deaths, bequests to others to the total amount of twelve thousand dollars. No direction was made that these should come out of the mortgage. The bequests were general: *Teel v. Hilton*, 21 R. I. 227, 42 Atl. 1111. A bequest to a son was of "six negroes to be designated by my executor, of a fair average value with my other negroes [including two named by the testator as being then in his possession] to him and his heirs forever." The bequest was general: *Dawson v. Dawson*, Speer Eq. 475. There was a devise to a wife, during widowhood and until the maturity of the youngest child, of all the testator's property, including his interest in a partnership; if the widow should remarry or the youngest child reach maturity, then all the property was to be divided equally among the wife and the children then living. The question was as to the partnership interest, and the holding was that the bequest of that was not specific: *Stehn v. Haysen*, 124 Wis. 583, 102 N. W. 1074.

b. Pecuniary Legacies.—"The general rule of law as to pecuniary legacies (in the absence of any sufficient indication of a contrary intention) is that they are payable by the personal legal representatives of the testator (in whom the whole personal estate vests by law) out of the personal estate not specifically bequeathed. The presumption is that the testator intends them to be so paid. Unless charged upon it by the will, they are not payable out of the real estate": *Robertson v. Broadbent*, 8 App. Cas. 812. A bequest of six hundred dollars in cash to several persons, each, is, it is almost unnecessary to say, a general bequest: *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785. So would be similar bequests when the testator makes them on the expressed hypothesis of his having at death sufficient personal property: *In re Corby's Estate*, 154 Mich. 353, 117 N. W. 906.

In *Vaiden v. Hawkins*, 59 Miss. 406, it is said in effect that to give a specific character to a pecuniary legacy the language of the testator must go very clearly to that effect; for instance, the oft-mentioned case of money in a bag: *Lawson v. Stitch*, 1 Atk. 508. The bequest of a sum of money without mention of any particular fund for it to come out of is to be looked upon as a general bequest, even though in the residuary clause it is referred to as specific: *Parker's Exrs. v. Moore*, 25 N. J. Eq. 228. A man bequeathed a sum of money to each of his children "to be kept in gold and silver" and paid to the legatees as they arrived each at maturity, the money not to be lent meantime nor used. The bequests were general: *Mathis v. Mathis*, 18 N. J. L. 59.

A will recited that the testatrix had "two thousand dollars out at interest at seven per cent," and directed that "said sum shall be kept invested" until a time stated, and then divided between two named persons. These were general bequests: *Langstreth v. Golding*, 41 N. J. Eq. 49, 3 Atl. 151. An entire estate was, under the will, to be reduced to cash, and of this a certain sum was to be invested and the interest given to the wife of the testator, there being no express

reference in the will to this being in lieu of dower. Another sum was to be invested and the interest paid to an adopted daughter. The gifts were general bequests: *In re Williams*, 1 Redf. Sur. (N. Y.) 208. A bequest by a woman to her husband of the use of five thousand dollars and as much of the principal as might be necessary for his support is general: *Scofield v. Adams*, 12 Hun, 366. The executors under a will were directed to invest a sum such as would bring in a clear one thousand dollars annually, and out of the investment to pay the wife of the testator one thousand dollars during widowhood. It was a general bequest: *Haviland v. Coeks*, 6 Dem. Sur. 4. A testator made his wife executrix and gave her fifty thousand dollars, "which may be invested in bank stock and in bonds." The bequest was general: *In re Hodgman's Estate*, 140 N. Y. 421, 35 N. E. 660. There were bequests of certain sums "in government bonds." When making the will and until his death the testator owned such bonds, the par value of them all being equal to the bequests so made; but at his death the bonds were at a premium. The bequests were general and the legatees entitled to so much money, rather than bonds: *In re Van Vliet*, 5 Misc. Rep. 169, 25 N. Y. Supp. 722. The face of a bond was to be collected and divided among legatees named in the will. After making this the testator took by assignment from the obligors of the bond, in place of the latter, another bond for a like amount and this was found among his assets. The bequest was general: *Doughty v. Stillwell*, 1 Bradf. 300.

Bequests to two of the sons of the testator, absolutely, one to have two hundred and fifty dollars and the other four hundred. A third son owed the testator one thousand dollars secured by mortgage, wherefore this son was to pay the legacies to his brothers out of the mortgage debt, retaining the balance due by way of a bequest from the father to him. The bequests to the first two sons were general, and the estate liable for them: *Newton v. Stanley*, 28 N. Y. 61. A bequest of a specified sum "or the value thereof in property" is general: *Fagan v. Jones*, 22 N. C. 69.

If a person is given by will a stated sum to be paid "in good notes" at his option, the person has a general legacy; so too if the bequest is of a stated sum "in notes to be paid by the executor" as soon as may be convenient after the testator's death: *Perry v. Maxwell*, 17 N. E. 488.

In *Cryder's Appeal*, 11 Pa. 72, the will provided first for the payment of the testator's debts, next for the sale of one of his two farms—with directions as to the price and how and when this was to be paid, and for the sale of the other farm for the best price obtainable. Then came bequests to some of his children, to the payment of which the produce of these sales was to be applied—that of the sale of the first farm as far as it would go and that of the second for the balance. Then came devises to other children in fee. Finally, there was a direction as to the order of payment of the "pecuniary legacies" payable from the product of the sale of the first-mentioned farm. The executor exhausted the personalty and the products of the sale of the two farms in paying the debts, and there was no fund for satisfying the legatees. The bequests were held, however, not to be general but specific. There was a devise of one of the plantations of the testator to one person, and of another to another person, and to the latter in addition so much money as with the

plantation he took would make the two bequests even. These were, it was held, general bequests: *Jenkins v. Hanahan*, *Cheves Eq.* 129.

A quasi pecuniary legacy, and hence general, was that of twenty negroes, so decided in *Warren v. Wigfall*, 3 *Desaus.* 47. A testatrix, as a feme sole, made a will, whereby a missionary society was given eight thousand dollars, and went on to say that if that sum proved to be more than half her estate, the society was to have but one-half; a church society was given the rest of what she had, real and personal. The missionary society took a general bequest: *In re Carey's Estate*, 49 *Vt.* 236, 24 *Am. Rep.* 133.

c. **Securities Given in Terms of Money.**—The effect in a bequest of the words, "I give to my friend [naming him] ten thousand dollars, in notes or in Confederate states bonds, at the option of my executors hereinafter named," is to make it general: *Harper v. Bibb*, 47 *Ala.* 547. "I give to my brother twenty thousand dollars in Confederate bonds," is a general bequest: *Gilmer's Legatees v. Gilmer's Exrs.*, 42 *Ala.* 9. A will directed "that the income from six thousand dollars in bonds of the United States shall be set apart and appropriated," etc. The testator owned twelve thousand dollars in such bonds at the time, and by the will disposed of twenty-one thousand altogether. The bequest was general: *Capron v. Capron*, 6 *Mackay*, 340. Under a will "notes to the amount of sixteen hundred dollars, on the N. K. & G. W. C. security," were devoted to buying for a woman and her children a plantation, this to be sold again and the proceeds distributed when the eldest child came of age. The bequest was general: *Smith v. Smith's Exrs.*, 23 *Ga.* 21. Where a certain number of shares of the stock of a named corporation was bequeathed without any reference to particular shares, the bequest was general: *Palmer v. Palmer's Estate*, 106 *Me.* 25, 75 *Atl.* 130, 19 *Ann. Cas.* 1184.

A will provided for bequests of six hundred dollars each to four persons. "This amount is in notes," it went on, "such as the executrix of my will may turn out to them." Testator's wife was given the residue of the estate and named executrix. It was held that the language here did not contemplate specific bequests of notes, but indicated rather a fund; that the legatees were not restricted to notes good or bad, and that if the fund mentioned failed to meet the amount of the bequest, resort should be had to the estate generally: *Frank v. Frank*, 71 *Iowa*, 646, 33 *N. W.* 153. Bequests were of stated amounts "in United States government bonds" to each of the two daughters of the testator. The latter left when he died such bonds amounting on their faces to the total of the bequests. The bequests were general: *Evans v. Hunter*, 86 *Iowa*, 413, 41 *Am. St. Rep.* 503, 53 *N. W.* 277, 17 *L. R. A.* 308.

At both the making of the will and his death the testator owned just eight state of Missouri bonds of the par value of one thousand dollars each; the words of the bequest were, "I give and bequeath to O. eight thousand dollars in state of Missouri bonds." The bequest was general: *Dryden v. Owings*, 49 *Md.* 356. When making his will the testator owned one hundred and eighty shares of the stock of a certain bank. He bequeathed "sixty shares of bank stock in the," etc., naming the bank, to each of two daughters, and afterward sold the stock. The bequests were general: *Johnson v. Goss*, 128 *Mass.* 433. One bequeathed particular sums in bonds and mort-

gages, when he did not have at the time of making the will securities of the sorts named enough to satisfy the bequests, and did not make any direction for selecting them out of his estate. The bequests were general: *Blundell v. Pope* (N. J.), 21 Atl. 456. A direction in a will to devote a named sum of money to buying a particular mortgage would not make the contemplated bequest specific: *Moore's Exr. v. Moore*, 50 N. J. Eq. 554, 25 Atl. 403.

If one makes a bequest of a stated number of shares of a named stock, and describes them no more closely, the bequest is general: *Tift v. Porter*, 8 N. Y. 516. "I give to," etc., naming the legatee, "twenty-five shares of the," etc., naming the corporation, "or the proceeds of the same, should the same have been sold," is a general bequest: *Osborne v. McAlpine*, 4 Redf. Sur. 1. Executors were directed by the will to keep fifteen thousand dollars invested in government bonds and pay the income to the husband of the testatrix from the date of her death. The bequest was not specific but general, even if the testatrix had owned the bonds when making the will: *Jackson v. Westerfield*, 61 How. Pr. 399. There was a bequest of two thousand dollars and another of one thousand, in each case the sum given being named as in government bonds. The bequests were general: *In re Newman*, 4 Dem. Sur. 65. If one has bonds and stocks of many sorts, and makes bequests, in varying sums to various persons, of "my" stocks and bonds as of their par value and without identifying them more closely, the bequests are general: *In re Hadden*, 1 Con. Sur. 306, 9 N. Y. Supp. 453. A bequest was of "the sum of fifty thousand dollars of the capital stock of the [etc., naming the company], or in case I shall not hold that amount of such stock . . . I direct them [the executors] to take from my other personal property an amount sufficient to equal said sum." There were words in the will whereby other persons were given bequests in varying amounts in "shares of the capital stock" of the same company. The bequest was held to be pecuniary and general, not specific: *In re Anderson*, 19 Misc. Rep. 210, 43 N. Y. Supp. 1143.

A bequest was of the contents, as such might be at the time of testator's death, of a box with a safe deposit company to several persons in stated proportions. When the testator died the box was found to contain stocks, bonds and life insurance policies. The securities were of all sorts of values, and it was impossible to divide them among the legatees. The bequests were held to be general: *In re Fisher*, 93 App. Div. 186, 87 N. Y. Supp. 567. Under the terms of a will the testator's debts were to be paid, his wife was to have the family residence for life and was to have also the household furniture, etc. The residue was to go to the children subject to the wife's dower. By a codicil the testator put corporate stock in the hands of trustees, in trust, to be held for a named period, the dividends to be distributed among the beneficiaries, and to these the shares were to be delivered at the end of the trust. The testator owned real estate, but it brought in nothing, and the stock was the only money making part of the estate when the codicil was made. It was held that the bequest of the dividends was general and was burdened with an obligation to pay debts: *In re Noon's Estate*, 49 Or. 286, 88 Pac. 673, 90 Pac. 673.

A bequest of "fifteen shares of" a named stock is a general bequest, and the testator's owning fifteen shares of such stock when

making his will and also at his death does not render it otherwise: *Appeal of Sponsler*, 107 Pa. 95. A testator had at his death forty-three thousand dollars in unregistered six per cent bonds of a certain company and five thousand dollars in like bonds registered in the name of another person, deceased. The latter's widow was given by the testator a bequest of forty-eight thousand dollars in the six per cent bonds of the company. The bequest was general: *In re Cummings' Estate*, 12 Pa. Co. Ct. 45, 2 Pa. Dist. B. 51. Bequests were made to several persons, in varying amounts, of certain shares of stock stated in the will to be owned by the testator and standing in his name on the books of the company. The bequests in all amounted to two thousand two hundred shares. When making the will testator had three thousand two hundred and fifty-seven shares, but had only two hundred shares when he died. The bequests were general and so not subject to ademption: *Mahony v. Holt*, 19 R. I. 660, 36 Atl. 1.

A will provided for a bequest of ten thousand dollars in money, stocks, bonds or notes that the testator might have at his death. At his death he had of money but a few hundred dollars, seven thousand and forty dollars' worth of railroad stock, two thousand two hundred dollars in good notes, and three thousand dollars in desperate ones. The legacy was general: *Martin v. Osborne*, 85 Tenn. 420, 3 S. W. 647. There was a bequest to the testator's daughter of three hundred dollars per annum, interest on five thousand dollars' worth of state stock of Virginia. It was a general bequest: *Corbin v. Mills' Exrs.*, 19 Gratt. 438. A bequest was of certain named stocks and ten thousand dollars in such United States six per cent stock, bank or other stocks at the current value not under par, or money, as may, as the will ran, be on hand, not otherwise appropriated, with power in the executors to change the investment of the funds under the direction of the orphans' court. This was a general legacy: *Ladd v. Ladd*, 2 Cranch C. C. 505, Fed. Cas. No. 7972.

d. Stated Derivation of Subject of Bequest.—A bequest in trust of "the sum of eighteen thousand dollars, first to be taken out of the proceeds of the sale of realty," etc., is not specific but general—a general bequest of money to a certain amount to be paid, in the first instance, out of a fund produced from the sale of realty, then out of the residuum in case of the insufficiency of the other: *Hutchinson v. Fuller*, 75 Ga. 88. A person was given by will money payable out of stock named, owned by the testator. The bequest was held to be a general one, and no specific shares of stock were susceptible of levy in aid of the legatee's judgment creditor: *Stout v. La Follette*, 64 Ind. 365. "I give and bequeath to my said father and mother the sum of three thousand dollars, and I desire my executors to pay the same over to them out of my life insurance money payable to my executor as soon as collected." This was a general bequest payable from the general assets of the estate in case of a failure to collect the life insurance policy: *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576.

A testator gave his wife the sum of twenty thousand dollars to be paid in installments, the first installment to be due in twelve months after his death; he then went on to say how this was to be paid out of this note and that owing him. The balance of the installments were to be paid in money at the wife's desire; the remain-

ing installments to be paid annually from the sale of the produce of his farm. It was a general pecuniary legacy that was not lost in case the funds failed to which it was referred: *Mitchener v. Atchinson*, 62 N. C. 23.

A bequest of money in a will directing the payment of legacies out of the personal property is not a specific or demonstrative bequest, but a general one: *Glass v. Dunn*, 17 Ohio St. 413. Bequests of "all moneys or legacies coming to me from any source" are not specific, but general: *Dean v. Rounds*, 18 R. I. 436, 27 Atl. 515, 28 Atl. 802. There were bequests to two daughters of one thousand dollars each, "to be paid in either money or negroes at their value," and a bequest to a son of "two thousand dollars, etc., negroes *Lewis, Jane, Buck, Daniel, Bob and Prince* to be divided according to valuation between [the three children] to answer to the amount above bequeathed." The bequests were not specific, but pecuniary and general: *Bell v. Hughes* (S. C.), 8 Rich. 397.

Whether a bequest, made in general terms, is specific or not so depends on whether the things bequeathed are or are not specific in character; so, where a will gave "all property, real and personal," which the testator had received through his wife and the property so received was found to have been received in money wholly, the bequest was held to be a general one: *Pell v. Pell*, Speer Eq. 18.

e. **Residuary Bequests, Actual, Virtual or Quasi.**—A testator disposed specifically of his personal property and then gave to his executor "the rest and residue of" his estate except some contingent bequests in trust to manage for the benefit of a daughter until her maturity, upon which he was to hand it over to her. This was a devise to the daughter so far as the real estate was concerned, and she did not take only as a residuary legatee: *Maybury v. Grady*, 67 Ala. 147. By the first clause of a will all the testator's estate, real, personal and mixed, was given to his wife for life with remainder over to his children, and by a subsequent clause provided that some sums of money that would or might come into his estate afterward should, when received, be divided among the wife and children. The later clause did not, it was held, change the effect of that foregoing so as to make residuary legatees of the persons taking under the first clause: *Henning v. Varner*, 34 Md. 102.

A residuary legacy is not regarded as specific, and the residuary legatee cannot call upon the other legatees to abate: *Blaney v. Blaney*, 1 Cush. 107. A devise by way of residue shows that the devisee is to have something uncertain and unknown: *Anderson's Exrs. v. Anderson*, 31 N. J. Eq. 560. There was a bequest of thirteen hundred dollars in trust for a brother during life, after which five hundred dollars of it was to go to the brother's son T., and the remainder to his other children equally. A part of the thirteen hundred dollars was used in paying debts of the estate. The bequest of the eight hundred dollars was held to be not a residuary legacy and that T.'s share must abate with that of the others: *Van Nest v. Van Nest*, 43 N. J. Eq. 126, 13 Atl. 179. A gift to a wife of "all my property, house and lot and store, and all my personal property therein," followed in a will some legacies to other persons. It was held it was clearly specific and was not a residuary gift, and so was not called on to abate, the personal property being insufficient: *In re Lynch's Estate*, 13 Phila. 322. A residuary bequest is general and not specific,

although articles bequeathed are enumerated: *In re Martin*, 25 B. I. 1, 54 Atl. 589. A will disposed of a part of the testator's personal property, and directed that his funeral expenses and debts be paid out of any money that might come into the hands of the executors; it then required these to sell the real property, and out of the product pay specific sums to certain devisees, among them two nieces, and divide the remainder, if there should be any, between these two nieces. It was held that the nieces took this as residuary legatees: *Darden v. Hatcher*, 1 Cold. (41 Tenn.) 513.

There was a specific pecuniary bequest given to a person, and this person also made residuary legatee. The same will gave annuities and other specific pecuniary legacies to other persons, and provided "that in case the personal estate and the produce arising from the real estate, which I shall die seised and possessed of, shall not be sufficient to answer said annuities and legacies, then said legacies and annuities shall not abate in proportion, but the whole deficiency, if any, shall be deducted from the legacy bequeathed to," etc. (naming the pecuniary legatee here first above mentioned). When the testator died his estate was amply sufficient to pay all the debts, of the executor. It was held that since the specific pecuniary bequest and the residuum had been given to the one person, and upon the same terms, and the testator appeared not to have intended the pecuniary legacy to have a preference over the residuum, that legacy assumed the character of a residuary bequest and was liable to deduction for deficiency in the other specific annuities: *Silsby v. Young*, 3 Cranch, 249, 2 L. ed. 429.

f. **Words of Testator Identifying Items in Residuum.**—There were pecuniary bequests and these words follow: "I give, devise and bequeath to A. the residue of said unimproved lot, my property on W. street in said town of B., improved by the brick dwelling-house in which I now reside, and the brick dwelling in which C. has his saddler's shop, all my household and kitchen furniture, stocks, bonds, notes and other evidences of debt, and all the rest and residue of my estate, real, personal and mixed, to her, her heirs and assigns forever, in fee simple." Here the bequest was general, and for payment of the pecuniary bequests the legatees could look to the proceeds of the furniture, etc.: *England v. Vestry of Prince Georgia Parish*, 53 Md. 466.

Where in a bequest to the residuary legatee certain articles are named as being of it with such words following as "and all the rest and residue of my estate," this does not necessarily make the bequest specific as to the articles named: *Le Rougetel v. Mann*, 63 N. H. 472, 3 Atl. 746. The stating in a residuary devise of what things go to make up the residue, bequeathed equally to persons named, and the directing that if any of these things be sold they be made up at a specific value, do not make the devise specific: *Bailey v. Wagner*, 2 Strob. Eq. 1.

g. **Estate Entire or in Portions.**—A provision in a will that the wife of the testator shall receive one-half of all property of which he may die seised does not effect a specific, but a general, bequest: *Abila v. Burnett*, 33 Cal. 658. A provision that a son under age shall be educated and supported up to full age and that then he be given the residue of the estate in the executor's hands does not amount to anything but a general legacy: *Bradford v. Haynes*, 20 Me. 105.

Where a devise is "of all my property," and the testator proceeds then to details of it and to except an item here and there, it is a general devise; as also a devise of "all the rest of my books," after named ones have been devised already, "with my household furniture to be preserved by my wife for her own use during her life, as hereinbefore mentioned, or to be sold or given to our children or grandchildren in such manner or proportions as she may think proper": *Mayo v. Bland*, 4 Md. Ch. 484.

A bequest of all the remainder of an estate, after the legacies, made by the will, shall have been paid and specific gifts deducted, is general: *Hays v. Jackson*, 6 Mass. 149. The following bequest was held to be not specific, to wit: "I give and bequeath to my beloved wife Nancy all my real estate, personal property, house, furniture," etc., "to have and to hold as hers as long as she shall live, and after her death the property that is remaining I request to be divided among my surviving children": *Calkins v. Calkins*, 1 Redf. Sur. 337.

After making his will the testator added a codicil thus: "Should I alone die on this trip, or in consequence of it, then, of the one thousand dollars before willed to my wife, five hundred dollars of this money are to be deducted from her and given to my daughter Lillie, or Lillian, before mentioned." By the will proper no specific sum of one thousand dollars had, in fact, been given to the wife, but to her and another daughter there had been given the residue of the estate, the value of which exceeded two thousand dollars. The bequest was general: *Adair v. Adair*, 11 N. D. 175, 90 N. W. 804.

A man gave to his wife by will his real estate, together with all his furniture, plate, personal property, debts due, etc. Then a trust was created, for the benefit of his son and married daughters, in lands. Fresh real estate became his after the making of the will but he died, having made no codicil and leaving debts. It was decided the wife had a general bequest and that this must be resorted to before the newly acquired real estate in paying the debts, since no intention appeared by the will that it be spared: *In re Walker's Estate*, 3 Rawle, 229. There was a bequest to a daughter of "all I now possess." The testatrix provided then that the daughter should take as well "the bond held by me." It was decided that "all I now possess" was a general bequest: *In re Zeller's Estate*, 2 Woodw. Dec. 191.

It was stated in a will that one—an expectant beneficiary—had slaves of his own, and the testator proceeded to give to two others "all the slaves" which he, the testator, might have at his death. This was a general bequest: *Jenkins v. Hanahan*, Cheves Eq. 129. A man directed by will that all his estate, after the debts should have been paid, should be divided equally between, etc. When making the will he had only personal property but acquired real afterward. The legacies were general: *Henry v. Graham*, 9 Rich. Eq. 100. Executors were directed to sell all property not specifically devised, to get in all debts owing the testator and devote the interest arising from the fund to schooling the children; and at the maturity of the latter, each, to pay him or her an equal share of the principal. These bequests were general: *McFadden v. Hefley*, 28 S. C. 317, 13 Am. St. Rep. 675, 5 S. E. 812.

V. The Test of the Quality of the Bequest is the Testator's Intention.

"It is necessary to bear in mind one or two elementary rules governing the construction of wills. The first is that a will should be construed according to the intention of the testator": *Wetmore v. St. Luke's Hospital*, 56 Hun, 313, 9 N. Y. Supp. 753. Whether a legacy is specific or general depends on the intention of the testator: *Cuthbert v. Cuthbert*, 3 Yeates, 486. A legacy will not be held to be specific unless the intention in the will to make it so be clear: *Morriss v. Garland's Admr.*, 78 Va. 215. This intent must be deduced from the face of the will: *Estate of Young*, 123 Cal. 337, 55 Pac. 1011. However, at the same time the testator must use language sufficient for his purpose: *Estate of Young*, 123 Cal. 337, 55 Pac. 1011. In other words, it must not be left to be inferred from the will that he meant this thing or that, for no matter how strong the inference in favor of the specific quality, if that is all the court has to go upon it will fall back upon the rule that solves doubt by making bequests specific whenever possible. It has been already said that in *Sibley v. Perry*, 7 Ves. 522, Lord Eldon admitted a belief that the testator really intended the bequest to be specific. If the testator had been more particular with his language, that belief must have been rather a conviction, and the court would have had no excuse for availing itself of the rule its conservatism inclined it to favor.

In *Missouri Baptist Sanitarium v. McCune*, 112 Mo. App. 332, 87 S. W. 93, the testatrix had made several specific bequests showing thereby that she knew how to make them, and this knowledge was imputed to her by the court in construing other bequests which, if intended by her to be specific, were certainly not expressed as if she had given them the benefit of her knowledge. In *Witherspoon v. Watts*, 18 S. C. 396, when the court found reason to impute knowledge similarly to the testator, it held that his referring in a later clause in the will to the legacy as having been "specifically" disposed of was entitled to weight.

In *Methodist Episcopal Church v. Hebard*, 28 App. Div. 548, 51 N. Y. Supp. 546, it was held that a bequest was demonstrative if the will showed clearly the testator's intention that the legatee should have the money. That is all very well, but a bequest of money in broad terms without identifying words or mention of a fund for paying it would hardly have that effect. In one case the testator referring to the legacy after making it called it "specific," but it did not satisfy the criteria, and the court said it was not such: *Parker's Exrs. v. Moore*, 25 N. J. Eq. 228.

In *Estate of Young*, 123 Cal. 337, 55 Pac. 1011, it is said, to be sure, that even if the legal effect of the testator's expressed intent is intestacy, it will be presumed he designed that result. That is going rather far; the courts do not favor intestacy: *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552. A testator may defeat his own intention. Through omissions or clashing provisions in the will, it may be impossible to enforce the intention: *Wetmore v. St. Luke's Hospital*, 56 Hun, 313, 9 N. Y. Supp. 753.

The intention must be indicated too by the will itself. It was held in *Cagney v. O'Brien*, 83 Ill. 72, that a bequest of money to be disposed of by the executor "according to verbal instructions given them by" the testator is not to be taken as a specific legacy in the face of express words in the will declaring a trust. To find out what the

testator's intent was, one is not restricted to any item, phrase or paragraph in a will, but may take the latter as a whole and judge it according to its spirit, as in *Re Carr*, 24 Misc. Rep. 143, 53 N. Y. Supp. 555. That the intention of the testator in respect to a disposition in one part of his will may be reflected from another part is shown in *Appeal of Knecht*, 71 Pa. 333, when the rule is applied. In *Douglass v. Douglass*, 18 App. D. C. 21, the expression "my other" served to fix the possessive character on the subject of a preceding bequest, being used to describe stock or bonds bequeathed. To the same effect, see *Harvard Unitarian Society v. Tafts*, 151 Mass. 76, 23 N. E. 1006, 7 L. B. A. 390, where the expression was "the balance of my stock"; and *Everitt v. Lane*, 37 N. C. 548, where it was "the balance of my negroes." In *McGuire v. Evans*, 40 N. C. 269, the expression was: "In case there should be any deficiency in the bank stock which I hold at my death as compared with the amount bequeathed in my will," etc.; and the effect was to make the bequests referred to specific.

But nothing is to be merely inferred or presumed from the will or circumstances affecting it. In a case in Iowa a legacy of a stated sum of money had been left to a daughter of the testator and general legacies to his sisters, and it was contended that the legacy to the daughter was intended as specific since naturally the testator would discriminate in favor of a daughter, as against sisters, besides which the daughter had received first attention in the will; but the court would not admit the contention: In *re Parson's Estate* (Iowa), 129 N. W. 955. Another apt illustration was a case in New York where it was held that the gift by a testator of a gold watch to one daughter raises no presumption that in then giving another daughter thirty-five dollars in money he intended the money gift to be specific: *Bliven v. Seymour*, 88 N. Y. 469.

RIDER v. CLARKSON.

[77 N. J. Eq. 469, 78 Atl. 676.]

ANIMALS—Vicious Dogs—Right to Keep.—It is lawful for a person to keep a vicious dog, but unlawful to keep it in such a manner that neighbors are unnecessarily exposed to danger. (p. 615.)

ANIMALS—Vicious Dogs.—It is a Nuisance for a neighbor to keep a vicious dog without appropriate restraint, and in such manner that it can and will escape and do bodily harm. (p. 615.)

ANIMALS—Vicious Dogs.—An Injunction may Issue to restrain the keeping of a vicious dog in such a manner that he can escape and do bodily harm, and as renders it unsafe for neighbors to pass to and from their homes. (p. 615.)

INJUNCTIONS—Parties.—The Joinder as Complainants of parties who suffer special injury by reason of the proximity of their properties to a nuisance which it is sought to restrain is proper. (p. 615.)

S. Cameron Hinkle, for the complainants.

Thompson & Cole, for the defendants.

469 LEAMING, V. C. Defendants have been duly served with a copy of the bill and accompanying affidavits and an order to show cause why preliminary relief should not be granted, and have not denied the truth of the matters charged. These matters must, therefore, at this time be deemed to be true.

It is lawful for a person to keep a vicious dog: *DeGray v. Murray*, 69 N. J. L. (40 Vroom) 458, 55 Atl. 237. But it is not lawful for a person to keep a vicious dog in such manner that neighbors are unnecessarily exposed to danger. It is no less a nuisance for a neighbor to keep a vicious dog without appropriate restraint ⁴⁷⁰ and in such manner the dog can, and will, escape and inflict bodily harm, than it is for such neighbor to conduct a lawful business in such negligent manner as to endanger the health of residents in the vicinity. The undisputed facts are that the dog in question is vicious, and is only restrained by a fence over which he can jump at will; and that the owner of the dog refuses to adopt suitable measures to prevent the escape of the dog; and that complainants are in danger of being attacked by the dog at such times as they leave their homes. The dog has been ordered by the municipality to be killed, pursuant to the provisions of a local ordinance, but the execution of that order has been prevented by a writ of certiorari; in the meantime the unlawful conduct of defendants renders it unsafe for complainants to pass to and from their homes. I think it the undoubted duty of a court of equity to extend immediate relief against the continuance of such conditions.

I see no reason why complainants may not appropriately join in the bill. They suffer special injury by reason of the proximity of their properties to the property occupied by defendants, and the wrongful conduct of defendants affects them in a similar way and at the same time: See *Rowbotham v. Jones*, 47 N. J. Eq. (2 Dick.) 337, 20 Atl. 731, 19 L. R. A. 663.

I will advise a preliminary injunction restraining defendants from longer keeping the dog on the premises in question without the adoption of suitable measures to prevent the escape of the dog from the premises.

The Owner of a Dog is not Liable in Damages merely because the animal bites a person: *Martinez v. Bernhard*, 106 La. 368, 87 Am. St. Rep. 306; but if he has notice, actual or constructive, of the dog's viciousness, he is answerable for injuries inflicted by it: *Robinson v. Marino*, 3 Wash. 434, 28 Am. St. Rep. 50; *Strouse v. Leipf*, 101 Ala. 433, 46 Am. St. Rep. 122; *Plummer v. Ricker*, 71 Vt. 114, 76 Am. St. Rep. 757; *Crowley v. Groonell*, 73 Vt. 45, 87 Am. St. Rep. 690. As to the liability of the owner of a dog supposed to be afflicted with hydrophobia, see *Buck v. Brady*, 110 Md. 568, 132 Am. St. Rep. 459; and as to the liability of the owner of animals *ferae naturae*, see *Hayes v. Miller*, 150 Ala. 621, 124 Am. St. Rep. 93.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PEOPLE v. MEAD.
[200 N. Y. 15, 92 N. E. 1051.]

LARCENY — Indictment — Ownership by Corporation.—An indictment charging grand larceny in feloniously appropriating the property of the "People's Mutual Life Insurance Association and League" is not demurrable because it fails to allege that the league is an association or corporation. (p. 617.)

E. A. Griffith, for the appellant.

Myron D. Short, district attorney, for the respondent.

15 CULLEN, C. J. The defendant was indicted for grand larceny, first degree, for having feloniously appropriated to his ¹⁶ own use the sum of \$738.67, the property of "The People's Mutual Life Insurance Association and League." The indictment was framed under the second subdivision of section 528 of the Penal Code, which makes embezzlement by the agent, clerk or officer "of any person, association or corporation" larceny. The only attack made on the indictment is that it fails to charge that the league was an association or corporation. For this alleged defect the demurrer was sustained by the county court, but has been overruled by the appellate division.

Under the old rule which prevailed long ago in England, which required great particularity in the description of persons, it was necessary to allege the incorporation of a corporation. But that rule has not been generally accepted in this country, though there is much contrariety between the decisions of the various states. In Illinois, Texas and Alabama it seems the absence of an allegation that the owner mentioned in an indictment for larceny is a corporation (when it is such) is fatal to its validity. On the other hand, in New Jersey and Indiana the exact reverse is held: *Fisher v. State*, 40 N. J. L. 169; *Johnson v. State*, 65 Ind. 204. Such seems to be the law now in California (*People v. Henry*, 77 Cal. 445, 19 Pac. 830), practically overruling an earlier (616).

decision: *People v. Schwartz*, 32 Cal. 160. If there is no conclusive authority in this state on the question, at least the case of *Noakes v. People*, 25 N. Y. 380, is very nearly such. That was a prosecution for forging an order for goods with intent to defraud the Meriden Cutlery Company. There was no allegation as to the nature of the company, whether it was a corporation, partnership or otherwise. Of this the court said: "In stating this intent to defraud, it is sufficient to describe the party intended to be defrauded, with reasonable certainty," and that the description in the indictment was sufficient. The only ground on which it can be contended that the case is not decisive of the question before us is that the court proceeded to say that even if there were no such company the indictment was sufficiently broad to reach the individual members ¹⁷ under the description contained in the indictment "of divers other persons to the jury unknown." I cannot find that the authority of this case has ever been questioned. In *McCarney v. People*, 83 N. Y. 408, 38 Am. Rep. 456, the indictment charged theft of the property of a corporation, naming it, and alleging that it was incorporated under the laws of the state of New York. In fact, it was a national bank, incorporated under the laws of the United States. It was held that the variance was immaterial as the allegation was unnecessary, for the indictment might have stated the true corporate name of the owner and stopped there. I construe that as meaning it was unnecessary to charge that the owner was a corporation. It is true that the statement was obiter, for the point was not in the case; but this criticism is equally applicable to the decision in *Cohen v. People*, 5 Park. Cr. 330, on which appellant relies, where it was said that it is necessary to allege in the indictment and prove on the trial that the corporation was an existing corporation. The indictment did charge ownership and the existence of the corporation and, hence, there was no question as to its sufficiency presented in the case. On the other hand, in *People v. McCloskey*, 5 Park. Cr. 57, an indictment which charged burglary upon the property of the Gulf Brewery was held sufficient, though it does not seem that any objection was taken that the indictment did not charge that the Gulf Brewery was a corporation. If in this state of the authorities we are to consider the question an open one in this court, we are clear that the rule declared by the appellate division is correct. It is a logical sequence of the decision recently made by this court in *People v. Gilbert*, 199 N. Y. 10, 92 N. E. 85. The appellant in that case, having been convicted of murder in the first degree, contended that the indictment was insufficient in not alleging that Viola Hughes, whom it was charged he had killed, was a human being. It was held that the name and sur-

name raised a presumption that the person killed was a human being. Conversely, as was said by the supreme court of Indiana in *Johnson v. State*, 65 Ind. 204, "when an ideality is referred ¹⁸ to in a pleading by a name such as is usual in creating corporations, and which discloses no individuals, a corporate existence is implied without being specially averred."

The order of the appellate division should be affirmed.

Gray, Haight, Vann, Willard Bartlett, Hiscock and Collin, JJ., concur.

Order affirmed.

An Indictment Charging the Theft of Property of a Corporation must, according to *White v. State*, 24 Tex. App. 231, 5 Am. St. Rep. 879, describe the corporation by its corporate name in full and also allege that it is incorporated. The ownership of property stolen from a partnership is sufficiently laid in one of the members of the firm: *Smith v. State*, 133 Ala. 145, 91 Am. St. Rep. 21.

WHITE v. MILLER.

[200 N. Y. 29, 92 N. E. 1065.]

DEEDS—Reservation of Mines and Minerals.—The expression in a deed, "excepting mines and minerals which are not hereby intended to be conveyed," is a clear and unambiguous expression or assertion by the grantor that a part of his estate in the lands was not granted. It is an exception of a portion of the premises described as granted. And the subject of exception is not of some right to mine; it is the property in the minerals which the land contains, and in the mines from which they may be obtained. (p. 621.)

WORDS AND PHRASES.—"Minerals," speaking generally, signify all natural inorganic bodies. (p. 621.)

DEEDS—Reservation of Minerals.—Gypsum underlying a limestone formation is a mineral within the meaning of a reservation, by deed, of all mines and minerals. (p. 622.)

DEEDS.—A Grant or Exception of "Minerals" will include all inorganic substances which can be taken from the land, and to restrict the meaning of the term, there must be qualifying words or language evidencing that the parties contemplated something less general than all substances legally cognizable as minerals. (p. 624.)

DEEDS—Exception of Minerals.—Under a Deed "excepting mines and minerals, which are not hereby intended to be conveyed," surface limestone is not excepted but every other mineral is. The grantee takes only the surface of the land, including the limestone. (p. 624.)

DEEDS—Exception of Minerals.—By Accepting a Deed excepting "mines and minerals," the grantee does not enter into any covenant with respect thereto, but in a proper case an equitable agreement may be implied which will work by way of estoppel. (p. 625.)

DEEDS—Exception of Minerals—Subsequent Grantees.—The grantee of a grantee under a deed excepting all the mines and minerals, whose deed is made subject to the original exception, does not, by accepting the same, enter into any covenant with respect to the exception and is not precluded from afterward acquiring title to the excepted property nor estopped from denying that his grantor had title. (pp. 39, 40.)

C. W. Andrews, for the appellant.

Jerome L. Cheney, for the respondent.

³² GRAY, J. The action is in equity to restrain a continuing trespass and the issue between the parties is as to the ownership of the minerals contained within a tract of nineteen acres of land, forming part of the plaintiff's lands, in Onondaga county, in this state. The result of the trial was a judgment in the plaintiff's favor and against the defendant, awarding to the former a sum of money by way of damages for entering upon his lands and cutting down a number of trees thereon. An injunction was granted against the continuance of such acts and against removing limestone, or quarrying, mining, or removing gypsum, or plaster. The trial was had before a referee, and the judgment entered upon his decision has been unanimously affirmed by the appellate division. The mineral product, whose commercial value has given importance to the controversy, is gypsum, and the question of its ownership is, in my opinion, to be answered upon a consideration of the effect of an early conveyance, by which an ³³ estate in the minerals underlying lands was severed from the general estate of the grantor in the property affected. The land in controversy formed part of a large tract in the township of Manlius, which, at an early day, was the subject of a grant by the state under letters patent; the title to which, in 1799, was determined to be in George D. Wickham. In 1814, Wickham made a conveyance to David Otis of a portion of the tract, which included the parcel in question, "with the exception of mines and minerals, which are not hereby intended to be conveyed." Otis conveyed a part of the same tract to another, "subject, however, to such rights and interests as were excepted and retained by George D. Wickham," and, by mesne conveyances, those lands came into the ownership of the Adamant Manufacturing Company. In 1894, this company conveyed them to George West, "excepting and reserving, however, to the party of the first part (grantor), its successors and assigns, all the gypsum, or plaster, and minerals in and upon" the parcel of nineteen acres in question. The company's conveyance reserved to it the right and privilege "of working, mining and carrying away said gypsum, plaster and

minerals and, for this purpose, of entering upon . . . said premises." By appropriate agreements in the conveyance, its rights to use the premises in all ways incidental to working and mining were secured. In 1905, West conveyed the lands to the plaintiff by a deed, which excepted and reserved to the Adamant Manufacturing Company all the gypsum, or plaster, and minerals in and upon the parcel of nineteen acres and the various rights and privileges, as they were specified in the company's deed to the grantor. In 1906, the plaintiff, by deeds from devisees of Wickham, in whom, by the terms of his will, had vested all his residuary estate, acquired a majority interest in the mines and minerals which the testator had excepted and retained in his deed to Otis. In the same year, the defendant acquired, through various mortgages, foreclosures and deeds, a conveyance of those rights and interests of the ³⁴ Adamant Manufacturing Company, which were described in its deed to West as the subjects of exception and reservation, and by a substantially similar description.

The estates in the surface of the land and in the minerals lying underneath, which were formerly in Wickham, and which he severed by his deed, would appear to have become reunited in the plaintiff. The counsel for the appellant, with industry and ability, has elaborately argued that minerals, in the broadest sense of the word, were not intended to be excepted by Wickham's deed; that gypsum was not included within the exception of "mines and minerals"; that under the Adamant Company's deed, in 1894, title to the limestone did not pass and that, by force of the terms of West's deed to the plaintiff, which excepted and reserved to the Adamant Company, West's grantor, the gypsum and minerals in the land, the plaintiff had covenanted and agreed that the company should have the title to them. The appellant contends that he had acquired from his predecessors in interest, through Wickham's conveyance, the title to the gypsum, as well as the limestone; inasmuch as, briefly stated upon authority, no distinction should be made between the two substances, in construing the grant.

It has been decided, below, that Wickham's deed did except from the grant his title to all mines and minerals, including gypsum, but not the limestone; that the plaintiff had become the owner of a majority interest in the minerals, including gypsum, through the deeds from Wickham's devisees, and, through the conveyances of the Adamant Company and of West, was the owner of the surface of the farm lands, including the limestone, and that he was not estopped from claiming title to all minerals.

I think that the courts below have determined the issue between the parties correctly and have applied the right rule under the decisions. As has been suggested, the determination of the controversy must turn upon the effect of the language of the exception in Wickham's deed, to wit: "excepting mines and minerals which are not hereby intended ³⁵ to be conveyed." This is a clear and unambiguous expression or assertion, by the grantor, that a part of his estate in the lands was not granted. It was an exception of a portion of the premises described as granted. It cannot be construed as a mere reservation from the grant by the grantor of rights over, or in relation to, the estate. The subject of exception is not of some right to mine; it is the property in the minerals, which the land contains, and in the mines from which they may be obtained. If there was doubt about the meaning, it would, properly, be resolved in favor of the grantee; but the language is too precise to allow of doubt that the intent of the instrument was understood to be to except that part of the estate comprehended within the description of "mines and minerals." When we come to consider how comprehensive is the term "minerals," then, we are to be guided by the nature of the transaction and by the construction to be given to the term, when used in conjunction with mines, under the authority of decisions of this court. The term "minerals" would, speaking generally, signify all natural inorganic bodies.

What Wickham conveyed to Otis, in 1814, was a large tract of farm lands, on a small portion of which deposits of gypsum have been found. Bordering upon this portion are other gypsum deposits, which the defendant has been working for some years. This mineral is a sulphate of calcium and has become an important article of commerce; its use being, formerly, for fertilizers and land plasters, and, more recently, for the manufacture of cement and for kindred purposes. It appears to have been first discovered in the locality in 1812 and there is evidence of the conveyance, or leasing, of gypsum rights in 1814; although the first removal of gypsum from this land is found to have been in 1842. As a mineral, it appears that it has been taken out by open quarrying; but it can be obtained by mining, as distinguished from quarrying. It is shown to have been mined at points in this state since 1844 and, according to the evidence, the date when it was first mined is not known. It underlay the limestone ³⁶ formation upon the premises, in ledges, at a depth of from twenty-five to forty feet, and, in places, rose in the form of caps to within a foot, or eighteen inches, of the surface of the soil. When taken from the land, it appears to have been worked by quarrying, after

the limestone covering it had been first blasted away; but it would seem to be clear, where the mineral formation underlies a bed of limestone at such a depth and is, itself, of great depth, that it would, more scientifically, if not ordinarily, be obtained by subterranean work, or excavation. Whether, or not, gypsum was particularly in Wickham's mind at the time of his grant to Otis, we cannot say. There is nothing to show that mineral ores were ever found in the vicinity and there is little to show why the broadness of the exception in Wickham's deed should be restricted. That he meant to except what could be legally defined as minerals is plain and the only admissible qualification, in that respect, would be minerals that were not obtainable by mining. The referee concluded that he did not intend to except limestone; but that he did so intend as to all other minerals. As the record does not show that any opinion was expressed by him, or by the justices of the appellate division, we may infer that the conclusion was reached upon the reasoning that the conjunction of "mines and minerals" evidenced the intent to except only those inorganic substances which might be taken from the land by the processes of mining. As limestone was a part of the surface of the land, covered only by the surface soil, it would naturally be quarried; while, however possible to quarry gypsum, after removing the limestone, it might be mined. For this construction, there is more or less precise authority in the case of *Brady v. Smith*, 181 N. Y. 178, 108 Am. St. Rep. 531, 73 N. E. 963, 2 Ann. Cas. 636. Before referring more particularly to our decision in that case, it may be well to observe that, within the decisions of the English courts, as by our own, a grant of the minerals in land will include all such as are obtainable beneath the surface of the soil for the purpose of profit, in the absence of language, or of circumstances, which would make a limitation of its import reasonable. In ³⁷ *Hext v. Gill*, L. R. 7 Ch. App. 699, an important English case, the grant reserved "all mines and minerals within and under the premises with full and free liberty . . . to dig, and search for, and to take, use, and work the said excepted mines and minerals." A bed of china clay was discovered under the land; a substance not known to have existed in that particular part of England. It was held to have been included in the reservation and that, as the result of the authorities which were considered, a reservation of "minerals" was so sweeping as to embrace all inorganic substances, which might be found underneath the surface and which could be worked at a profit, unless otherwise limited. It was there considered that coupling "mines" with "minerals" did not limit the meaning of the latter word; as minerals would include open quarrying,

as well as subterranean working: See, also, *Midland Ry. Co. v. Checkley*, L. R. 4 Eq. Cas. 19. The doctrine of that case, and of the other English cases, which followed it, was deemed authoritative by this court in *Armstrong v. Lake Champlain Granite Co.*, 147 N. Y. 495 (49 Am. St. Rep. 683, 42 N. E. 186), in construing the word "minerals" in a grant, and the term was held to be all embracing in its reference to "anything mineral in character, which can be got by mining." In that case, it was sought to restrain the quarrying of granite and the decision turned upon the interpretation to be given to the words "minerals and ores" in a deed. It was held that granite would be embraced in such a grant, in the absence of words of qualification, and that it would be "an unwarrantable limitation of such a grant or reservation, to exclude from its operation beds of coal or other nonmetallic mineral deposits of commercial value or to confine it to such minerals as were known or supposed to be on the premises at the time": P. 505. A grant, or reservation, of minerals in a deed was deemed by us to contemplate any description of valuable mineral, which would come within the legal meaning of the word and which "might thereafter be discovered." In that case, the context indicated, however, that the parties had in view, only, such minerals, as were obtainable by underground mining and, therefore, that granite, which was obtainable as by open quarrying, did not pass under the grant of "minerals and ores." I may, briefly, observe that the qualifying language was in the granting of special rights for the purpose of making the grant effectual. The specification of those rights showed them to be such as were essential to and connected with usual mining operations, and included a grant "of sufficient land to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores." Obviously, the parties could not have intended granite. Considering, then, the case of *Brady v. Smith*, 181 N. Y. 178 (108 Am. St. Rep. 531, 73 N. E. 963, 2 Ann. Cas. 636), which, as I infer, has influenced the determination below and which is authoritative, we find the language in the deed to have raised the question before the court, whether limestone was excluded from the grant. The language was: "excepting and reserving therefrom . . . all mines and minerals which may be found on the above piece of land, with the right of entering . . . to dig and carry the same away": P. 179. The language was construed as not including the limestone; that being a substance upon, and a part of, the surface of the land, which was removable by quarrying. The principle of the decision was that though the word "minerals," of itself, might, when broadly defined, embrace the soil and all that is found

beneath the surface, "under a definition coupling it with mines it covers all substances taken out of the bowels of the earth by the processes of mining": P. 185. It is true that the context furnished qualifying words in "found" and "dig"; but they were not controlling words; serving, rather, to emphasize the interpretation given to "mines and minerals." It was thought to be a "strained and unnatural construction" to assume that the words referred to the boulders and ledges of limestone, cropping out of the surface of the land. This decision introduced a qualification of the English doctrine; inasmuch as the coupling of mines and minerals, contrary to what was considered in *Hex v. Gill*, L. R. 7 Ch. App. 699, was regarded as restricting the broadness of the meaning of the latter word. I think that the case is an authority, which should be followed in the present case, and, therefore, while the gypsum ³⁹ was retained by Wickham, the limestone passed as part of the surface.

The rule, as it stands upon the authority of the decisions of this court, is that a grant, or an exception, of "minerals," will include all inorganic substances, which can be taken from the land, and that to restrict the meaning of the term, there must be qualifying words, or language, evidencing that the parties contemplated something less general than all substances legally cognizable as minerals. I conclude, therefore, that in Wickham's deed to Otis every mineral was excepted but the surface limestone; that Otis' grantee and successors in interest took only the surface of the land, including its limestone, and that the ownership of both estates in the soil and in the minerals is in the plaintiff. If the limestone passed to the grantee under the terms of Wickham's conveyance to Otis, then equally, it passed to the grantee of the Adamant Company by its conveyance. We have held that Wickham's deed is not to be construed as excepting that substance, and that construction is demanded of the company's deed to West.

It is argued that, in the conveyance by the Adamant Company to West, the grantee entered into covenants respecting the grantor's right to the gypsum and minerals; which, by the terms of the deed to the plaintiff, were repeated as covenants by him. There was no covenant by West and none by the plaintiff on the subject. Whatever there was is contained in the exception of the grant and that contains no agreement as to title. If the company did not own the substances beneath the soil, its exception amounted to nothing. The plaintiff did enter into certain express covenants in the instrument of conveyance; but not with respect to the minerals claimed by the company. If an equitable agreement might be implied, it would not

help out the grantor's lack of title; however, it might, in a proper case, work by way of estoppel. If neither the company, nor West, nor the plaintiff, had title to the minerals covered by Wickham's exception, then neither West, nor the plaintiff, was concluded by the acceptance of his deed. Neither was precluded from afterward acquiring title to the excepted property and neither was estopped from denying that the company had title. In *Champlain & St. L. R. R. Co. v. Valentine*, 19 Barb. 484, a well-considered case, the grant was of land under water, reserving a certain "building . . . which remains vested" in the grantee. The grantor's title to the building failed as to a part and, subsequently, the plaintiff acquired title to it. It was held that the exception, or reservation, left the building as though not part of the grant and that there was no covenant by force of the exception. If neither grantor nor grantee had title to the building, "accepting the deed did not prevent Webb (the grantee), or anyone holding under him," it was said, "from afterward acquiring title to the excepted piece from some other source." As, under the construction given to Wickham's deed, the gypsum and other minerals excepted did not pass to Otis, the Adamant Company's predecessor in title, that company never was their owner and the plaintiff was not concluded by a recital of what was claimed by the grantor in the excepting clause and was at liberty to acquire the outstanding title. If the company did not own the gypsum, the excepting clause was meaningless, and while, in an action upon the deed, it is possible its language might be relied upon as constituting an estoppel, this was not such an action and the relief sought did not, in any respect, depend upon the company's conveyance to West, or upon his to the plaintiff.

For these reasons, I advise the affirmance of the judgment appealed from.

Cullen, C. J., Werner, Willard Bartlett and Chase, JJ., concur; Hiscock, J., not voting.

Judgment affirmed, with costs.

There is a Distinction Between a Reservation and an Exception in a deed. The former means something taken back from the thing granted; the latter means some part of the estate not granted. If, from the words of the deed, it is doubtful whether it creates an exception or a reservation, that question is one largely of intention to be determined by the court from the nature and effect of the provision itself, the subject matter and the situation of the parties, and evidence is admissible to aid the court in removing any existing ambiguity: *Pritchard v. Lewis*, 125 Wis. 604, 110 Am. St. Rep. 873.

Reservation or Exception of Minerals.—A deed of a strip of land, "coal rights reserved," separates the title to the surface from the title to the coal with the mining rights connected therewith, and the

grantor may not only mine the coal, but may use the space from which he takes it as a means of access to coal in other lands, and this right he may transfer to another: *Attebery v. Blair*, 244 Ill. 363, 135 Am. St. Rep. 342. A conveyance providing that the grantor reserves to himself "one-half the plaster or the proceeds thereof, which may hereafter be found on such land," "to have and to hold the same, the one-half the plaster as above designated only excepted," is an exception whereby the grantor retains to himself the fee simple in one-half of the plaster: *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 962. A conveyance excepting therefrom "all mines and minerals which may be found on the above piece of land, with the right of entry at any time with workmen and others to dig and carry away the same," does not except from its operation ledges of limestone rising above the natural surface of the earth, and visible when the deed was made, nor give the grantee the right to conduct open quarrying for the purpose of taking possession of such limestone: *Brady v. Smith*, 181 N. Y. 178, 106 Am. St. Rep. 531. A reservation in a deed of the "coal and other minerals" indicates substances which have a value of their own, apart from the remainder of the land, sufficient to induce the expense and labor of severance for their own sake, but does not include common mixed sand: *Hendler v. Lehigh Valley R. R. Co.*, 209 Pa. 256, 103 Am. St. Rep. 1005; and see, also, *Murray v. Allred*, 100 Tenn. 100, 66 Am. St. Rep. 740; *Armstrong v. Lake Champlain Granite Co.*, 147 N. Y. 495, 49 Am. St. Rep. 683.

Grants of Minerals Reserving the Land or of Lands Reserving the Minerals, and the rights of the parties thereto, are discussed in the note to *Lillibridge v. Lackawanna Coal Co.*, 24 Am. St. Rep. 554.

The Rights of the Owner of the Surface of Mineral Lands as against the owner of the minerals thereunder are considered in the note to *West Pratt Coal Co. v. Dorman*, 135 Am. St. Rep. 131.

The Word "Mineral," in the commercial sense and as commonly used in conveyances and leases of lands, may be defined to mean any inorganic substance found in nature, having sufficient value, separated from its situs as part of the earth, to be mined, quarried or dug for its own sake, or for its own specific uses: *Hendler v. Lehigh Valley R. R. Co.*, 209 Pa. 256, 103 Am. St. Rep. 1005.

MATTER OF CALLAHAN.

[200 N. Y. 59, 93 N. E. 262.]

ELECTIONS—Constitutionality of Statute—Regulating Nominations.—A statute forbidding a committee of any party or independent body, authorized either to make nominations or to fill vacancies, to nominate a candidate of another party or independent body for the same office, is unconstitutional. (p. 627.)

ELECTIONS—Constitutionality of Statute Regulating Nominations.—While the legislature may prescribe in what manner and by what bodies nominations for office may be made, and may refuse to grant committees of parties or of independent bodies to make nominations at all, and require all nominations to be made by conventions, yet if it does grant to any convention, committee or body the right to make nominations, it cannot limit the right of such convention to nominate as its candidate any person who is qualified for the office. (p. 628.)

ELECTIONS—Constitutionality of Statute Prescribing Qualifications.—The legislature may prescribe qualifications for office where there is no constitutional provision on the subject, but it cannot enact arbitrary exclusions from office or arbitrary exclusion from candidacy for office. (p. 628.)

ELECTIONS—Constitutionality of Statutory Regulations.—Legislation regarding elections, to be valid, must not only not deprive the elector of his right to vote for whom he will, but for what candidate he will, and it must not discriminate in favor of one set of candidates against another set. (p. 630.)

ELECTIONS—Nomination of Candidates.—A Section of a Statute entitled "Party Nominations," and providing that "Party nominations of candidates for public office can only be made by a convention, or by a duly authorized committee of such convention, of a political party which at the last preceding general election, . . . cast ten thousand votes," etc., contemplates that the "party nomination" may be made by the convention, or by its committee appointed for that purpose. A nomination made by such a committee would be as much an "original" nomination as though made by the delegates in convention. (p. 631.)

ELECTIONS—Nomination of Candidates—Powers of Committees.—The provisions of the election laws that "when no nomination shall have been made by a political party or by an independent body for an office, or when a vacancy shall exist, it shall not be lawful for any committee of such party or independent body to nominate or substitute the name of a candidate of another party or independent body for such office," etc., when construed with the other sections and provisions of the statute do not prohibit the nomination of a candidate of another party by a committee acting for the convention, in making nominations for offices upon their party's ticket. The inhibition applies in cases where a nomination has been declined, or an attempt to nominate has resulted in a tie, or a candidate regularly nominated dies or is found to be disqualified, or if a certificate of nomination is found defective, etc. (pp. 631, 632.)

CONSTITUTIONAL LAW—Elections—Nominations by Committees, etc.—A statute forbidding a committee of a political party, authorized to make nominations, to nominate for an office on the party ticket a person who is the candidate of another party for the same office is unconstitutional. (p. 632.)

Edward M. Shepard, William N. Dykman, William F. Hagarty and Maurice V. Theall, for the appellant.

Robert Stewart, Eugene L. N. Young, Edward R. O'Malley, attorney general, and Frederick C. Tanner, for the respondents.

60 CULLEN, C. J. While I think the decision of the courts below could well be sustained on the ground of long acquiescence by the public and legislature in the interpretation of section 136 of the election law, declared by Mr. Justice Bischoff in *Matter of Gillespie v. McDonough*, 39 Misc. Rep. 147, 79 N. Y. Supp. 182, and while I agree in the opinion of my brother Gray on that question, I wish to place my vote on a broader ground. In my opinion the provisions of section 136 forbidding a committee of any party or independent body authorized either to make nomi-

nations or to fill vacancies to nominate a candidate of another party or independent body for the same office are plainly invalid and unconstitutional. I shall not discuss the extent of the power of the legislature to regulate elections other than to say that concededly the power must be so exercised as not to deny or impair the rights of the electors. I ⁶¹ shall assume that the legislature may prescribe in what manner and by what bodies nominations for office may be made. I will assume also that the legislature might have refused to grant committees of parties or of independent bodies the power to make nominations at all, but have required all nominations to be made by conventions. The proposition which I assert is this: That if the legislature does grant to any convention, committee or body the right to make nominations, it cannot limit the right of such convention, committee or body to nominate as its candidate any person who is qualified for the office. The electors have the right to vote for whom they will for public office, and this right cannot be denied them by any legislation: *People v. Shaw*, 133 N. Y. 493, 31 N. E. 512, 16 L. R. A. 606; *People v. President etc. of Wappinger Falls*, 144 N. Y. 616, 39 N. E. 641. Equally, any body of the electors has the right to choose whom it will for its candidate for office and to appeal to the whole electorate for votes in his behalf. If the legislature has the constitutional power to prevent a committee of a party from nominating as its own candidate a candidate already in nomination by another party or body, it may equally, if it sees fit, forbid a convention from making such a nomination. It is true that the legislature may prescribe qualifications for office where there is no constitutional provision on the subject, but it has been settled law from the earliest period in the history of our state that it cannot enact arbitrary exclusions from office: *Barker v. People*, 3 Cow. 686, 15 Am. Dec. 322; *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; *People v. Coler*, 173 N. Y. 103, 65 N. E. 956. If it cannot enact arbitrary exclusions from office, equally it cannot enact arbitrary exclusions from candidacy for office. What exclusion could be more arbitrary than that one party or organization should not be permitted to nominate the candidate of another. For years the great popular outcry has been against the domination of partisanship in the election of administrative and judicial officers. To some extent the voters have felt the effect of the popular demand, especially this has been the case in this state in reference to the judiciary. For the past nine ⁶² years every member of this court has been elected on the common nomination of the two great political parties. The same was the case with the election this year, but under the construction of the

statute contended for by the appellant, assuming its validity, the candidate of the party which made the latest nomination was not entitled to a place on the ticket of the other party, because that party had first held its convention and intrusted the nomination to one of the vacancies to a committee in the hope that there might be presented to the electors two common nominees worthy of the support of all the people and thus avoid division on partisan lines. Personally, I should think it a subject for public congratulation that a candidate was so well qualified for the office he sought as to command the support of other political bodies. But I do not base my argument at all on the claim that the legislation operates against nonpartisanship; that may seem to me an objection, but to others not an objection. I insist that the legislature has not the right to legislate so as to induce either partisan voting or independent voting. The liberty of the electors in the exercise of the right vested in them by the constitution to choose public officers on whatever principle or dictated by whatever motive they see fit, unless those motives contravene common morality and are, therefore, criminal, such as bribery, violence, intimidation or fraud, cannot be denied.

It has been suggested that committees can more readily make fusions and combinations than conventions. If such is the case, what power is there to forbid such fusions and combinations as the electors choose to make? It has also been suggested that a committee may be exposed to corrupt influences. I do not see why corruption might not be used to prevent the indorsement of another candidate as well as to indorse him. But assuming the suggestion well founded, it may be a reason for denying the power of nominating to a committee, but the power cannot be vested in them to be exercised in favor of one class of nominees and against another. Could a provision be upheld that the committee should not nominate ⁶³ a man worth more than a million dollars on the theory that he would be more able to corrupt it than a poor man? The fact is plain that the legislative provision is solely intended to prevent political combinations and fusions, and this is the very thing that I insist there is no right to prevent or hamper as long as our theory of government prevails, that the source of all power is the people, as represented by the electors.

A similar question arose in Michigan. A primary election law in that state provided that before the name of any candidate should be placed upon the ballot at the primary election such candidate should take oath that he was a candidate for the office. This provision was held unconstitutional. The court said: "The authority of the legislature to enact laws for the purpose of securing purity in elections does not in-

clude the right to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise. . . . We cannot escape the conclusion that the provision in question does most seriously impede the electors in the choice of candidates for office, and that it is in conflict with the provisions of section 1 of article 18 of the constitution. . . . This provision . . . precludes the voters from choosing as a candidate one who declines to himself seek the office": *Dapper v. Smith*, 138 Mich. 104, 101 N. W. 60.

It is no answer to this position to say that the law permits conventions to nominate the candidates of other parties, and that, therefore, neither the right of the elector nor that of the candidate is impaired. Legislation, to be valid, must not only not deprive the elector of his right to vote for whom he will, but for what candidate he will, and it must not discriminate in favor of one set of candidates against another set. Would a statute which authorized a committee to nominate as its own candidate a candidate of either of the two great political parties, but not a candidate of one of the smaller parties, or authorized it to name a black-haired man, but not a red-haired man, be valid? Yet, if the argument by which it is sought to sustain the legislation before us is sound, it would equally support such legislation. It could be said that no ⁶⁴ right was impaired because conventions were at liberty to nominate red-haired men, though committees were not.

The orders of the appellate division and special term should be affirmed, with costs.

GRAY, J. I think that the determination below was right and that the order appealed from should be affirmed. The courts have followed, as I understand, a decision made in 1902 by Mr. Justice Bischoff in *Matter of Gillespie v. McDonough*, 39 Misc. Rep. 147, 79 N. Y. Supp. 182. There a precisely similar situation existed, the committee of the state convention of the Prohibition party nominating as their candidate for the office of attorney general the candidate of the Democratic party for the same office. That decision has been acquiesced in for the past eight years. The legislature has, repeatedly, had under consideration amendments of the election law (Const. Laws, c. 17) and, in 1909, revised and consolidated that law; but the provisions of the section (136) in question then and now have not been changed. I am clear that when the committee of the Independence League party, duly authorized by resolution of its delegates, in convention assembled, "to make original nominations for justices of the supreme court," etc., placed in nomination the respondent, Garret J. Garretson, that was an original nomination by the party, and that it was not invalidated, within the provisions of section 136 of the election law, because Garretson was a candidate for the same office on the ticket of the Republican

party. Section 120 of the law is entitled "Party Nominations," and provides that "Party nominations of candidates for public office can only be made by a convention, or by a duly authorized committee of such convention, of a political party which at the last preceding general election, . . . at which a governor was elected, cast ten thousand votes," etc. The section contemplates that the "party nomination" may be made by the convention, or by its committee appointed for the purpose. The ordinary mind would, irresistibly, infer that the nomination by such committee would be as "original," as ⁶⁵ though made by delegates in convention. That such was, also, the legislative understanding seems to be apparent from the language in the next section. Section 121, in providing for "Party certificates of nomination," requires that "the party certificate . . . shall contain the title of the office for which each person is nominated, and . . . shall, also, designate . . . the name of the political party which the convention, primary or committee making such nomination represents. . . . When the nomination is made by a committee, the certificate of nomination shall contain a copy of the resolution passed at the convention," etc. The whole intentment of this section is aimed at the certificate, whereby an original nomination of a candidate is made by a political party, whether made in convention, or by the committee there selected by the delegates for the purpose. When, later, the situation is considered, which may arise from vacancies occurring, we find section 135 enacted to meet it. It is entitled "Filling vacancies in nominations." It provides that "If a nomination is duly declined, or the attempt to nominate at a primary results in a tie, or a candidate regularly nominated dies before election day, or is found to be disqualified . . . or if any certificate of nomination is found to be defective, . . . the committee appointed on the face of such certificate of nomination . . . may make a new nomination to fill the vacancy so created, or may supply such defect," etc. Then section 136 follows, whose language gives rise to the question before us, which is entitled "Certificates of new nominations." It provides how "the certificate so made" shall be executed and filed, and what shall be the duty of the Secretary of State upon its filing. Then, immediately, follows in the section the provision that: "When no nomination shall have been originally made by a political party or by an independent body for an office, or when a vacancy shall exist, it shall not be lawful for any committee of such party or independent body authorized to make nominations or to fill vacancies, to nominate or substitute the name of a candidate of another party or independent body for such office; it ⁶⁶ being the intention of this chapter that when a candidate of one party is nominated and placed on the ticket of another party or independent body,

such nomination must be made at the time and in the manner provided for making original nominations by such party or independent body." I think that this section, when read in the light of the preceding sections, should be regarded as having reference to the "new nominations" to be made, where the vacancies have occurred, which the preceding section 135 has covered in its provisions. If we take the view, which I think proper and reasonable, of section 120, that nominations of party candidates made according to its provisions are original nominations, we have no difficulty in referring the language of section 136 to, and in harmonizing it with, the provisions for making new nominations, made necessary by the happening of the events specified in section 135. The inhibition of section 136 against the selection of a candidate on another ticket for the same office would not apply to a case where the committee was acting for the convention, in making nominations for offices upon their party's ticket. In that case the intendment of section 136, that such a nomination "must be made at the time and in the manner provided for making original nominations by such party," would be satisfied. The intent of the statute may be so inartificially expressed as to give rise to debate; but, when we consider the provisions in their order and in their apparent connection with the subjects of each, we should find no difficulty in interpreting their purport in the way I have indicated. The question has been fully discussed in the opinions rendered by Justice Bischoff, in *Gillespie v. McDonough*, 39 Misc. Rep. 147, 79 N. Y. Supp. 182, and by Justice Stapleton in the present case, and I deem it unnecessary to speak further. I think that our affirmance should be rested upon the ground stated, as sufficient for the disposition of the appeal. As a majority of my associates, however, desire, also, to concur with the chief judge in the views expressed by him, I shall join with them in holding that the provisions of section 136 are unconstitutional and, therefore, invalid, in forbidding the committee ⁶⁷ of a political party, authorized to make nominations, to nominate as a candidate for an office on the party ticket a person who is the candidate of another party for the same office. The power of the legislature to regulate may not, validly, be stretched so far as to restrict a body, authorized to make nominations for a political party, in its right to select any duly qualified person as a candidate for public office. It cannot deprive the electors of the right to vote for any person for a public office not disqualified under our laws.

I think the affirmance may well be placed upon the first ground discussed; but if necessary to the affirmance, I shall concur with the chief judge's opinion.

HISCOCK, J. I concur for affirmance on the first ground stated by Judge Gray. The provisions of the election law governing the question now before us are not entirely free from ambiguity and uncertainty. I think, however, that they may fairly be construed as permitting what was done in this case, and in view of the fact that the legislature for several years has allowed such interpretation by the courts to prevail and be followed by political parties when, independent of the question of constitutionality raised by Chief Judge Cullen, it could have avoided or prevented the same by a slight amendment of the statute, makes me the more ready to adopt this view.

Haight, J., dissented.

Werner and Willard Bartlett, JJ., concur with Cullen, C. J., and Gray, J.; Chase, J., concurs with Cullen, C. J., only; Hiscock, J., concurs, in memorandum, with Gray, J., only on the ground first stated in his opinion; Haight, J., reads dissenting opinion.

Orders affirmed with costs.

The Power of the State to Impose Qualifications for Voters and Holders of Offices is considered in the note to *Blair v. Bidegly*, 97 Am. Dec. 263.

The Power of the State to Require and Prescribe the Mode of Proof of Registration is considered in the note to *Southerland v. Norris*, 28 Am. St. Rep. 260.

Qualifications of Voters as Fixed by the Constitution cannot be added to nor subtracted from by the legislature: *Coggeshall v. City of Des Moines*, 138 Iowa, 730, 128 Am. St. Rep. 221.

BOROUGH CONSTRUCTION COMPANY v. CITY OF NEW YORK.

[200 N. Y. 149, 93 N. E. 480.]

MUNICIPAL CONTRACT—Recovery for Extra Work.—Within certain limits a contractor, ordered by the proper representatives of a municipality to furnish materials or do work as covered by his contract which he thinks are not called for by the contract, may, under protest, do as directed and subsequently recover damages because he has been so required, even though it should turn out that he was right and that the officials had no right to call on him to furnish such material and do such labor. (pp. 636, 639.)

MUNICIPAL CONTRACT—Recovery for Extra Work.—Where a representative of a municipality directs a contractor to furnish material or do labor which is clearly beyond the limits of the contract, the contractor is not justified in doing it, even under protest, and cannot subsequently recover therefor. (p. 639.)

Francis K. Pendleton, Terence Farley and Theodore Conolly, for the appellant.

Edward M. Grout, James F. McKinney and Paul Grout, for the respondent.

¹⁵⁰ HISCOCK, J. This action is brought really to recover the value of extra materials furnished and extra labor done by the respondent while constructing a large sewer under contract with the appellant in the borough of Brooklyn. It is not brought, however, on the theory of recovering on or under the contract for such extra material and services, but is instituted and thus far has been sustained on the theory that the appellant unjustly required the respondent to furnish materials and do work not covered by its contract, and thereby committed a breach of contract for which damages measured by the value of such material and work may be recovered.

The sewer which the respondent contracted to construct was a large one, the price being upward of eight hundred thousand dollars. The engineer was the official principally charged with the ¹⁵¹ duty in behalf of the city of supervising the execution of the contract and securing the proper performance thereof by the contractor. Amongst other things, it was provided: "To prevent all disputes and litigation, it is further agreed by and between the parties to this contract, that the chief engineer of sewers shall in all cases determine the amount or the quantity of the several kinds of work which are to be paid for under this contract, and he shall determine all questions in relation to said work and the construction thereof, and he shall in all cases decide every question which may arise relative to the execution of this contract on the part of the said contractor, and his estimate and decision shall be final and conclusive upon said contractor."

Two provisions in the contract are directly involved in the controversy. One of these provided that when the work to be constructed "is all or partly below the city datum (meaning high water) Portland cement must be used when directed by the engineer." The other was to the effect that: "During the progress of the work, and until the entire completion and final acceptance thereof, the sewers, drains, basins, culverts and connections are to be kept thoroughly cleaned throughout and left clean, and the drainage of any old sewer that may be taken up or intercepted must be provided for by the contractor."

Claiming to act under the first clause, the engineer in charge demanded that the contractor should lay not only that portion of the sewer located below the city datum line in Portland cement, but also should lay in such cement that portion of the same section which was above the line, this cement being much more expensive than that which the contractor

was otherwise allowed to use. Again, claiming authority I suppose under the second clause quoted above, if anywhere, the engineer demanded that the contractor make the sewer ready for an alleged inspection by the city officials, and to that end that he not only do various things in the way of cleaning it up, but that he prepare a lift by which to lower automobiles into the sewer and illuminate the sewer its entire ¹⁵² length, which was done with a great number of candles. In each case the contractor in substance protested that the things thus required of him were not covered by his contract, but on the insistence of the said official finally did as he was required, and it is because of what he was thus required to do that he brings this action. There are some preliminary questions to be disposed of before we reach the main one whether he can succeed because thus required.

The first one is raised by the contention on behalf of the appellant that no sufficient notice of claim was filed in behalf of the respondent. My attention has not been called to and I have been unable to find any place where this question was presented on the trial in a manner that survives the unanimous affirmance of the judgment secured at the trial term.

A second question is whether the appellant is in a position, in view of the unanimous affirmance, to attack the judgment which has been rendered against it on the merits. I think that by its objections and exceptions to the reception of evidence and to the charge and refusals to charge it has placed itself in a position to do this.

The next question is whether the respondent was required to furnish materials and do work which were not covered by its contract, for of course this claim lies at the bottom of its recovery. I think it was. It is clear that some of the things which it did in preparation for the so-called inspection trip of the city officials, such as installing an elevator and placing candles the entire length of the sewer and perhaps other things, were not required by the contract. I also think it is reasonably clear that it was not compelled to lay in Portland cement those portions of the sewer which were above the city datum. Of course, the object of the clause in the contract on this point which has been quoted was to require a higher grade of cement where the sewer was exposed to the action of water, and there would be no sense in so construing it as to require the upper part of the sewer which was never subjected to the action of water to be laid in Portland cement because the lower portion was subject to the action of water and therefore ¹⁵³ should be laid in it. It is asserted without contradiction that for its entire length some part of the lower portion of the sewer was below the line in question, and this being so, the contention of the appellant would result in requiring

the entire sewer to be laid in Portland cement, a result evidently not dreamed of by the parties.

The disposition of these questions brings us to the main inquiry, whether a recovery may be allowed on the theory of a breach of contract chosen by the respondent because it was unjustifiably required to furnish these extra materials and do this extra work in spite of its protest.

The learned counsel for the appellant with considerable insistence advances arguments applicable to an action brought to recover on contract for extra services and materials and leading to the conclusion that such recovery cannot be permitted because such materials and work were not called for or authorized in the manner prescribed by the contract. Of course, on the premises formulated by counsel on this theory his conclusions are unimpeachable, but the answer to the entire argument is that this action does not rest on any claim for extra services or materials under the contract, but on an alleged breach of the contract by the city and its representatives whereby the respondent has suffered damages, and the question is whether the action can be maintained on that line.

I regard it as settled that it may; that within certain limits a contractor who is ordered by the proper representatives of the municipality to furnish materials or do work as covered by his contract which the former thinks are not called for by such contract may under protest do as directed and subsequently recover damages because he has been so required, even though it should turn out that the contractor was right and that the official had no right to call on him to furnish such materials and do such labor. Decisions of this court have so conclusively established the principle that under such circumstances the contractor may treat the conduct of the municipality acting through its representative as a breach of contract¹⁵⁴ and recover damages, that it is only necessary to summarize these without argument.

In *Gearty v. Mayor etc. of New York*, 171 N. Y. 61, 63 N. E. 804, a case was presented where the engineer of construction had required a contractor to take up and relay a part of a pavement on the ground that it had been improperly laid. The contractor, although protesting that the work had been properly done, and that the requirement was improper, nevertheless complied therewith and afterward brought an action alleging two causes of action. One of them was for damages suffered by reason of certain work being unlawfully and in breach of the contract required to be done the second time. In that case as in this one the contract proper had been fully performed and the contractor had received his compensation in full thereunder, and there was no certificate for extra work as provided in the contract. Under these circumstances it was held that the action was not to be treated as one to recover

extra compensation under the contract, but as one to recover damages for a breach of the contract, and that plaintiff might maintain an action on that theory, and that on that theory no certificate of the engineer was necessary.

The appellant seeks to distinguish that case on its facts from the present one, but in my opinion, while the nature of the thing lawfully required of the contractor was somewhat different from what was required in this case, this difference of detail is not sufficient to decisively distinguish the two cases or to withdraw this case from the principles laid down in deciding the former one. It was, amongst other things, said: "It is insisted on behalf of the city that the plaintiff by obeying the orders of the engineer of construction requiring him to take up and relay the alleged improper work without making any claim for extra compensation at the time the changes were ordered or made or without making a new contract, has waived any claim, if he was entitled to any, to extra compensation. This proposition assumes erroneously that the plaintiff is seeking to recover extra compensation under the contract. This action is to recover damages for breach of ¹⁵⁵ the contract. . . . We are of opinion that either of the remedies discussed (one being to comply with the improper direction and then bring an action for breach) was open to the plaintiff at his election."

In *Lentilhon v. City of New York*, 102 App. Div. 548, 92 N. Y. Supp. 897, affirmed, without opinion, 185 N. Y. 549, 77 N. E. 1190, while the plaintiff's claim to recover because extra work had been improperly required of him was defeated on the construction given the contract, it was written: "Damages as for a breach of contract may be recovered for an erroneous direction of a representative of a municipality, authorized to give directions in the premises in superintending the execution of contract work, which are insisted upon and necessitate the performance of more work than the contract, properly interpreted, requires, and the contractor has an election either to refuse to proceed and recover upon a quantum meruit for the work already done or to continue under protest and recover the value of the extra work upon a quantum meruit as the measure of damages for the breach of contract," citing, amongst others, the *Gearty* case (117 N. Y. 61, 63 N. E. 804).

In the more recent case of *People v. Schneider*, wherein this court affirmed, without opinion (191 N. Y. 523), the judgment of the appellate division, which in turn affirmed the judgment below on the opinion of the referee, the question here presented was decided in favor of the contractor on practically identical facts. In that case the contractor was engaged in constructing a sewer, and the official in charge in behalf of the municipality contended that the contract

required certain work to be done in a certain manner, and demanded that it should be so performed. The contractor, while disputing the contention of the engineer, and protesting that the contract did not compel him to do as required, nevertheless complied with the directions given to him, and subsequently brought an action to recover what amounted to the extra cost of doing work which he had been improperly instructed to do, and he was allowed to recover on the authority and theory of the Gearty case, already ¹⁵⁶ referred to. While the referee, in his opinion and findings, uses expressions concerning a recovery of the value of the extra work required, these must be construed as relating to the measure of recovery on the fundamental facts showing a breach of contract by the municipality, and the judgment must be regarded as having been affirmed on that theory.

While it has thus been established that a party may recover damages as for a breach of contract when he has been unlawfully required to furnish materials or do work not called for by his contract, I agree with the counsel for the appellant that the principle unless restricted in its application may be made the source of grave abuse. While such an action theoretically seeks to recover damages as for a breach of contract, its real purpose is to secure compensation for extra work and a municipal representative and contractor might by collusion make the theory a ready method of saddling the municipality with extra work and materials which it never authorized and of burdening it with liabilities which it never contemplated. Municipalities ought not to be subjected to any unlimited risk of this kind, but some such logical and reasonable limitation should be placed on the operation of this principle as will be decisive under ordinary circumstances and be a safeguard against any such unfortunate result as has been suggested.

The underlying justice of the principle is that where a municipal representative having authority to speak for it and supposed to be familiar with such matters in apparent good faith and with a show of reason requires a contractor to do certain things as covered by his contract, the contractor, although protesting against the requirement, ought not to be compelled to refuse obedience and incur the hazard of becoming a defaulter on his contract, even though it shall subsequently turn out that he was right and the municipal representative wrong in the dispute. The theory involves the idea that the requirement of the municipal representative finds some reasonable basis in the contract and that the question whether his demand is proper or improper is one which may be the subject of some doubt and debate and in respect of ¹⁵⁷ which the contractor might prove to be mistaken if he should refuse to do what was required of him, and there is

no justification for applying it where the municipal representative requires something which is so palpably and manifestly beyond the provisions of the contract that the contractor would not be confronted by any of the legal perils of an erroneous decision if he should refuse to obey.

These considerations seem to suggest the general rule that where the municipal representative, without collusion and against the contractor's opposition, requires the latter to do something as covered by his contract, and the question whether the thing required is embraced within the contract is fairly debatable and its determination surrounded by doubt, the contractor may comply with the demand under protest and subsequently recover damages even if it turns out that he was right and that the thing was not covered by his contract, and, on the other hand, if the thing required is clearly beyond the limits of the contract, the contractor may not even under protest do it and subsequently recover damages. While this rule is only a general one and may not be determinative of every conceivable case, it seems to furnish a test by which to decide phases of the question which will ordinarily present themselves, and it may both be illustrated by and applied to the facts established in this case.

The demand of the appellant's engineer, that respondent should use Portland cement in laying both the portions of the sewer above the city datum line as well as those below, finds some support in the wording of the clause of the contract relating to that subject. In fact a literal interpretation of the clause would sustain the demand of the engineer, and it is only by tempering the letter of the provision by the spirit of its purpose that we reach the conclusion that it did not require the extra Portland cement demanded by the engineer. Under these circumstances the court could well say, as it has, that the contractor was justified in following the instructions of the engineer, although protesting against the justice thereof, rather than in refusing to comply with ¹⁵⁸ those requirements and hazarding a breach of his contract involving eight hundred thousand dollars, and that its supply of the extra material furnished a basis for recovery in this kind of an action.

On the other hand, if we assume that it was based on the contract, the demand that the contractor should furnish elevators by which to lower automobiles and illuminate the sewer as was done, and I use these items as illustrations without attempting to classify on this question all of the items embraced in this branch of the case, was so preposterous that there could be no reasonable doubt that it exceeded the obligations of the contract and that a refusal to comply with it would not work a breach of contract. Under those conditions the contractor was not justified in doing the work and

cannot recover damages on the theory now invoked. Of course it is true that if it had refused compliance it might have been subjected to annoyance or even to unjust litigation, but that is a possibility which confronts everyone and in my opinion is not enough to furnish a basis for this kind of an action.

I, therefore, reach the conclusion that a judgment awarding damages measured by some of the items proved might be sustained, but that the jury were permitted to take into account other items which were not a proper subject for consideration, and inasmuch as it is not possible to determine from the verdict which ones were made the measure of damages, it seems necessary to reverse the judgment and grant a new trial, costs to abide the event.

Cullen, C. J., Vann, Werner, Willard Bartlett and Chase, JJ., concur.

With Respect to the Private Character of Its Powers and Obligations, a Municipal Corporation represents the pecuniary and proprietary interest of individuals, and the rules which govern the responsibility of individuals are properly applicable: *New Orleans v. Kerr*, 50 La. Ann. 413, 69 Am. St. Rep. 442. A city, when acting in its private capacity, as contradistinguished from its governmental capacity, is bound by its contracts, and may be estopped by the conduct of its proper officers when acting within the lawful scope of their powers: *Gregsten v. Chicago*, 145 Ill. 451, 36 Am. St. Rep. 496; and see *Springfield*, 148 N. Y. 46, 51 Am. St. Rep. 667.

BARKER v. WASHBURN.

[200 N. Y. 280, 93 N. E. 958.]

WITNESSES—Person Adjudged Incompetent.—It does not follow that a person adjudged incompetent and unable to manage his own affairs is incompetent as a witness, for he may possess sufficient intelligence to be truthful and to describe simple occurrences as they were. (p. 642.)

EVIDENCE—Weight and Sufficiency.—**Special Instructions** regarding the weight to be given certain evidence must be requested by the party who desires them. (p. 642.)

FALSE IMPRISONMENT—Incompetent Kept from His Committee.—The committee of an incompetent person, suing in his behalf, may recover damages from one who takes and detains the incompetent from his committee, as such constitutes a false imprisonment. (p. 642.)

Fred. Linus Carroll, for the appellants.

Frank Talbot, for the respondent.

²⁸¹ HISCOCK, J. We are led to the consideration of rather unusual facts in this action which was brought for alleged false imprisonment. It was instituted by the respondent as committee of one Sutliff, an incompetent person, to recover for the alleged unlawful removal and restraint of his ward by the appellants. This conduct on the part of the latter is claimed to have been in violation of the will and wishes both of the incompetent himself and of the respondent as his committee, and apparently the real motive involved in this controversy over the possession of the idiot's body is the purpose to reap a profit on his services as a farm laborer.

Several years before the occurrences in question the respondent was duly appointed committee of said Sutliff on a finding duly made in lunacy proceedings that the latter was "an idiot and incapable of managing or caring for his own affairs or business." For several years the incompetent person ²⁸² was allowed by his committee to live with the appellants and then he was taken away by the former and hired out to a third party. Thereafter as the evidence unquestionably permitted the jury to find, the appellants on two occasions took the incompetent person away under such circumstances as permitted the jury to find that such removal was against the will of the incompetent person, if he had one, and amounted to a false imprisonment. The evidence likewise permitted the jury to find that not only was the removal and retention on these occasions against the will of the committee, although consideration of one of them so far as the committee was concerned was withdrawn from the jury, but that at other times the appellants without physical force, against the will and wishes of said committee, enticed the incompetent away, and on one occasion aided in concealing his whereabouts from the committee for several weeks. In addition to damages compensatory for the loss of wages which might have been earned by the incompetent, the jury were allowed to award punitive damages, which they apparently did in a small amount.

Many of the questions argued by the counsel for the appellant on this appeal involve mere questions of evidence or familiar and well-settled principles applicable to such an action as this, and I deem it unnecessary to discuss these, contenting myself with saying that we have considered them and approve of the disposition thereof made by the courts below. There are two questions of a less familiar character which may be briefly considered.

The respondent's case was sustained in part by the evidence of the incompetent himself. Basing his claim on the inquisition and on some of the evidence presented in the

lunacy proceeding, it is argued by counsel for appellants that that proceeding and the order appointing his committee adjudicated that the incompetent was so completely and permanently devoid of intelligence that he could not be assumed to understand the object and nature of testimony, and that, therefore, he should not have been sworn and received as a witness. In ²⁸³ my judgment this contention is not well founded. The inquisition was found several years before the trial of this action and the committee was appointed on the ground that Sutliff was an idiot and incompetent to manage his own affairs. It did not by any means follow from this as a matter of law that he was, and for years would continue to be, so utterly lacking in intelligence that he could not appreciate at all the relationship and significance of facts and would not be able to understand the obligation of an oath and describe accurately what those facts were. We know both as a matter of definition and of observation that a person who would be judicially declared incompetent and unable to manage his affairs might nevertheless possess sufficient intelligence to be truthful and to describe simple occurrences as they were. When this person was offered as a witness he was interrogated both by the court and counsel for the purpose of determining his competency as a witness, and thereafter the court decided that he should be sworn. This determination was undoubtedly within the power of the trial court, and the testimony which was subsequently given and the accuracy of which was tested by long and exacting cross-examination in my judgment bears on its face such marks of intelligence and comprehension as fully justify the disposition which the trial judge made of the question presented to him. If the appellants desired any special instructions to the jury concerning the weight to be given to this evidence they should have asked for them.

The other question to which reference has been made is the more interesting and novel one.

Apparently this case was tried on the theory that the appellants might be found guilty of false imprisonment either because they took possession of and restrained the incompetent person against his will, if he was found to have one, or because they seized and removed him from the custody of the committee.

The court, amongst other things in its charge, said: "I say that this case is somewhat peculiar. I say further that because of this peculiarity in this case (the appointment of a committee ²⁸⁴ over the incompetent) the question is not so much whether Ansel Sutliff was seized and detained by these defendants against his own will, but whether he was seized and detained by physical force by these defendants against the will of his committee. If, therefore, there is

proof in this case that these defendants have jointly used force to take Ansel Sutliff physically away from his committee and against the will of his committee and detained him against the will of his committee, then there might be jurisdiction for a finding on your part that there has been false imprisonment in this action."

He further charged at the request of the appellants themselves: "Plaintiff must prove both an unlawful arrest or seizing and unlawful detention against the will of Ansel W. Sutliff by a preponderance of evidence." I assume that this last charge must be construed as subject to the provision that the jury should take the view that the incompetent was capable of exercising volition.

Exception was taken to that portion of the charge first quoted, and thereby the inquiry is presented whether an action of false imprisonment may be maintained by a committee of an incompetent person because his ward has been unlawfully taken and removed from his custody or from the custody of those with whom he has temporarily placed him. While this specific question does not seem to have been adjudicated in this state, I think that such principles have been established in other analogous cases as lead to an affirmative answer to the question suggested.

Robalina v. Armstrong, 15 Barb. 247, was an action for assault and battery and false imprisonment. The plaintiff was an infant about four years of age and the illegitimate child of one Eliza Gilbert, with whom she had lived since birth. The defendant was the putative father of the child, and had obtained possession of her without the consent of her mother, and refused to restore her to the latter. The court held that the mother and not the father was entitled to the custody of the child, and that inasmuch as the latter against the will of the mother had wrongfully detained and ²⁸⁵ maintained possession of the infant, an action for false imprisonment would lie in the name of the infant whose rights were violated. In thus ruling in the case of an infant too young to have any volition in the matter the principle was necessarily involved that the unlawful removal of a person having no will by reason of infancy from the custody and possession of the person entitled thereto furnished the basis for an action of false imprisonment.

People v. Wilcox, 22 Barb. 178, was a habeas corpus proceeding instituted to obtain the possession and custody of an infant of such tender years as to be incapable of exercising volition as to its custody, and therein was approved the principle cited from *The King v. Greenhill*, 4 Adol. & E. 642, "where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody,

because the law presumes that, where the custody is, no restraint exists."

In *People v. Porter*, 1 Duer, 709, it is said: "An infant of such tender years as to be incapable of rationally expressing its wishes, which is all I can understand to be meant 'by incapable of making a choice,' is of necessity under restraint, and in order to determine whether the restraint is illegal, the court must determine to whom the custody belongs."

Commonwealth v. Nickerson, 5 Allen (87 Mass.), 518, was a criminal action for assault and battery and was predicated on the acts of the defendant in taking an infant of the age of nine years from school, where he had been placed by his father who had his legal custody, in order to deliver him into the custody of the mother who was not entitled thereto. The court sustained the action and amongst other things said: "Being in the actual custody of his father, whose will alone was to govern as to his place of residence and the selection of a teacher and custodian, this child of nine years of age was incapable of assenting to a forcible removal from the custody of his teacher and a transfer to other persons forbidden by law to take such custody. He was under legal restraint, when taken ²⁸⁶ from the lawful custody and against the will of his rightful custodian; and such taking is in law deemed to be forcible and against the will of the child. . . . Without limiting the precise age in which a child would be held not to have the legal capacity to assent to such forcible abduction from the custody of the parent to whom such custody has been assigned, . . . the forcible taking away of a child of nine years of age against the will of his father, or those to whom his father had committed him for nurture or education, will authorize a jury to find that the child was illegally restrained of his liberty, whatever may have been his apparent wishes or satisfaction in being withdrawn by force from his place of legal custody . . . and placed under the care of those whose custody was illegal restraint": See, also, *Mercein v. People*, 25 Wend. 64, 35 Am. Dec. 653; *People v. Walts*, 122 N. Y. 238, 25 N. E. 266.

So far as the principles thus announced are concerned, I see no reason for distinguishing those cases from the present one. There was no objection by the appellants to the theory on which the jury were permitted to find them guilty of false imprisonment because they had violated the wishes and will of the incompetent, if he was possessed of them, but they have expressly and repeatedly argued that the incompetent had no mind or will whose violation could be made the basis of such an action as this. If the jury took that view and concluded that the incompetent like a child of tender years had no such will as would enable him to exercise intelligent and legal volition as to his custody, then the case was

brought exactly within the principles of the cases to which reference has been made and on this theory I think the trial judge committed no error in giving the instructions which have been quoted, but that here as elsewhere with much clearness and fairness he amply protected all the rights of the appellants.

The judgment should be affirmed, with costs.

Cullen, C. J., Haight, Werner, Willard Bartlett, Chase and Collin, JJ., concur.

What Constitutes False Imprisonment is the subject of a note to *Hebrew v. Pulis*, 118 Am. St. Rep. 719; and see the notes to *Tyron v. Pingree*, 67 Am. St. Rep. 408, and *Mitchell v. State*, 54 Am. Dec. 258.

Admissibility of the Evidence of Insane Witnesses is the subject of a note to *Lopez v. State*, 28 Am. St. Rep. 942. A person affected with insanity is competent as a witness, if he has sufficient understanding to comprehend the obligation of an oath, and is capable of giving a lucid account of such matters as are in dispute: *Bowdle v. Detroit Street R. R. Co.*, 103 Mich. 272, 50 Am. St. Rep. 366.

BRAUN v. BUFFALO GENERAL ELECTRIC COMPANY.

[200 N. Y. 484, 94 N. E. 206.]

ELECTRIC COMPANIES—Negligence—Insulation of Wires.—

While the convenience of electric and telephone wires is obvious and their maintenance should not be burdened with excessive liabilities, still a company maintaining dangerous wires should not be relieved, on the ground of expense, from the affirmative duty of exercising a reasonable degree of care to maintain proper insulation and thereby prevent accidents reasonably to be apprehended to those lawfully coming in the neighborhood of the wires. (p. 648.)

ELECTRIC COMPANIES—Uninsulated Wires Over Vacant

Lot.—The question whether an electric company is guilty of negligence in maintaining wires, without proper insulation, across a vacant lot in a thickly settled portion of a city, and liable for injury to a workman engaged in erecting a building on the lot, occasioned by such wires, is one of fact for the jury. (p. 649.)

ELECTRIC COMPANIES—Unsafe Wires Over Vacant Lot—

Notice.—Where an electric company maintains wires, defectively insulated, across a city lot, there being nothing to indicate to whom the wires belong or that they are dangerous, it is not necessary that the owner of the premises, or a workman engaged in the erection of a building thereon, should have noticed the wires and given the company notice to remove them or make them safe before the company can be held liable. (p. 649.)

ELECTRIC COMPANIES—Care of Wires Required.—

An electric company, if reasonably chargeable with knowledge, or if in the exercise of reasonable prudence is bound to anticipate, that people may lawfully come in close proximity to its wires, either for purposes of business or pleasure, is under obligation to exercise care to keep the wires in safe condition. (p. 650.)

ELECTRIC COMPANIES—Defective Wires—Anticipated Use of Property.—An electric company maintaining its wires over a vacant city lot is bound to anticipate the use of the lot for building purposes and to keep the wires in a condition safe for workmen and others coming in proximity thereto. (p. 652.)

ELECTRIC COMPANIES—Defective Wires.—A Workman Erecting a Building over which electric wires are run is upon the premises by express permission and for a lawful purpose, and may recover damages from the electric company occasioned by a defective condition of the wires. (pp. 652, 653.)

ELECTRIC COMPANIES—Contributory Negligence of Workman.—Whether a workman engaged in erecting a building is guilty of contributory negligence in taking hold of an electric wire, not knowing the character thereof, nor noticing its defective insulation, is a question of fact for the jury. (p. 653.)

NEGLIGENCE—Contributory Negligence of Deceased.—Where the injured person is deceased, wider latitude should be allowed to the jury in passing upon the question of contributory negligence. (p. 653.)

Charles Newton, for the appellant.

Alfred L. Becker, for the respondent.

457 HISCOCK, J. While plaintiff's intestate was engaged as a carpenter in the erection of a building on private premises in the city of Buffalo, he took hold of two wires strung and maintained by the respondent across said premises and carrying an electric current of a high voltage. Inasmuch as the insulation on these wires had become ragged and defective, there followed the quite inevitable result—death of the man. The learned courts below have unanimously decided that the intestate was killed without legal responsibility on the part of the respondent for the part which it took in bringing about this result, and in determining whether this conclusion was justified we are called on to consider the rule of care and responsibility which governs a company carrying wires charged with dangerous currents of electricity over private premises in the midst of a large and thickly populated city.

The controlling facts which present this question in this case as they might have been found by the jury are as follows:

The premises where the intestate was at work were part of a lot situated at the corner of Northampton street and East Parade avenue in the city of Buffalo. The entire lot was thirty feet front on Northampton street and had a frontage on East Parade avenue of one hundred and fifty feet. Some years before the accident a one-story house had been erected facing on Northampton street and with a yard occupying about sixty feet in depth along East Parade avenue. In the rear of this lot and fronting on the latter avenue the owner had commenced the erection of what was intended to be a

two-family apartment house. This building had been in process of construction for some time, and had reached the point where joists were being laid between the second and third floors at a distance of something over twenty feet from the ground. As ⁴⁸⁸ far back as 1888 or 1889 the respondent, under a written permission, and so far as appears without compensation, had strung two electric wires for the purpose of furnishing electric light to a summer park near by. These wires from their terminus in the park were carried to a pole in East Parade avenue, and thence diagonally across the premises in question, so that they were situated directly over the building in process of erection. They had not been in service from November until the date of the accident in March, but nevertheless they were carrying a current of between two thousand and three thousand volts. They were from twenty to twenty-four inches apart and ran about four and a half feet above the joists on which the deceased was working, making a total distance from the ground of twenty-five or twenty-six feet. There was nothing to indicate who maintained them. It was discovered after the accident that the insulation at and around the point of contact by deceased had become defective and entirely ineffective to protect a person from the electric current, and so far as appears nothing had been done in the way of inspecting or repairing this insulation during the entire time of the service of the wires as above stated, although it appeared that such insulation as was used would not remain effective for more than three years.

The diameter of an ordinary telephone wire which does not carry a current of sufficient voltage to be dangerous is about one-sixteenth of an inch without insulation and the wires in question had a diameter of about five-sixteenths of an inch. The ownership of the premises had changed since the installation of the wires and except for the difference in size there was nothing to indicate even to an experienced person that the wires were not telephone wires or that they were "alive" and dangerous. In fact the contractor for whom the deceased was at work stated that he took them to be telephone wires. The entire neighborhood, except this one lot, was built up presumably with dwelling buildings. The deceased was called by one of his coworkers to come and assist in straightening out the joists, which naturally required him to ⁴⁸⁹ move around on the joists below the wires. He was not seen at the instant when he took hold of the latter, but being attracted by a noise one of the witnesses discovered him with one hand on each wire and hanging down therefrom. Owing to the relative situation of the wires and the joists it would be natural for one desiring to go from one side of the building to the other to raise the wires so that

he could pass under or bear down on them so that he could step over.

The question now presented to us is one of those which as a general class are constantly becoming of greater importance. In earlier times the proposition that a man owned all of the space above his land commonly became, after a short distance, one of mere theoretical interest, but with the constantly increasing uses for upper space this is changing, and the subject is continually becoming more and more one of new and practical importance. Recently this court has held in opposition to earlier authorities that an action of ejectment may be maintained for the removal of a telephone wire stretched at considerable height over a man's premises: *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 116 Am. St. Rep. 563, 79 N. E. 716, 11 L. R. A., N. S., 920, 9 Ann. Cas. 858.

While the measure of liability of one stringing or maintaining overhead wires conducting a dangerous current of electricity has been frequently under consideration, it may be admitted that it has not been determined under circumstances entirely analogous to those now presenting it, and we are, therefore, called on to determine largely by the application of general principles the rule which should be applied.

As a preliminary general consideration counsel for the respondent, in view of the evidence that the insulation such as was originally placed on the wires would be effective for only three years, argues that it would be a great hardship to require a company like the respondent to renew this insulation so frequently, and that as a matter of general policy we should not impose any such burden. It is probable that the weight of the burden is somewhat exaggerated, but however that may be, this argument does not impress us as being very decisive of the rule which should be applied in this or similar ⁴⁹⁰ cases. It is a matter of common knowledge that a company like the respondent for its own profit ordinarily installs and maintains its wires across private premises without compensation. In a large city overhead wires are apt to be numerous, and there are no such marked characteristics of the different ones as would enable an ordinary layman to distinguish between those which are comparatively harmless, like a telephone wire, and those which are charged with a deadly current like those here. While the convenience of electric and telephone wires is obvious and their maintenance should not be burdened with excessive liabilities, still it seems clear that a company maintaining dangerous wires should not be relieved on the ground of expense from the affirmative duty of exercising a reasonable degree of care to maintain proper insulation and thereby prevent accidents reasonably to be appre-

hended to those lawfully coming in the neighborhood of such wires.

When we apply general principles of diligence and care to the respondent in this case, its conduct seems to be such that a jury should have been allowed to decide whether or not it was guilty of negligence, rather than that the court should have held as a matter of law that it was not guilty thereof.

Little need or can be said about the condition of the wires, for if the respondent owed any obligation whatever of making them safe, it would scarcely have been more negligent if, instead of allowing them to remain uninspected and unrepaired as it did, it had strung and maintained absolutely naked wires. The only question which is at all close is whether the respondent in the exercise of reasonable care and foresight should have apprehended that the premises over which the wires were strung might be so used as to bring people in contact with them, and whether, therefore, it should have guarded against such a contingency. As indicated, I think this was fairly a question for the jury. Here was a vacant lot in the midst of a thickly built-up section of a large city. It was no remote or country lot where no buildings could be expected. The neighboring land was covered with buildings. ⁴⁹¹ It was the only vacant lot in the vicinity. It fronted on a street and there was plenty of space for a building. Now, what was reasonably to be anticipated—that this lot would be allowed indefinitely to lie unimproved and unproductive, or that it, like other surrounding lots, would be improved by additions to the old building or by the erection of new and independent ones? Was it to be anticipated that its use would be an exception to the rule prevailing in the entire neighborhood or that it would be in conformity therewith? It seems to me that the answer to these questions should have been made by the jury, and that the latter would be justified in saying that the respondent was bound to anticipate what was unusual rather than that which was exceptional and act accordingly. It does not appear how much this neighborhood may have changed since the wires were first strung, but assuming that it had materially changed in respect to the use of lots for buildings, such a change in a neighborhood, for aught that appears in this case, requires some time, and as a basis for responsibility it is not too much to charge a company stringing such wires with notice of gradual changes in the locality through which the wires pass.

Of course, it is not necessary to say that the respondent might be required in the exercise of reasonable prudence to anticipate that just this particular fashion of building would be erected at just the particular spot where intestate was working. If it could be required to foresee that the lot would probably be built upon, the situation of the wires was such

with reference to the ground and the shape of the lot that a jury might fairly say that such building operations were quite apt to bring persons in proximity to the wires and that they should be safeguarded. It is not a satisfactory answer to appellant's claim that the company should have exercised care respecting its wires to say that the intestate or his employer should have noticed them and given notice to remove or make them safe, for, as has been pointed out, there was nothing to indicate to whom the wires belonged or, as matter of law, that they were dangerous.

⁴⁹² As has been said, apparently there are no authorities directly in point. Some may be cited, however, which tend to support the conclusions here adopted. The fundamental and general principle that a company like respondent, if reasonably chargeable with knowledge, or in the exercise of reasonable prudence bound to anticipate, that people may lawfully come in close proximity to its wires either for purposes of business or pleasure, is under obligation to exercise care to keep the latter in a safe condition is abundantly established: *Connell v. Keokuk El. Ry. & P. Co.*, 131 Iowa, 622, 109 N. W. 177; *Rowe v. Taylorville El. Co.*, 213 Ill. 318, 72 N. E. 711; *Fitzgerald v. Edison El. Ill. Co.*, 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 161; *Wabash St. L. & P. Ry. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391; *McLaughlin v. Louisville El. L. Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812.

It is only the application of this general principle which can provoke discussion, and the cases next cited are illustrative of the varying circumstances to which it has been applied, with the result of holding that the defendant might be held negligent for not anticipating and guarding against the accidental contact by an outsider in each case with its wires.

In *Fitzgerald v. Edison El. Ill. Co.*, 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 161, it appeared that the intestate, who was a painter, for his convenience, went on a roof and, in order to do his work, propped up some of defendant's wires. Subsequently one of these slipped from the prop and killed him because of defect in insulation, and it was held that a nonsuit was improper.

In *McLaughlin v. Louisville El. L. Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812, the defendant was held liable to a painter on a house who came in contact with a nearby wire of defendant which was imperfectly insulated.

In *Griffith v. United El. L. Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675, 32 L. R. A. 400, it appeared that plaintiff was a tinsmith engaged in placing a conductor on a building and was injured through the latter pipe accidentally coming in contact with a defective wire several feet away. It was held that the defendant, owing the duty to use reason-

able diligence to keep its wires in repair for every person who for purposes of business might be rightfully on the ⁴⁹³ premises, was liable although the injuries were the result of an accidental and somewhat novel contact.

Geissman v. Missouri-Edison El. Co., 173 Mo. 654, 73 S. W. 654, is a somewhat analogous case. There the defendant was held liable in a case where deceased, who was engaged in removing a sign, was killed through a wire connected with the sign coming in contact with a defectively insulated wire of defendant several feet away.

In *Daltry v. Media Electric L., H. & P. Co.*, 208 Pa. 403, 57 Atl. 833, the defendant was held liable for injuries from a defectively insulated wire which was strung across a private lawn and which came in contact with plaintiff, a boy ten years old, who had passed from the street on to the lawn to play. The court said: "Having constructed the line across the lawn to the house in proximity to the carriageway, it knew that children as well as adults might frequent the way, and, hence, the necessity of keeping its wires in a proper condition and repair to avoid danger. It must be presumed that the company also knew that the evidence disclosed as a fact that children used the lawn of the premises near the gateway and in the vicinity of the wire as well as the street in front of the premises as a playground. . . . It was, therefore, the duty of the company . . . to take reasonable precautions to prevent injury to persons who might be at this point."

In *Byerly v. Consolidated Light, P. & I. Co.*, 130 Mo. App. 593, 109 S. W. 1065, although plaintiff was defeated on other grounds, it appeared that the intestate was engaged in working around a pile of refuse produced from a mine growing larger as fresh deposits were made. By reason of this growth, one of the defendant's wires which originally was far enough away not to be dangerous, was finally brought near to the pile so that intestate, as assumed, came in contact therewith. It was held on that branch of the case that it was the duty of defendant, in view of the changes in the pile, either to have insulated its wires or else to have elevated them beyond the line of danger.

In *Temple v. McComb City El. Light & Power Co.*, 89 Miss. 1, 119 Am. St. Rep. 698, 42 South. 784, 10 Ann. Cas. 924, a demurrer ⁴⁹⁴ was overruled to a complaint in which it was in substance stated that the plaintiff, a boy ten years old, had been injured by coming in contact with a live wire strung by defendant through a tree with branches reaching nearly to the ground in a thickly populated neighborhood and in which plaintiff and other children played. In holding that the bill stated a cause of action, the court did so not on the ground that the defendant actually knew of the habit of the plaintiff and other children, but on the ground that "it did know the

tree, the kind of tree, and, knowing that, knew what any person of practical common sense would know—that it was just the kind of a tree that children might climb into to play in the branches.”

In *Horning v. Hudson River Tel. Co.*, 111 App. Div. 122, 97 N. Y. Supp. 625, affirmed, 186 N. Y. 552, 79 N. E. 1107, plaintiff recovered for injuries which were primarily caused by a disused telephone wire dropping upon an electric light wire, neither being properly insulated, and whereby a powerful current was conducted to his body while handling the telephone wire. The contact of the two wires was caused by the burning of a building to which the telephone wire was attached by brackets. On appeal the charge of the trial court was approved, which, amongst other things, instructed the jury in effect that one of the questions in the case was whether the electric light company in the exercise of reasonable prudence should have observed the insulation of the wires and that the telephone wire was supported by a wooden building which was liable to burn, causing the wires to come in contact as they did.

The true scope of these decisions as indicating the range of probabilities which an electric company may be required to anticipate is made all the clearer by reference to a single case cited by the respondent, in which it was held that the occurrences leading to the accident were so irregular and unusual that such a company could not reasonably be expected to foresee them.

In *Sheffield Co. v. Morton*, 161 Ala. 153, 49 South. 772, the attempt was made to recover for the injuries to a boy who had come ⁴⁹⁵ in contact with one of the defendant's wires. But it appearing that the wire in question was maintained on a bluff out of reach of persons resorting to the neighboring level places in an ordinary and rational way, and that the plaintiff came in contact with it only after climbing into a position of difficulty on the bluff and of obvious danger independent of the wire, it was held that defendant could not be held liable for not anticipating such a situation.

While it may be going a step further than these authorities went to decide that respondent may, if a jury sees proper, be held to the obligation of anticipating the use of the land under its wires for building purposes which would bring people in close proximity to the latter, I think this step is a logical and proper one, and, therefore, should be taken.

If, as has been reasoned, the respondent could be held to anticipate such use of the lot as was made and safeguard its wires for the protection of persons liable to come in contact with them, this obligation would be broad enough to include as amongst those entitled to its protection one like intestate, who was upon the premises by express request or permission

for a lawful purpose: *Griffin v. United Electric L. Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675, 32 L. R. A. 400; *Ennis v. Gray*, 87 Hun, 355, 34 N. Y. Supp. 379; *Wagner v. Brooklyn Heights R. R. Co.*, 69 App. Div. 349, 74 N. Y. Supp. 849; *Wabash St. L. & P. Ry. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391.

In addition to the argument that respondent was not negligent, it is urged that there is no sufficient evidence to show that the intestate was free from contributory negligence. I have already referred to the facts bearing on that subject, and think the jury would have been allowed by the evidence to reach the conclusion that the intestate in moving about in the course of his work took hold of the wires for the purpose of passing under or over them, and that he was not guilty of negligence as a matter of law for not knowing the nature of the wires (*Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108, 28 L. R. A. 596), or for not noticing the lack of proper insulation, which was not discovered by any of the men at work on the building until the day after the accident: *Illingsworth v. Boston El. L. Co.*, ⁴⁹⁶ 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552. It has often been said that where the injured person is dead wider latitude should be allowed to the jury in passing on this question of contributory negligence, and this case seems to come well within those where it has been decided on meager evidence that the care of the deceased person was a question for the jury: *Schafer v. Mayor etc. of N. Y.*, 154 N. Y. 466, 48 N. E. 749; *Jones v. New York C. & H. R. R. Co.*, 28 Hun, 364; affirmed, 92 N. Y. 628; *Noble v. New York C. & H. R. R. Co.*, 20 App. Div. 40, 46 N. Y. Supp. 645; affirmed, 161 N. Y. 620, 55 N. E. 1098; *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622.

For these reasons I recommend that the judgment of both courts be reversed and a new trial granted, with costs to abide event.

Cullen, C. J., Gray, Willard Bartlett, Chase and Collin, JJ., concur; Werner, J., dissents.

The Duties and Liabilities of Electric Corporations are discussed in the note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 515. Where a corporation makes use of electric wires carrying dangerous currents in the streets of a city, under an ordinance requiring effective insulation, it is not a sufficient answer to the charge of failure to comply with its obligation, and to a demand for damages for injury and death resulting from such failure, for it to say that such insulation is unnecessary and expensive, and that other persons and contractors have no reason for coming in contact with its wires. The necessity is determined by the ordinance, which is intended for the protection of persons who may come in contact without reasoning upon the subject through accident, ignorance, inadvertence or imprudence: *Morey v. New Orleans Ry. etc. Co.*, 125 La. 944, 136 Am. St. Rep. 344. Failure to comply with an ordinance regulating the placing,

guarding and insulation of electric wires is prima facie negligence: *Mize v. Rocky Mountain Bell Telephone Co.*, 38 Mont. 521, 129 Am. St. Rep. 659; *Conrad v. Springfield R. R. Co.*, 240 Ill. 12, 130 Am. St. Rep. 251.

A Lineman in the Employ of a Telephone Company whose duty it is to climb poles upon which are strung lighting wires of a municipal corporation, is entitled to regard the wires as safe and properly insulated, and his nonexamination of their dangerous condition is not contributory negligence: *Hodgins v. Bay City*, 156 Mich. 689, 132 Am. St. Rep. 546; and see *Olson v. Nebraska Tel. Co.*, 85 Neb. 331, 133 Am. St. Rep. 660.

Where an Electric Railway Company and a Telephone Company are making a joint use of a structure to which the wires of each are attached, each is under the same obligation to the other as persons having common rights in a place or passageway are to one another, not negligently to place a dangerous substance on the common territory where it may be reasonably anticipated that others having common rights may be injured: *Gentzkere v. Portland Ry. Co.*, 54 Or. 114, 135 Am. St. Rep. 82. In an action against an electric company for injury caused by shock from a broken wire, evidence that its wrappings—the insulation—were unraveled, the absence of any mechanical device to prevent the wires from falling, the fact that kites were tangled in the wire, is sufficient to carry the case to the jury notwithstanding conflicting evidence on these points: *Seith v. Commonwealth Electric Co.*, 241 Ill. 252, 132 Am. St. Rep. 204. A policeman who, without invitation from the owner, goes upon the roof of a private building to detect unlawful gambling in an adjoining building, and there comes in contact with a defectively insulated wire, maintained by the city as a part of its electric light system, has no cause of action against the city for his injuries: *City of Greenville v. Pitts*, 102 Tex. 1, 132 Am. St. Rep. 843.

Where an Electric Light Company Stretches Wires eighteen feet above the ground, and a telephone company attaches to one of its poles near by two guy wires, which pass within eight inches of the electric light wires and run to the ground at an angle of forty-five degrees, being four feet apart at the ground and coming together at the top of the pole, neither company is liable to a child who in playing runs up the guy wires and is killed by coming in contact with the electric wires: *Mayfield Water & Light Co. v. Webb's Administrator*, 129 Ky. 395, 130 Am. St. Rep. 469.

As to the Liability of an Electric Company to Trespassers or Licensees injured by coming in contact with its dangerous wires, see *Temple v. McComb City Electric Light & Power Co.*, 89 Miss. 1, 119 Am. St. Rep. 698; *Cumberland Tel. & Tel. Co. v. Martin*, 116 Ky. 554, 105 Am. St. Rep. 229. If a guy wire used by a telephone company breaks and falls across an electric light wire below belonging to another company, and the broken end drops to the ground in an open field across which people are accustomed to travel without objection from the land owner, the telephone company is not exempt from liability for the death of a person who there comes in contact with the wire, on the ground that, as against the owner of the land, the deceased was a trespasser or bare licensee: *Guinn v. Delaware etc. Tel. Co.*, 72 N. J. L. 276, 111 Am. St. Rep. 668.

CASES

IN THE

CRIMINAL COURT OF APPEALS

OF
OKLAHOMA.

IN RE JONES.

[4 Okl. Cr. 74, 109 Pac. 570.]

MUNICIPAL CORPORATIONS.—The Powers of a Municipal Corporation are only those granted by express words; those fairly implied in, or incident to, the powers expressly granted; and those indispensable to the declared objects and purposes of the incorporation. (p. 657.)

NUISANCE—Power to Declare—Billiard and Pool Rooms.—Within constitutional limitations the legislature has the power to declare what shall constitute a nuisance; and in the exercise of that power it is not restricted to declaring only such things a nuisance as were so at common law or are so per se. It may declare billiard and pool halls and bowling alleys nuisances and forbid them. (p. 658.)

NUISANCE—Power of Municipal Corporation to Declare What is.—The legislature may lawfully delegate to municipal corporations, to be exercised within their corporate boundaries, the power to declare what shall constitute a nuisance and to prevent the same. (p. 658.)

NUISANCE—Power of Municipal Corporation to Declare What is.—A statutory grant of power to a municipality to declare what shall constitute a nuisance does not empower the municipality to declare a thing a nuisance which is clearly not one; but it does empower the municipality to declare anything a nuisance which is so per se, or which by reason of its location, management or use, or of local conditions and surroundings, may or does become such within the common-law or statutory definition of a nuisance, or those things which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. (p. 659.)

NUISANCE—Power of Municipal Corporation to Declare What is.—Where a thing may or may not be a nuisance, depending upon its location, management or use, and the conditions existing in the municipality, thus requiring judgment and discretion in determining the matter, the determination of the question by a municipality having power to declare what shall be a nuisance is conclusive upon the courts. (p. 659.)

NUISANCE—What Constitutes.—Under section 4751 of Snyder's Compiled Laws and by the common law, anything which annoys, injures or endangers the comfort, repose, health or safety of others, is a nuisance. (p. 661.)

NUISANCE.—The Operation of a Billiard Hall or a Poolroom for gain is not recognized by the law as necessary or useful, or as a business which a person has an inherent right to engage in; and a municipal ordinance declaring them a nuisance and forbidding them, passed under statutory authority to declare what shall constitute a nuisance and to prevent the same, is valid. (pp. 661, 663.)

APPEAL.—Where a Judgment of a Justice of the Peace Recites that after duly considering the "evidence as produced and confessed" the court finds the defendant guilty, in the absence of an affirmative showing that no evidence was introduced, it will be presumed that evidence was taken. (p. 667.)

(Syllabi by the court.)

J. T. Shive and Henry Bulow, for the petitioner.

W. C. Austin and Shartel, Keaton & Wells, for the respondent.

⁷⁵ RICHARDSON, J. The incorporated town of Eldorado, Oklahoma, passed an ordinance entitled "An ordinance describing what shall constitute a public nuisance; prescribing the punishment for maintaining the same, and providing methods for the abatement thereof," by which ordinance it was declared in substance that all billiard halls, poolrooms, or other places where any billiard, pool or combination billiard and pool table or tables are or may be kept or operated for hire, shall be deemed public nuisances, and making it a misdemeanor punishable by a fine of twenty-five dollars for any person, either as owner, servant or employee, to open, establish, carry on or maintain the same, or to assist in so doing, within the corporate limits of said town, and making each day's continuance thereof a separate offense. This ordinance became effective on January 1, 1910.

On January 25, 1910, the petitioner W. C. Jones was convicted before the town justice of Eldorado of violating said ordinance by running a poolroom for hire in said town, and he was sentenced to pay a fine of twenty-five dollars and cost, failing and refusing to pay which he was ordered committed to the town jail to be there imprisoned until said fine and cost were liquidated, allowing him two dollars per day for each day of his imprisonment. Being in custody under said commitment, he applied to this court for a writ of habeas corpus, to the end that he be released. He contends that his imprisonment ⁷⁶ is illegal for two reasons: first, because the ordinance in question is void for want of power in the town trustees to enact the same; and second, because the judgment of conviction is void in that it was rendered without any testimony being taken or produced, and without any plea of guilty being entered by petitioner. The writ was issued and served, and return thereto was made setting forth the ordinance in question, the complaint made against petitioner in the justice court, the justice's record of the trial and judgment, and the

order of commitment under which petitioner is held; and upon these the cause came on for determination. Writ discharged and petitioner remanded to custody.

It is contended by petitioner that the ordinance in question is void, for the reason that the incorporated town of Eldorado had no statutory grant of power to pass the same; that municipal corporations are creatures of the legislature, and can exercise only such powers as are expressly conferred by their charter or by statute; that a grant of power to them must be strictly construed, so that they take nothing by implication; and that they have no power to declare anything a nuisance unless it is so per se.

It is true that a municipal corporation has no power except that which is specifically granted or necessarily implied. Dillon on Municipal Corporations defines the powers of such corporations as, "First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable." And he also states that, "Any fair, reasonable doubt concerning the existence" of power is resolved by the court against the corporation, and the power is denied. Of every municipal corporation, the charter or statute by which it was created is its organic act. Neither the corporation nor its officers can do any act or make any contract or incur any liability not authorized thereby. All acts beyond the scope of the powers granted are void." The foregoing statements of the law have been quoted, approved and adopted by courts innumerable; and constitute perhaps as clear, accurate, and succinct a rule for determining the power and the limitations upon the power of municipal corporations as could be formulated. Bearing this rule in mind, then, as our guide, let us examine our statutes and see if such power as that attempted to be exercised by the passage of this ordinance is granted to incorporated towns in this state.

Cities of the first class are by express statute authorized "to restrain, prohibit and suppress tippling shops, billiard tables, bowling alleys, houses of prostitution, and other disorderly houses": Snyder's Compiled Laws, sec. 683. But no such express grant of power is given to incorporated towns and villages so far as billiard halls and bowling alleys are concerned. It is provided by section 847 of Snyder's Compiled Laws with respect to towns and villages that, "The board of trustees shall have the following powers, namely: 4th, to declare what shall constitute a nuisance, and to prevent, abate and remove the same. . . ." And it is clear that if the town of Eldorado had the power to enact the ordinance in question, that power must be found in the fourth subdivision of

the section just quoted; and from the title and wording of the ordinance it is also clear that it was from this source that the trustees claimed the power which they sought to exercise.

Within constitutional limitations the legislature has the power to declare what shall constitute a nuisance; and in the exercise of that power it is not restricted to declaring only such things a nuisance as were so at common law or are so *per se*: *Joyce on the Law of Nuisances*, secs. 81-83; *Bepley v. State*, ⁷⁸ 4 Ind. 264, 58 Am. Dec. 628; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929; *Fisher v. McGirr*, 1 Gray (Mass.), 1, 61 Am. Dec. 381; *Moses v. United States*, 16 App. D. C. 428, 50 L. R. A. 532; *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813, 23 N. E. 878, 7 L. R. A. 134; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205. It may declare billiard and pool halls and bowling alleys nuisances and forbid them; that is a legitimate exercise of the police power: *State v. Noyes*, 30 N. H. 279; *Freund on Police Power*, sec. 193.

Now, the legislature may delegate this power to municipal corporations to be exercised within their corporate boundaries. "After repeated challenge of municipal authority to exercise the police power, on the ground that it is a sovereign power and therefore nondelegable, the doctrine is firmly established and now well recognized that the legislature may expressly or by implication delegate to municipal corporations the lawful exercise of police power within their boundaries; the measure of power thus conferred is subject to legislative discretion": 28 Cyc. 693, and the many cases there cited. And Judge Freeman states in his note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 625, 632, that, "Discretionary powers granted to a municipal corporation, to be exercised according to its judgment as to the necessity or expediency of a given measure, vests the corporation, within the sphere of the powers delegated, with a control as absolute as the legislature would have possessed if it had never delegated the powers, and the decision of the municipality in respect to the exercise of the powers granted is as wide as that possessed by the government of the state." And in support of the statement he cites the following cases: *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 509, 24 Am. Rep. 756; *Dillon on Municipal Corporations*, 3d ed., sec. 308; *Ex parte Burnett*, 30 Ala. 461; *Osborne v. Mayor*, 44 Ala. 493; *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425; *Covington v. East St. Louis*, 78 Ill. 548; *Indianapolis v. Indianapolis Gas Light and Coke Co.*, 66 Ind. 396; *Perdue v. Ellis*, 18 Ga. 586; *Kniper v. Louisville*, 7 Bush (Ky.), 599; *Mayor* ⁷⁹ *v. Morgan*, 7 Mart., N. S., 1, 18, Am. Dec. 232; *Portland v. Portland Water Co.*, 67 Me. 135; *Heland v. Lowell*, 3 Allen (Mass.), 407, 81 Am. Dec. 670;

State v. Dwyer, 21 Minn. 512; **St. Paul v. Coulter**, 12 Minn. 41, 90 Am. Dec. 278; **Taylor v. Carondelet**, 22 Mo. 105; **Metcalf v. St. Louis**, 11 Mo. 102; **State v. Noyes**, 30 N. H. 279; **Howe v. Plainfield**, 37 N. J. L. 145; **Brick Presb. Church v. New York**, 5 Cow. 538; **Markle v. Akron**, 14 Ohio, 586; **Republica v. Duquet**, 2 Yeates (Pa.), 493; **State v. Williams**, 11 S. C. 288; **Trigally v. Memphis**, 6 Coldw. (Tenn.) 382; **Milne v. Davidson**, 5 Mart., N. S., 409, 16 Am. Dec. 189, and note.

Now, turning again to the statute under consideration, we find that the board of trustees of incorporated towns are expressly empowered to declare what shall constitute a nuisance, and to prevent the same. This delegation of authority is apparently as broad and comprehensive as the legislature could make it, and according to some decisions grants to a municipality the power to declare anything local in its character and operation a nuisance which the legislature could constitutionally include in a statutory definition of the word, and thus leaves the municipal power in this respect limited only by the state and federal constitutions. But according to the greater weight of authority this grant empowers a municipality to declare only those things a nuisance which are so per se, or which by reason of their location or use may become such within the common law or statutory definition of a nuisance, or those things "which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds"; and according to all the cases it does not and could not authorize a municipality to declare that a nuisance which is clearly not so: **Laugel v. Bushnell**, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266; **North Chicago City Ry. Co. v. Town of Lake View**, 105 Ill. 207, 44 Am. Rep. 788; **Harmison v. City of Lewistown**, 153 Ill. 313, 46 Am. St. Rep. 893, 38 N. E. 628; **Kansas City v. McAleer**, 31 Mo. App. 433; **Glucose Refining Co. v. City of Chicago**, 138 Fed. 209; **State v. Iams**, 78 Neb. 678, 111 N. W. 604, 11 L. R. A., N. S., 736. The real point of division among the authorities is whether under this grant of power a municipality may enlarge ^{so} the common-law or statutory definition of a nuisance, or is restricted to declaring only those things a nuisance which in their nature, character and tendencies come within the established definition of the word. We do not find it necessary to determine this question; for where under the statutory definition a thing may or may not be a nuisance, depending upon its location, management or use, or upon the conditions existing in the municipality, thus requiring the exercise of judgment and discretion in determining the matter, it is held that under a grant of power such as is contained in this statute the action of the board of trustees, who reside in the town and are familiar with the local

conditions and surroundings, and who are presumed to have investigated and considered the matter in all its phases, will be conclusive upon the courts. Thus in *North Chicago City Ry. Co. v. Town of Lake View*, 105 Ill. 207, 44 Am. Rep. 788, where it was held that under a statutory grant of authority to define, declare and prevent nuisances, a municipality might forbid the using of steam as a motive power on a public street, it was said:

"We do not at all question the general proposition, which has been argued with so much elaboration by appellant's counsel, that under a general grant of power over nuisances, like the one in question, town authorities have no power to pass an ordinance declaring a thing a nuisance which in fact is clearly not one. The adoption of such an ordinance would not be a legitimate exercise of the power granted, but on the contrary, would be an abuse of it. But in doubtful cases, where a thing may or not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question."

The same doctrine was adhered to in *Harmison v. Lewis-town*, 153 Ill. 313, 46 Am. St. Rep. 893, 38 N. E. 628, where it was held that a city or village might by ordinance forbid slaughter-houses within its corporate limits. The syllabus of that case is as follows: "Under a general power over nuisances, town authorities cannot declare a thing a nuisance which is clearly not one; but if the ⁸¹ thing is of such character that it might or might not be a nuisance, depending upon circumstances, the action of such authorities, in the exercise of their legislative functions, will be conclusive."

In *Kansas City v. McAleer*, 31 Mo. App. 433, Justice Ellison announces the same rule, quotes from *North Chicago City Ry. Co. v. Town of Lake View* with approval, and holds that Kansas City, having power to define and declare what shall constitute a nuisance and to prevent the same, may forbid the running of a rock-crushing machine on any block within the corporate limits where there are as many as three residences: See, also, *Laugel v. Bushnell*, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266. The same rule is announced by Judge Kohlsaat in *Glucose Refining Co. v. City of Chicago*, 138 Fed. 209, and he cites in support thereof *Dillon on Municipal Corporations*, sec. 379; *North Chicago City Ry. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *Roberts v. Ogle*, 30 Ill. 459, 83 Am. Dec. 201; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *State v. Heidenhain*, 42 La. Ann. 483, 21 Am. St. Rep. 388, 7 South. 621; *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869, 28

L. R. A. 679, 683; *Monroe v. Gerspach*, 33 La. Ann. 1011; *Gundling v. Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; *Cincinnati v. Miller*, 11 Ohio Dec. 788; *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; *People v. Lewis*, 86 Mich. 273, 49 N. W. 140. In *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830, the court said:

"We are not unmindful of the rule that a municipal corporation has no power to treat a thing as a nuisance which cannot be one; but while we recognize this rule, we also recognize the equally well-settled rule that it has the power to treat as a nuisance a thing that from its character, location and surroundings, may and does become such. In discussing this general subject it was said, in a recent case: 'But in doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question': *North Chicago City Ry. Co. v. Town of Lake View*, 105 Ill. 207, 44 Am. ⁵² Rep. 788. The chancellor, in the course of a discussion of the question in the famous case of *Hart v. Mayor, etc.*, 3 Paige, 213, said: 'It therefore becomes necessary, in all populous towns and crowded harbors, to regulate such matters by police ordinances. And public policy requires that the corporation of the place, or conservators of the port, should not be disturbed in the exercise of those powers, unless they have clearly transcended their authority.'"

See, also, *Walker v. Towle*, 156 Ind. 639, 59 N. E. 20, 53 L. R. A. 749; *Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 865, 70 L. R. A. 230, 2 Ann. Cas. 892; *St. Paul v. Haugbro*, 93 Minn. 59, 106 Am. St. Rep. 427, 100 N. W. 470, 66 L. R. A. 441, 2 Ann. Cas. 580; *Ex parte Cheney*, 90 Cal. 617, 27 Pac. 436; *Waters Pierce Oil Co. v. Town of Iberia*, 47 La. Ann. 863, 17 South. 343.

Now, under our statute (*Snyder's Compiled Laws*, sec. 4751), and by the common law, anything which annoys, injures or endangers the comfort, repose, health or safety of others, is a nuisance. And who can say that a public billiard hall or poolroom operated for gain in a small town may not, through its management or use, or on account of local conditions and surroundings, become a nuisance, or that it is not a thing "which in its nature may be a nuisance, but as to which there may be honest differences of opinion in impartial minds"? Bowling alleys, tenpin alleys and stages for rope-dancing were held at common law to be nuisances per se: 1 Hawk. P. C., by Curwood, c. 32, sec. 6; *Hall's Case*, 1

Mod. 76, 2 Keb. 846. In *Tanner v. Trustees of Albion*, 5 Hill (N. Y.), 121, 40 Am. Dec. 337, it is held that a tenpin alley kept for gain is a nuisance at common law, and may be prohibited by a municipal corporation under a charter authorizing it to make by-laws relative to nuisances, although the printed rules of such alley posted up therein prohibited all betting and the attendance of minors. In the opinion the court said:

"Establishments of this kind in populous communities are, at best, and even when used without hire, very noisy, and have a tendency to collect idle people together and detain them from their business. When built and kept on foot for gain, the owner is interested to invite and procure as full an attendance as possible, day after day; and for this purpose temptations beyond mere amusement^{ss} are often resorted to, such as drinking and gaming. So far as I have been able to discover, erections of every kind adapted to sports or amusements, having no useful end, and notoriously fitted up and continued with the view to make a profit for the owner, are considered in the books as nuisances. Not that the law discountenances innocent relaxation; but because it has become matter of general observation that, when gainful establishments are allowed for their promotion, such establishments are usually perverted into nurseries of vice and crime. Common stages for rope-dancers have been adjudged nuisances at the common law; 'not only,' says Hawkins, 'because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood': 1 Hawk. P. C., by Curwood, c. 32, sec. 6 I mention common stages for rope-dancing, because bowling alleys were long since held to stand on the same footing: *Hall's Case*, 1 Mod. 76. Hall, a rope-dancer, had erected a stage, or was about erecting one, at Charing Cross, which the court of king's bench pronounced to be a nuisance. Hale, C. J., mentioned as a precedent, 'that in the eighth year of Charles I, Noy came into court and prayed a writ to prohibit a bowling alley erected near St. Dunstan's Church, and had it.' In the report of *Hall's Case*, in 2 Keb. 846, Chief Justice Hale is represented as saying that 'Noy prayed a writ to remove a bowling alley; and had it, without any presentment at all.' Thus we see Hawkins is sustained by the highest authority in saying that such places cannot but be nuisances.

"The tendency of the alley being well known, it was adjudged to be a nuisance of itself; and a writ accordingly issued to remove it without any trial. Now this is not because rope-dancing or playing at ninepins, or any other game with bowls is a mischief; nor that being a spectator

at a rope-dance is censurable in the least. Such acts are not nuisances. In themselves they are entirely innocent. The nuisance consists in the common and gainful establishment for the purpose of sports, having the aptitude and tendency of which Hawkins speaks; not that this always produces the consequences of which he complains, but because there is imminent danger of its doing so."

This decision was followed in *Updike v. Campbell*, 4 E. D. Smith (N. Y.), 570, where it was held that a contract leasing certain ⁸⁴premises for the purpose of conducting a bowling alley therein was void, because the leasing was for an illegal purpose. And *State v. Haines*, 30 Me. 65, holds the running of a bowling alley an indictable nuisance, and says that it was such at common law. And we see no distinction in principle between a bowling alley and a billiard hall. We do not desire to be understood, however, as holding that billiard halls and bowling alleys are nuisances *per se*. There are plenty of modern decisions to the effect that they are not, and with them we are in entire accord. We cite these cases merely for the purpose of showing how they were regarded by the common law, and the differences of opinion that exist even among the courts in regard to the matter. That they may become nuisances, however, from the manner in which they are conducted, managed or used, from the character and conduct of the people who frequent them, or on account of local conditions or surroundings, no one will deny. They are not recognized as necessary or useful; no one has an inherent right to engage in that business, and the business is subject to regulation or absolute prohibition by the state or its duly authorized agencies.

The case of *Ex parte Murphy*, 8 Cal. App. 440, 97 Pac. 199, is a case very like the one at bar. Section 11, article 11, of the constitution of California provides that, "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Under this provision the city of South Pasadena passed an ordinance in the exact words of the ordinance of Eldorado now in question. Murphy was convicted of violating the ordinance, and made application to the court of appeals for a release by writ of habeas corpus, contending that the ordinance was void in that poolrooms are not a nuisance *per se*, and that it was not within the power of the board of trustees of Pasadena to enact the ordinance. The court in holding the ordinance valid said:

"We may concede at the outset that the business of conducting a public billiard hall and poolroom is not *per se* a nuisance. In the case of *Ex parte Meyers*, 7 Cal. App. 528, 94 Pac. 879, this ⁸⁵court, in considering the validity

of 'an ordinance prohibiting minors from visiting . . . public billiard and pool rooms . . . ' said: 'That a billiard hall is immoral per se because it is public will hardly be contended by anyone.' Petitioner insists that, unless the business is held to be immoral, or a nuisance per se, it is not subject to the exercise of the city's police power to the extent that it may be prohibited. His contention is that billiard halls and poolrooms fall within that class of cases, the conduct of which might, by reason of the character of the business, prove obnoxious or injurious to health, or affect the comfort and welfare of others, such as laundries, tanneries, and soap factories; that as to those the power of a municipality is to regulate only. This is true as to that class of business recognized as necessary and useful employments, but the character of which renders their operation obnoxious to the health, welfare, or comfort of others in the community. The question of the reasonableness of ordinances regulating the conduct of such business, and excluding their operation from, or confining it to, certain prescribed limits, as well as the uniform operation of the same, is always a proper subject for judicial inquiry. Such avocations being necessary and useful, the citizen, under proper restrictions, has a fundamental right to engage therein: *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429, 2 L. R. A., N. S., 588, 3 Ann. Cas. 878. When dealing with a nonuseful calling, the power of the municipality is much broader. The citizen possesses no inherent right to conduct for profit a public place intended purely for the amusement of its patrons, the tendency of which is immoral or vicious. In all such cases the question arises, What is the effect of the conduct of the business upon the morals and public welfare of the community? 'That a public pool and billiard hall,' says petitioner's counsel, 'is a proper subject for police regulation is not denied,' and concedes that 'stringent rules undoubtedly may be enacted to regulate the said business.' Referring again to the case of *Ex parte Meyers*, 7 Cal. App. 528, 94 Pac. 870, wherein this court held that a poolroom was not per se a nuisance, it was said: 'That it may become such by the presence of the professional billiardist and gambler, ready to fleece the unwary and to inculcate the gambling habit in the youths of the city, must be admitted.' In the case of *Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202, it is said: 'Public billiard halls are regarded by many as vicious in their tendencies, leading to ^{so} idleness, gambling, and other vices.' In *Goytino v. McAleer*, 4 Cal. App. 655, 88 Pac. 991, Mr. Justice Allen, expressing the views of this court, said: 'Nor can it be said that as ordinarily, if not invariably, conducted, such business might not within the limits of

reasonable probability be attended with uses injurious to the public peace and morals.' 'Any practice or business, the tendency of which as shown by experience is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, is a legitimate subject for regulation or prohibition': *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. 933; *Ex parte Lacey*, 108 Cal. 326, 49 Am. St. Rep. 93, 41 Pac. 411, 38 L. R. A. 640; *State v. Thompson*, 160 Mo. 333, 83 Am. St. Rep. 468, 60 S. W. 1077, 54 L. R. A. 950. It thus appears that a public billiard hall and poolroom may, by reason of its environment or conditions existing in some communities, constitute a menace and danger to the morals and well-being of the citizens thereof; and it is therefore a subject for regulation or absolute prohibition, notwithstanding the fact that it is not a nuisance *per se*; the right of the city depending upon a question of fact, the existence of which it is conclusively presumed the board of trustees has properly passed upon, the courts cannot go behind such finding: *Ex parte Shrader*, 33 Cal. 279. Regulation measures, not extending to the stringency of prohibition, might afford adequate protection in some communities, while in others conditions might exist by reason of which the public welfare demand the absolute suppression of the business. In all cases, however, the extent to which the power shall be exercised is a matter for the legislative body of the municipality to determine."

The supreme court of Kansas in the case of *Burlingame v. Thompson*, 74 Kan. 393, 86 Pac. 449, 11 Ann. Cas. 64, sustaining an ordinance prohibiting the maintenance and operation of pool tables for hire in a city of the third class, said: "Many games and practices may be detrimental to the welfare of a community which are unaccompanied by boisterousness and cannot be classed with nuisances of the disturbing kind. Some of the most enticing are reported as 'gentlemen's games,' in playing which the nicest decorum is observed. So the constant tendency to become disorderly may be but one of the faults of the small-town poolroom. It may be vicious and not be loud. The supreme court of Nebraska has said that a poolhall in a village is ⁸⁷ apt to degenerate into a trysting place for idlers and a nidus for vice: *Morgan v. State*, 64 Neb. 369, 90 N. W. 108."

They are evidently so regarded by the law-making power in our state, for by section 681 of Snyder's Compiled Laws we find it provided that cities of the first class "shall have authority to levy and collect a license tax on . . . dram-shops, saloons, liquor sellers, billiard tables and other gambling tables, bowling alleys," etc.; and by section 683, that "the city council shall have power to enact ordinance to restrain, prohibit and suppress tippling-shops, billiard

tables, bowling alleys, houses of prostitution and other disorderly houses," etc. To say the least, the statute casts a shadow on their reputation by the company to which it assigns them. And also it would be peculiar if the statutes, which have granted to cities of the first class, ordinarily well policed, the power to suppress billiard halls and pool-rooms, should be construed to withhold that power from towns and villages often possessing little or no police protection. In our opinion our statutes are not susceptible of that construction.

Our conclusions therefore are: First, that the legislature may lawfully delegate to municipal corporations the power to declare what shall constitute a nuisance within its corporate boundaries, and the power to prevent, abate or remove the same. Second, that under such delegation of power the municipality may not lawfully declare a thing a nuisance which clearly is not one, but that it may declare anything a nuisance which is so per se, or which by reason of its location, management or use, or on account of local conditions or surroundings, may or does become a nuisance within the common-law or statutory definition thereof, or those things which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. Third, that where a thing neither necessary nor useful may or may not be a nuisance, depending upon a variety of facts and circumstances, or upon local conditions and surroundings, the determination of the question by the municipality through its ^{ss} legislative body is, under such a grant of power, conclusive upon the courts. And fourth, that billiard halls and poolrooms are not protected as necessary or useful institutions; that they may or may not be nuisances, depending upon circumstances, and that the determination of that question locally by the town trustees of Eldorado is conclusive upon us. We therefore hold the section of the ordinance in question to be valid.

Was there such a trial of the case before the town justice as would warrant a judgment of conviction? The judgment, omitting the caption, reads in part as follows:

"And now, on this the twenty-fifth day of January, 1910. came on to be heard the above-entitled matter, the plaintiff present by W. C. Austin, special attorney for the plaintiff, and the defendant present in person and by his attorney, J. T. Shives. The defendant, having waived arraignment in open court, enters a plea of not guilty, and both parties having announced ready for trial, defendant waives jury and thereupon the plaintiff reads and offers the complaint charging the defendant with willfully and unlawfully engaging in, establishing, opening, keeping, carrying on and assisting in carrying on, maintaining and assisting in main-

taining a poolroom and place by then and there, to wit, on January 24, 1910, in Eldorado, Oklahoma, keeping pool tables for hire and for public use in violation of ordinance Number 40 of the said incorporated town of Eldorado, Oklahoma. And the defendant after the plaintiff had proven the ordinance under which said charge was made enters a confession on his part of having committed the corporal acts and matters therein charged against him; and the court after hearing the argument of the counsel and after duly and fully considering the law applicable thereto, and the evidence as produced and confessed, finds the defendant guilty as charged; and it is the order of the court that a fine of twenty-five dollars be and the same is entered against the said defendant."

This judgment purports to have been rendered upon "the evidence as produced and confessed"; no attempt has been made to show by evidence of any kind that no testimony was in fact taken; and in the face of the judgment recital we will not presume that the justice did not in fact hear testimony.

We therefore hold that the petitioner's imprisonment is not ^{so} illegal. The writ of habeas corpus heretofore issued will accordingly be discharged, and the petitioner will be remanded to the custody of the town marshal. It is so ordered.

Furman, Presiding Judge, and Doyle, Judge, concur.

The Operation of a Poolroom or Billiard Table is not wrong in itself, and a general ordinance cannot be enacted by a municipality prohibiting the operation of all poolrooms, without regard to the manner in which they are operated, especially when poolrooms are legalized by statute: *Crittenden v. Booneville*, 92 Miss. 277, 131 Am. St. Rep. 518.

As to Whether the Keeping of Devices Which may be Used for Gambling or for innocent and lawful purposes may be regarded as wrongful per se, see *State v. Derry*, 171 Ind. 18, 131 Am. St. Rep. 237, and the note to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 230.

The Authority of the Legislature to Declare What Constitutes a Nuisance is considered in the note to *Hurst v. Warner*, 47 Am. St. Rep. 544; and what are public nuisances is the subject of a note to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 195.

The Power of a Municipality to Declare What is a Nuisance is the subject of a note to *Miller v. Town of Syracuse*, 120 Am. St. Rep. 372. A municipal corporation cannot declare that a nuisance which is not so in fact: *Lonoke v. Chicago etc. Ry. Co.*, 92 Ark. 546, 135 Am. St. Rep. 200.

CULPEPPER v. STATE.

[4 Okl. Cr. 103, 111 Pac. 679.]

HOMICIDE—Presumption of Innocence—Instructions.—Upon a trial for murder, where the defendant's plea was self-defense, the court gave the jury the following instruction: "You are instructed that the defendant in this case is presumed to be innocent of the crime charged in the indictment, and this is a presumption of law that remains with him and is thrown around him for his protection up to the moment when the killing is proved, or admitted. When the killing is proved or admitted by defendant and the plea of self-defense is interposed, as in this case, it then devolves upon defendant to show any circumstances of mitigation to excuse or justify it by some proof strong enough to create in the minds of the jury a reasonable doubt of his guilt of the offense charged, unless the proof on the part of the state shows that the defendant was justified in doing the act." Held, that under sections 6828 and 6854 of Snyder's Compiled Laws of Oklahoma, the instruction was not erroneous. (p. 669.)

CRIMINAL TRIAL.—The Presumption of Innocence Fixes the Burden of proof in the first instance, and designates the party whose duty it is to produce evidence and effect persuasion. It is not evidence and does not partake of the nature of evidence. (p. 669.)

CRIMINAL TRIAL.—The Presumption of Innocence Remains with the defendant only until it is overcome, and does not necessarily remain with him throughout the whole of the trial. (p. 674.)

CRIMINAL TRIAL.—Credibility of Defendant—Instructions.—It is error to single out the defendant in a criminal case, and instruct the jury specially upon his credibility as a witness. (p. 681.)

EVIDENCE.—A Witness' Prior Contradictory Statement cannot be used as substantive testimony tending to show the truth of the facts then stated; it may be shown only for the purpose of affecting the credibility of the witness. (p. 681.)

WITNESS.—A Party cannot Impeach His Own Witness by proof of a prior contradictory statement, where such party has not been misled by the witness, and where the witness has testified to no fact injurious to such party but has only failed to testify to matters beneficial to him. (p. 682.)

(Syllabi by the court.)

Martin, Rice & Lyons, for the plaintiff in error.

Chas. West, attorney general, and Smith C. Matson, assistant attorney general, for the state.

104 **RICHARDSON, J.** The first contention in this case is that the verdict was contrary to the evidence. An examination of the evidence discloses that the commission of the homicide by plaintiff in error was proved on the one hand and admitted on the other. His plea was self-defense; and upon this issue the evidence, ¹⁰⁵ though conflicting, was amply sufficient to sustain the verdict.

The next assignment of error is predicated upon the action of the court in giving the jury the following instruction: "You are instructed that the defendant in this case is pre-

sumed to be innocent of the crime charged in the indictment, and this is a presumption of law that remains with him and is thrown around him for his protection up to the moment when the killing is proved, or admitted. When the killing is proved or admitted by defendant and the plea of self-defense is interposed, as in this case, it then devolves upon defendant to show any circumstances of mitigation to excuse or justify it by some proof strong enough to create in the minds of the jury a reasonable doubt of his guilt of the offense charged, unless the proof on the part of the state shows that the defendant was justified in doing the act."

It is contended that this instruction was erroneous because it deprived plaintiff in error of the application of the presumption of innocence to his plea of self-defense. It is also contended that the presumption of innocence is evidence in behalf of the accused, and that it remains with him throughout the whole of the trial under any and all circumstances until the jury have reached a verdict of conviction; and plaintiff in error requested the court to so instruct the jury, and assigns his refusal to do so as error. The two assignments are treated together in plaintiff in error's brief and we shall so consider them here.

Our statutes provide that "a defendant in a criminal action is presumed to be innocent until the contrary is proved": Snyder's Compiled Laws, sec. 6828. It is also provided that, "Upon a trial for murder, the commission of the homicide by the defendant being proven, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable": Snyder's Compiled Laws, sec. 6854. Under the section first quoted the defendant goes into the trial presumed to be innocent, and this presumption remains with him until the ¹⁰⁸ contrary is proved. This fixes the burden of proof in the first instance, and designates the party whose duty it is to produce evidence and effect persuasion, the party upon whom lies at first the risk of non-persuasion. It is but another way of stating the maxims, *Presumitur pro reo*, and *Actore non probante reus absolvitur*. The presumption is not evidence of any kind, nor does it partake of the nature of evidence. It is rather a rule in regard to the production of evidence. What is presumed, so long as the presumption remains, need not be proved; and as to the matter presumed, the burden is on him against whom the presumption exists. Upon this subject Mr. Wigmore has this to say:

"The 'presumption of innocence' is a term which has been the subject of two special fallacies, namely, (1) that it is a genuine addition to the number of presumptions, and (2) that it is *per se* evidence. As to the first of these fallacies, it is to be noted that the 'presumption of innocence' is in truth merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases, i. e., the rule that it is for the prosecution to adduce evidence, and to produce persuasion beyond a reasonable doubt. As to this latter part, the measure of persuasion, the 'presumption' says nothing. As to the former part, the 'presumption' implies what the other rule says, namely, that the accused (like every other person on whom the burden of proof does not lie) may remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i. e., to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it. . . .

"As to the second fallacy, it seems to have been mainly propagated by the passage of Professor Greenleaf, declaring that 'this legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled.' But it cannot be regarded as 'matter of evidence.' No presumption can be evidence; it is a rule about the duty of producing evidence. This is, in itself, only a matter of the theory of presumptions, and to that extent may be regarded as a mere question of words—of the way of phrasing a rule upon the substance ¹⁰⁷ of which there is no dispute. But when this erroneous theory is made the ground for ordering new trials because of the mere wording of a judge's instruction to a jury, the erroneous theory is capable of causing serious harm to the administration of justice": 4 Wigmore on Evidence, sec. 2511.

And Professor Thayer in his famous lecture on the Presumption of Innocence in Criminal Cases, which is generally recognized as the best treatment of the subject extant, and in which the rule announced in *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. Rep. 394, 39 L. ed. 481, is analyzed and utterly refuted, says: "Now, what does the presumption of innocence mean? Does it mean anything more than a particular application of that general rule of sense and convenience, running through all the law, that men in general are taken, *prima facie*—i. e., in the absence of evidence to the contrary—to be good, honest, free from blame, presumed to do their duty in every situation in life; so that no one need go forward, whether in pleading or proof, to show, as regards himself or another, that the fact

is so, but everyone shall have it presumed in his favor? If it does, what is its meaning?"

And after tracing the history of the presumption, he continues: "It is important to observe this, because, by a loose habit of speech, the presumption is occasionally said to be, itself, evidence, and juries are told to put it in the scale and weigh it. Greenleaf, in a single phrase, in the first volume of his treatise on Evidence, section 34, a phrase copied occasionally into cases and text-books, has said: 'This legal presumption of innocence is to be regarded by the jury in every case as matter of evidence, to the benefit of which the party is entitled.' This statement is condemned by the editor of the last edition of Greenleaf's book; and in Taylor on Evidence, the great English handbook, which followed Greenleaf's text closely, this passage is omitted, and always has been omitted. In the latter part of Greenleaf's Evidence, volume 3, which deals specifically with criminal cases, it does not appear. It is denied also by Chamberlayne, the careful editor of the works on Evidence of Best and Taylor.

"What can such a statement as this mean—that the presumption is to be regarded as evidence? Is it meant that on grounds of natural presumption or inference innocence is ordinarily found ¹⁰⁸ in criminal cases? As to that, if one would see the true operation of natural inference, and natural presumption in criminal cases, and would appreciate how entirely artificial, how purely a matter of policy the whole rule is which bids a jury on the trial to assume innocence, let him turn his attention to the action of courts at other stages than the trial."

And after proceeding to show that after indictment found the law presumes the defendant guilty for the purpose of determining whether bail shall be granted and in fixing the amount thereof, and for all other purposes except that of having a fair and impartial trial before a petit jury, he proceeds: "The effect of the presumption of innocence, so far from being that of furnishing to the jury evidence—i. e., probative matter, the basis of an inference—is rather the contrary. It takes possession of this fact, innocence, as not now needing evidence, as already established *prima facie*, and says: 'Take that for granted. Let him who denies it, go forward with his evidence.'"

And he concludes as follows: "A presumption itself contributes no evidence, and has no probative quality. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption—being a legal rule or a legal conclusion—is not evidence. It may represent and spring from certain evidential facts; and these facts

may be put in the scale. But that is not putting in the presumption itself. A presumption may be called 'an instrument of proof,' in the sense that it determines from whom evidence shall come, and it may be called something 'in the nature of evidence,' for the same reason; or it may be called a substitute for evidence, and even 'evidence'—in the sense that it counts at the outset, for evidence enough to make a *prima facie* case. But the moment these conceptions give way to the perfectly distinct notion of evidence proper—i. e., probative matter, which may be a basis of inference, something capable of being weighed in the scales of reason and compared and estimated with other matter of the probative sort—so that we get to treating the presumption of innocence or any other presumption, as being evidence in this its true sense, then we have wandered into the region of shadows and phantoms": Thayer's Preliminary Treaties on Evidence, 1908, Appendix B, p. 551.

¹⁰⁰ And Elliott on Evidence, volume 1, sections 91, 92 and 93, says: "The office or effect of a true presumption is to cast upon the party against whom it works the duty of going forward with evidence. It has the force and effect of a *prima facie* case, and, temporarily at least, relieves the party in whose favor it arises from going forward with the evidence. This would seem to be its sole office and effect, considered merely in its character as a presumption. If nothing further is adduced, it may settle the case in favor of the party for whom it works; and, on the other hand, when the other party has gone forward with his evidence and the *prima facie* case is overcome, the force of the presumption is spent. . . .

"It is sometimes said that presumptions are evidence or instruments of proof having probative force, and to be put into the scale and weighed along with the other evidence in a case. This doctrine has the support of the supreme court of the United States in a comparatively recent case; but the opinion in that case has been severely criticised, and, in a lecture delivered about a year after the decision was rendered, it and the authorities upon which it is based were carefully reviewed by a learned professor, who had given the subject thorough study, and it was very clearly demonstrated that the authorities cited in the opinion give very little support to the doctrine. The court might have cited other authorities that seem to give at least equal countenance to the doctrine; but the true view would seem to be that presumptions are not evidence or instruments of evidence to be given probative force and weighed as evidence. The evidential facts upon which the presumption is based or from which it springs may take their place with the rest, and operate with their own natural force as a part

of the entire mass of evidence or probative matter, and thus be put into the scale and weighed with the rest, but the presumption itself cannot be. To permit a presumption to be added to the scale when the facts upon which it is based are shown would be, in many cases at least, to give double weight to the same facts. To give them their own natural force as evidence, and then to add to that the presumption based on such facts, or, if the presumption is based upon presupposed facts, when the actual facts are shown, to add both together, or to weigh one against the other, would be equally erroneous. The two things are so different that they cannot be weighed in the same scales, and, to change the simile, the process would be much like the logical fallacy of begging the question. ¹¹⁰ 'A presumption which the jury is authorized to make is not a circumstance in proof.'

"A thorough consideration of the subject seems to lead to the following conclusions: A presumption operates to relieve the party in whose favor it operates from going forward in argument or evidence, and serves the purpose of a *prima facie* case until the other party has gone forward with his evidence, but, in itself, it is not evidence, and involves no rule as to the weight of evidence necessary to meet it. How much evidence shall be required from the other party to meet, overcome or destroy the presumption is determined by no fixed rule. When a presumption is called a strong one, like the presumption of legitimacy, it is meant that it is accompanied by another rule relating to the weight of evidence to be brought in by him against whom it operates. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption, being a legal rule or a legal conclusion, is not evidence. It may represent and spring from certain evidential facts, and these facts may be put in the scale; but that is not putting in the presumption itself. It may, in a sense, be called 'an instrument of proof' or something 'in the nature of evidence,' in that it determines from whom evidence shall come; or it may be called a substitute for evidence, in the sense that it counts at the outset for evidence enough to make a *prima facie* case; but it is not evidence in the true sense. It is not probative matter, which may be a basis of inference and weighed and compared with other matter of a probative nature."

And in the case of *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. Rep. 235, 41 L. ed. 624, the defendant requested the trial court to give the following instruction: "Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as a matter of evidence to the

benefit of which the party is entitled. This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy." This requested instruction embodied exactly what the supreme court had previously held in the Coffin case, and a portion of it was in Justice White's exact language, wherein he said: "The fact that the presumption of innocence ¹¹¹ is recognized as a presumption of law, and is characterized by the civilians as *presumptio juris*, demonstrates that it is evidence in favor of the accused; for in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy." But notwithstanding this, the supreme court held that the trial court properly refused the requested instruction, "on the ground of the tendency of its closing sentence to mislead"; and it expressly approved the following instruction which the trial court did give: "The defendant is presumed to be innocent of all the charges against him until he is proven guilty by the evidence submitted to you. This presumption remains with the defendant until such time in the progress of the case that you are satisfied of the guilt beyond a reasonable doubt."

And in that case the supreme court further said: "Undoubtedly, in criminal cases, the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial. But when a *prima facie* case has been made out, as conviction follows unless it be rebutted, the necessity of adducing evidence then devolves on the accused."

Now, under an express provision of our statutes (Snyder's Compiled Laws, sec. 6854), where the charge is murder, if the prosecution proves the death of the deceased and the fact that he was killed by the defendant, without proving circumstances tending to show either justification or excuse for the defendant, then there devolves upon the latter, if he contends that he was justifiable or excusable, the duty of producing evidence tending to show that fact. The quantum of evidence necessary for that purpose is fixed by law, and is denominated such as is sufficient to raise a reasonable doubt upon that issue. The state is not required in the first place to prove the absence of justification or excuse. Unless the evidence on the part of the state tends to show the presence of one or the other, the defendant must produce such evidence or a conviction will result. Therefore, when such stage of the proceeding has been reached and such condition has arisen that the burden of ¹¹² proving circumstances that justify or excuse the homicide, to use the statutory expression, devolves upon the defendant, can it be said that he is then presumed to be innocent? If so, in what does the presumption consist? What is innocence? Innocence consists either in not having com-

mitted the homicide at all, or in the existence of facts or circumstances which justify or excuse it. And to be presumed innocent, the defendant must be presumed either not to have done the killing, or to have done it under circumstances constituting the act legally justifiable or excusable. Now when it has been proved beyond a reasonable doubt on the one hand, and admitted on the other, that the defendant committed the homicide, there can no longer be a presumption that he did not do so. Of this the contrary has been proved, has not been denied, but is explicitly admitted. So, if there exists now a presumption of innocence in the defendant's behalf, it consists solely in the presumption that the act was either justifiable or excusable. But here the statute intervenes and says that the burden of proving circumstances that justify or excuse the homicide devolves upon the accused. And by what process of reasoning can the statement that he is presumed to have been excusable or justifiable be reconciled with the statutory provision that the duty devolves upon him in such case to produce evidence tending to show his justification or excuse, failing in which a conviction follows? How can that be presumed which the law says must be proved? And of what value would the presumption be in such case?

Our code of criminal procedure was copied very largely from that of California, and sections 6828 and 6854 of Snyder's Compiled Laws of Oklahoma are identical with sections 1096 and 1105 respectively of California's Penal Code. And in *People v. Milner*, 122 Cal. 171, 54 Pac. 833, the supreme court of California, in construing those sections, said: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the ¹¹³ crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable: Penal Code, sec. 1105. In this case the killing by the defendant was clearly established by the people's proof. No circumstances of mitigation or justification to bring the case within the exception contemplated by the section were shown in the prosecution's evidence. The burden of proof, then, of justifying and excusing the act, or of proving circumstances which would lessen the gravity of the offense to manslaughter, devolved upon the defendant. At the close of the prosecution's case the presumption against the defendant was that he had committed an unlawful homicide. It may not be said that the presumption of innocence counter-vailed against this, since by the express provision of the law the presumption of innocence was overcome, and a presumption of guilt took its place when the required facts were proven."

And again in *People v. Matthai*, 135 Cal. 442, 67 Pac. 694, the same court said: "Complaint is made that the court failed to instruct the jury, as provided by section 1096 of the Penal Code, that a defendant in a criminal action is presumed to be innocent until the contrary is proved. Section 1127 of the Penal Code provides that in charging the jury the court must state to them all matters of law necessary for their information, and assuredly the instruction as to presumption of innocence is one which should be given in every case of the court's own motion. But in this case the defendant made no request that such instruction should be given, and, as held in *People v. McNutt*, 93 Cal. 658, 29 Pac. 243, in the absence of a request, the failure of the court to charge upon any specific principle of law will not be held error.

"The court charged: 'Up to the moment when the killing is proved, the prosecution must make out its case beyond any reasonable doubt.' Appellant detaches from its context this single sentence of the charge, and complains of it. but the instruction continues as follows: 'When the killing is proved, it devolves upon the defendant to show any circumstances in mitigation to excuse or justify the homicide, by evidence on his part—that is, the killing being proved, the defendant must must make out his case in mitigation, or to excuse or justify it by some proof strong enough to create in the minds of the jury a reasonable doubt of his guilt of ¹¹⁴ the offense charged, unless, as before stated, the proof on the part of the prosecution tends to show the crime committed only amounts to manslaughter, or that the defendant was justified or excused in doing the act.' The whole instruction certainly presents a fair exposition of the law. As was said in *People v. Milner*, 122 Cal. 171, 54 Pac. 833: 'At the close of the prosecution's case the presumption against the defendant was, that he had committed an unlawful homicide. It may not be said that the presumption of innocence countervailed against this, since by the express provision of the law the presumption of innocence was overcome, and a presumption of guilt took its place, when the required facts were proven.' "

The situation of a defendant charged with murder who has been proved to have committed the killing, and who seeks to justify or excuse it, is analogous to that of a defendant in a civil action, whose plea is a confession and avoidance. There is no presumption in favor of the existence of matter in avoidance for either; for the duty of producing evidence is upon each of them. The quantum of proof, to be sure, is different, the defendant in the civil action being required to prove the matter alleged in avoidance by a preponderance of the evidence, while the defendant in the criminal action prevails if upon the whole case he succeeds merely in generating a reasonable doubt of his justification or excuse. But the

quantum of proof required has nothing to do with the presumption. The fact that any degree of proof is required of the defendant shows that the presumption is not with him; for it is foolish to say that what is already presumed must be proved, and that what must be proved is presumed. For instance, the law says that all men are presumed sane and responsible for their acts, and that if a defendant charged with crime contends that he was excusable on account of insanity, the duty rests upon him of producing evidence at least sufficient to raise a reasonable doubt as to his sanity, unless the evidence on the part of the prosecution engenders such doubt. Now, suppose that A is charged with the murder of B, and his defense is insanity. The killing is proved beyond a reasonable doubt, and no facts, indicating either justification¹¹⁸ or excuse for A appear from any portion of the evidence on the part of the prosecution. The prosecution then rests. Is A presumed to be innocent at this stage of the proceeding? If so, it is because he is presumed insane; he is no longer presumed not to have killed B. And if he is still presumed innocent, he too may rest here, and an acquittal must follow; for it is absurd to say that a man can be returned guilty while he is presumed innocent. The same is true if A's plea is self-defense or that the killing was an accident. The statute expressly declares that the burden of proving circumstances that justify or excuse the homicide is on him. The presumption is no longer with him. The law says to him at this stage of the proceeding: "You have been stripped of your presumption of innocence. Produce evidence of your insanity, your self-defense, or your accident, or suffer the consequences."

It is true that the burden of proof, properly so called, is on the prosecution from the beginning to the end of the trial. That is to say, to obtain a verdict of guilty, the prosecution must by evidence exclude every reasonable doubt of the defendant's innocence, and see to it that it stands excluded when the trial ends. If, when the prosecution has concluded its evidence in chief, its character is such that, if un rebutted, a jury under their oaths should and would return a verdict of guilty, then the prosecution has borne its burden to this stage. If the defendant produces no evidence, the trial closes, the prosecution has borne its burden throughout the trial, and a conviction is therefore the result. On the other hand, if the defendant does not rest, but produces evidence sufficient to engender a reasonable doubt, either upon the direct case, or as to the truth of matter set up in avoidance, and the prosecution allows that doubt to remain when the taking of evidence is closed, then the prosecution fails. It has not maintained its burden, for it has not caused a reasonable doubt of innocence to stand excluded when the trial ends.

But if, when the state concludes its evidence in chief, it is such that if un rebutted a verdict of guilty should result, the presumption of innocence is then ¹¹⁶ overcome; the defendant cannot then rest and demand an acquittal because he is presumed to be innocent. That which the presumption of innocence relieved him of so long as it existed, namely, the necessity of adducing evidence, now devolves upon him. The burden of proof which the law created, that of having a reasonable doubt of innocence excluded when the trial ends, is still on the prosecution. The hazard of losing, which the proof on the part of the prosecution created, is on the defendant. The presumption of innocence having been overcome, it is no longer "his sufficient shield," "an aegis of protection" for him. He must now go forward with his evidence, or suffer the consequences.

But it is said that the presumption must be evidence, and must always abide with the defendant throughout the whole trial, for if the evidence upon any essential issue be equally balanced or the matter be doubtful, the presumption of innocence turns the scale for the defendant. We do not so understand the law. The quantum of proof necessary to effect persuasion and establish guilt has nothing to do with the presumption of innocence. The law might provide that a mere preponderance of evidence should be sufficient to establish guilt, and still prescribe for the defendant this same presumption of innocence. The law does provide that the defendant's guilt must be proved beyond a reasonable doubt; and if upon the whole case the evidence be equally balanced, or the matter be left doubtful, or even if the evidence preponderates in behalf of his guilt, but does not exclude a reasonable doubt of innocence, an acquittal must result. Not, however, because the presumption is thrown into and tips the scales; even if the presumption be evidence, that would be determining the question of guilt by a mere preponderance of the evidence; but an acquittal follows because the prosecution has not complied with that other provision of the law requiring proof of guilt to the exclusion of a reasonable doubt.

It is also said that the presumption must under all circumstances abide with the defendant throughout the trial, because the ¹¹⁷ jury are not to form any opinion as to guilt or innocence until they have heard all the evidence and until the matter has been finally submitted to them. It is true that the jury are to keep open minds at all times, ready for the reception and proper weighing of all evidence given before them, the application thereto of the court's instructions, and a consideration of the attorney's argument; but we do not understand that this duty grows out of the presumption of innocence, that it is in any manner dependent

upon the presumption for its existence, or that the duty disappears when the presumption has been overcome. On the contrary, we opine that it springs from that provision of the law expressed by the maxim, *audi alteram partem*, and that this same duty would appertain to a juror if the law presumed guilt instead of innocence, or if it indulged no presumption at all. This duty exists in all cases, both civil and criminal, throughout the whole trial, though successive presumptions may arise in behalf of each party and be overcome, and though the burden of proof, i. e., the duty of producing evidence may shift time after time. The jury are not to form any opinion as to guilt or innocence until the case has been finally submitted to them for their verdict; but that does not mean that in fact the evidence at a certain stage of the proceeding was not sufficient to establish guilt, so that if the parties had rested there a conviction would have resulted; that the presumption of innocence had not in fact been overcome, and the necessity of adducing evidence had not shifted to the defendant, so that the risk of nonpersuasion was on him. Such may have been the case without the jury at that time having so determined. Such is often the case. The present knowledge or ascertainment of that fact is not necessary to its present existence. The court and the parties take cognizance of these matters as the trial progresses in regulating the production of evidence. If, when the state rests, the defendant is still presumed to be innocent, then he too may safely rest, for, as already stated, a jury cannot return a verdict of guilty so long as they presume him innocent; but before he does so, let him ¹¹⁸ be sure, and determine at his peril, that the presumption is still with him.

Also, it is said that the presumption of innocence must abide throughout the whole of the trial and relate to every element of the crime charged, for if the circumstances attending any material act proved at any stage of the proceeding are subject to two different interpretations, one such as to make the act criminal, and the other innocent, the presumption of innocence impels the adoption of that interpretation which favors innocence. We do not agree with this statement. We think the true statement is that if the state of the evidence is such that a reasonable doubt of the criminality of the act or acts remain after a consideration of all the evidence in the case, the prosecution has failed. If the minds of the jurors are left hesitating or vacillating between guilt or innocence, then the rule respecting a reasonable doubt upon the whole case impels an acquittal. The presumption does not, and to say that it does is again to say that the matter is determined by a preponderance of the proof, that the presumption is proof and creates a preponderance for the defendant.

The presumption of innocence is the same presumption which obtained in behalf of the accused at common law. In not a single instance has it been amplified by statute. And the statements that it is evidence in behalf of the accused, and that it always abides with him until the verdict is reached, are both judicial innovations, never heard of anywhere, and not found in any text-book or report, until after the beginning of the nineteenth century. Such statements wholly ignore the history of the presumption; they are at variance with the reason and philosophy of it, and they involve the subject in such mysticism and inexplicable confusion that it becomes impossible of application or even comprehension.

We think the rules contended for are contrary to the whole rationale of a trial; that when the trial of any criminal case is observed throughout its various stages, it becomes apparent that no such rules exist. And when they are given as an instruction, they ¹¹⁹ are mere empty words, a verbal formality, devoid of meaning and impossible of application. When the jury go to deliberate upon their verdict, they weigh no presumption; they look to the proof and only to the proof. They weigh the evidence and the evidence only. The presumption of innocence fulfilled its purpose when it required the state first to go forward with its evidence and establish a *prima facie* case. Thenceforth it is solely a question of proof and the quantum thereof. The whole subject is exhaustively discussed in Thayer's Preliminary Treatise on Evidence (1898), Appendix B, p. 551. See, also, 4 Wigmore on Evidence, sec. 2511; Greenleaf on Evidence, 16th ed., c. 6, sec. 14w; Berry v. State, 4 Okl. Cr. 202, 111 Pac. 676, 31 L. R. A., N. S., 1849; Elliott on Evidence, secs. 91-93; Thayer's Preliminary Treatise on Evidence, cc. 8, 9; State v. Kennedy, 154 Mo. 268, 55 S. W. 293; People v. Ostrander, 110 Mich. 60, 67 N. W. 1079; State v. Quigley, 26 R. I. 263, 58 Atl. 905, 67 L. R. A. 322, 3 Ann. Cas. 920; Waters v. State, 117 Ala. 108, 22 South. 490; State v. Maupin, 196 Mo. 164, 93 S. W. 379; Williams v. State, 144 Ala. 14, 40 South. 405; Morehead v. State, 34 Ohio St. 212; Stevens v. Commonwealth, 20 Ky. Law Rep. 48, 45 S. W. 76; State v. Young, 105 Mo. 634, 16 S. W. 408; State v. Harper, 149 Mo. 514, 51 S. W. 89; State v. Heinze, 66 Mo. App. 135; Strickland v. State, 151 Ala. 31, 44 South. 90. We decline to follow in this respect the cases of Horn v. Territory, 8 Okl. 52, 56 Pac. 846, and Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. Rep. 394, 39 L. ed. 481; and we hold that there was no error in the instruction given.

The next assignment given is that the court erred in giving the jury the following instruction: "You are instructed that the defendant is a competent witness in his own behalf, and when he testified as a witness in this case he became as any other witness, and his credibility is to be tested by and

is subject to the same tests as are legally applied to any other witnesses; and in determining the degree of credibility that should be accorded to the testimony of the defendant the jury have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct on the witness-stand."

¹²⁰ This singling out the defendant and instructing specially upon his credibility as a witness was properly excepted to; under the uniform holding of this court it was erroneous, and the state of the case was such as to make the error reversible: *Fletcher v. State*, 2 Okl. Cr. 300, 101 Pac. 599, 23 L. R. A., N. S., 581; *Banks v. State*, 2 Okl. Cr. 339, 101 Pac. 610; *Crow v. State*, 3 Okl. 428, 106 Pac. 556.

Objections are urged to the court's instructions relative to plaintiff in error's right of self-defense, but we do not find them tenable; and the law upon the subject has been so often stated and discussed by this court, that we deem a discussion of the questions here raised unnecessary.

Plaintiff in error introduced as a witness in his behalf Robert Webb, a cousin of the deceased. This witness was not present during the fatal difficulty, and there was no evidence in the case tending to show that he was concerned in the least in the trouble which resulted in the killing. He testified that a short time before the killing, the deceased, one Reps West and himself were together in deceased's yard, and that he (the witness) was at that time considerably intoxicated; that there was no conversation between the three in regard to plaintiff in error; and that he had no recollection of even hearing the latter's name mentioned. He was then asked if, immediately after hearing of the homicide, he did not go to a certain place and say to certain women: "Dave (the deceased), and Reps and I had been drinking around this afternoon, and we talked about going down and doing old man Culpepper up, and we left the house and started down toward Culpepper's store to do him up, and on the way down there I told the boys they were too drunk, and tried to get them not to go, but to wait until to-morrow when they were sober, and we would do him up right; and Reps West said to Dave Webb, 'Come on Dave, and be a man, I will stand by you'; and they went on, and I knew the trouble was going to happen." This question the witness answered in the negative. Plaintiff in error then offered to prove by the women that at the time and place specified the witness made to them the ¹²¹ statement just quoted. The court sustained an objection to the offered testimony, and its action in so doing is assigned as error.

The testimony offered was incompetent as substantive evidence tending to prove as a fact the formation and existence of a design to injure plaintiff in error and that the

deceased acted in accordance therewith. For such purpose the offered evidence was wholly hearsay and inadmissible. Had the evidence been admitted, it could have been received for no other purpose than to show that Robert Webb made the statement which he denied making; it would not have been evidence that the statement made by him was true. So, if the evidence tendered was competent at all, it was so only for the purpose of impeaching the witness. But this witness was introduced by plaintiff in error. There was no contention that he had ever made a different statement to plaintiff in error or his attorney, or that he had ever led either to believe that his testimony would be other than what it was. And the witness gave no testimony against plaintiff in error; he merely failed to testify to exculpatory matter. Apparently he was placed on the stand merely to be impeached. And what would have been accomplished by impeaching him? The impeaching evidence offered could neither have proved nor disproved any substantive matter in the case. It could only have affected the credibility of the witness. And what could have been gained by affecting the credibility of a witness who had testified to nothing? Why set up a man of straw and immediately proceed to knock it down? A witness cannot be brought on merely to be impeached. The right of a party to thus impeach his own witness who gives testimony injurious to him is not involved here, and upon that we express no opinion; but in the present case the evident purpose was to prove a substantive fact by a purely hearsay statement under the guise of impeaching a witness. This the court properly refused to permit: See *Wigmore on Evidence*, sec. 904, subd. 8; *Sturgis v. State*, 2 Okl. Cr. 362, 102 Pac. 57; *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064; *People v. Jacobs*, 49 Cal. 384; *Mercer v. State*, ¹²² 41 Fla. 279, 26 South. 317; *Hull v. State*, 93 Ind. 128; *Champ v. Commonwealth*, 2 Met. (Ky.) 17, 74 Am. Dec. 388.

For the error pointed out the cause is reversed and remanded with directions to set aside the judgment and grant plaintiff in error a new trial.

Furman, Presiding Judge, and Doyle, Judge, concur.

In a Criminal Case, if the Accused Testifies in his own behalf, the court should not, by conduct or instructions, in any manner disparage his testimony: *Donner v. State*, 72 Neb. 263, 117 Am. St. Rep. 789. Where the accused in a homicide case testifies in his own behalf, an instruction that "the jury, in determining the weight to be given the testimony of the accused, if any, have the right to consider his interest in the result of this prosecution," is improper in employing the words "if any": *State v. Porter*, 213 Mo. 43, 127 Am. St. Rep. 589. And an instruction concerning the testimony of the accused given in his own behalf which concludes with the words "You

are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true or made in good faith, or only for the purpose of avoiding conviction," is erroneous: *Donner v. State*, 72 Neb. 263, 117 Am. St. Rep. 789.

An Instruction cannot Single Out Any Particular Witness and direct the jury to consider his condition in particular at the time of the transactions concerning which he has testified: *State v. McClellan*, 23 Mont. 532, 75 Am. St. Rep. 558; and see *Harris v. Murphy*, 119 N. C. 34, 56 Am. St. Rep. 656.

A Defendant in a Criminal Case is Entitled to the Presumption of Innocence and Reasonable Doubt, and a charge to the jury which, in effect, requires them to believe from the evidence adduced that the defendant is innocent before they can acquit him is erroneous: *Johnson v. State*, 30 Tex. App. 419, 28 Am. St. Rep. 930. Where the court failed to instruct the jury upon the presumption of innocence, and where no exception was reserved to such failure, and no special instruction was requested on the subject, and where the court did instruct the jury that the burden was upon the state to establish the guilt of the defendant by competent evidence beyond a reasonable doubt, the failure of the court to instruct on the presumption of innocence will not constitute reversible error: *Cochran v. State*, 4 Okl. Cr. 393, 114 Pac. 747.

The Subject of "Reasonable Doubt" in criminal cases is the subject of a note to *Burt v. State*, 48 Am. St. Rep. 566; and see *Jolly v. Commonwealth*, 110 Ky. 190, 96 Am. St. Rep. 429; *Vasquez v. State*, 54 Fla. 127, 127 Am. St. Rep. 127; *Davidson v. State*, 167 Ala. 68, ante, p. 17.

Presumption as to Degree of Crime.—Whenever the commonwealth asks for a conviction of murder in the first degree, it must overcome the presumption of second degree after having established a felonious homicide, even if committed by the use of a deadly weapon upon a vital part of the body of the deceased: *Commonwealth v. Greene*, 227 Pa. 86, 136 Am. St. Rep. 867.

ELLIOTT v. STATE.

[4 Okl. Cr. 224, 111 Pac. 820.]

HOMICIDE—Indictment—Manner of Killing—Variance.—Under an information for manslaughter charging the death of the deceased to have been directly produced by a blow from the fist or foot of the defendant, a conviction cannot be had upon proof that the deceased was knocked down by the defendant and was killed by being trampled upon by a horse. (p. 685.)

HOMICIDE—Indictment—Manner of Killing—Variance.—Where the instrument of death alleged and that proved are substantially of the same character, capable of inflicting practically the same nature of injury in substantially the same manner, there is no variance. The question in each case is whether the nature and character of the injury and the manner and means of inflicting it as proved, are practically and substantially, though not identically, the same as that alleged. (p. 686.)

HOMICIDE—Indictment—Manner of Killing—Variance.—Where the allegation is that the accused directly inflicted the fatal wound, and the proof shows that the same was produced by some

other different and independent agency, there is a fatal variance. (p. 688.)

HOMICIDE — Indictment — Manner of Killing — Variance.—

Wherever there is doubt or uncertainty as to the means by which death was effected, all the different probable means should be alleged, either in separate counts in the indictment or information, or in the alternative in the same count, so as to provide against contingencies in the proof and prevent a variance. (p. 688.)

(Syllabi by the court.)

A. J. Morris, for the plaintiff in error.

Chas. West, attorney general, and Smith C. Matson, assistant attorney general, for the state.

225 RICHARDSON, J. The information in this case charged plaintiff in error, hereinafter called the defendant, with the crime of manslaughter in the first degree. As to the manner of the killing, it alleged in substance that with his clenched fist the defendant struck one Isaac Carrico upon the head, breast and left side, and with his feet stamped and crushed the said Isaac Carrico, and by the said striking, stamping and crushing then and there wounded the said Isaac Carrico, "from which said striking, kicking, stamping and crushing done and committed as aforesaid he the said Isaac Carrico did then and there die." On a trial upon this information the defendant was convicted of manslaughter in the second degree.

The evidence disclosed that the defendant and the deceased were engaged in a fist fight in the former's yard. The deceased had just dismounted from a horse on which he had ridden up, and during the fight he held the horse by the bridle reins through which he had thrust his left arm, and the horse was rearing and plunging. The evidence for the state further tended to show that in the difficulty the defendant knocked the deceased down, and that the latter fell close to the horse's forefeet. A woman and her daughter who lived near by, who witnessed the difficulty, and were not related to either party, each testified that after the deceased fell it appeared that the horse stamped upon him with his forefeet, and the deceased expired within a few minutes thereafter. An examination of deceased's body by a physician and the coroner's jury disclosed that he had received some blows about the head, none of which, however, were mortal or even dangerous in their effect; and also that a rib was broken immediately over the heart and the flesh bruised there, and the physician testified that this was the fatal wound. The defendant testified that during the fight he **226** struck the deceased only about the head; that the horse in rearing and lunging struck each of the combatants and knocked them both over; that when the defend-

ant got up the deceased was lying on the ground and the horse had pulled loose; that it was immediately apparent that deceased was seriously injured, and defendant called for and procured some water, and tried to revive and aid him, but he died in a few moments.

The court instructed the jury as to manslaughter in the first degree, predicated the instruction upon the theory that deceased was killed by a blow delivered with defendant's fists; and the court then gave the jury the following instruction as to manslaughter in the second degree:

"12. Or, if you believe from the evidence beyond a reasonable doubt that the defendant did unlawfully commit an assault and a battery upon the person of Isaac Carrico, as such an assault and battery have been hereinbefore defined to you, by then and there striking the said Carrico, as alleged in said information, in and upon the head, or breast, or left side of the said Carrico, and did then and there by the act of striking and assaulting the said Carrico inflict upon the said Carrico an injury and a wound from the effect of which, and as the result of which, the said Carrico then and there fell to the ground and by reason of the said acts of the defendant was then and there prostrate and helpless upon the ground, and you further believe that the defendant then and there knew that the said Carrico was so helpless and prostrate upon said ground, and then and there knew that he was in imminent danger of being killed, or of such bodily harm being done him as would probably result in the death of said Carrico, by being trampled upon or otherwise injured by the horse of deceased, and you further find that while in such position and condition the said Carrico was trampled upon and injured by said horse, and from which said trampling upon and injury the said Carrico then and there died, and that it was in the power of the defendant to prevent the said horse from so trampling upon and injuring the deceased, if you find that he was so injured and trampled upon, and you believe that the said defendant failed and neglected and refused to prevent the injury and that by reason of his said failure and neglect and refusal so to do, the said Carrico was then and there wounded and injured and then and there died from ²²⁷ the effect of said wound and injury, then you are instructed that under such circumstances as herein in this paragraph defined to you, the defendant is guilty of manslaughter in the second degree and you will so find."

The action of the court in giving this instruction is assigned as error, and we think the assignment well taken. This instruction told the jury in effect that if the defendant unlawfully struck the deceased and knocked him to the ground where he was in danger of being trampled upon

by the horse, and that the defendant then saw and realized deceased's said danger, and that it was in the defendant's power to rescue him from that danger, and that the defendant failed and neglected to do so, and that deceased was killed by being trampled upon by the horse, then the jury should convict the defendant of manslaughter in the second degree. Certainly a person is guilty of an unlawful homicide who willfully and wrongfully or through culpable negligence casts or knocks another under a horse's feet, whereby the other is killed. If that be done unlawfully and with a premeditated design to effect death, it is murder. And also under proper allegations in the indictment or information, the jury might well find such an act, if done willfully and unlawfully, though without a design to kill, to be one imminently dangerous to the deceased, evincing a depraved mind in the perpetrator, regardless of human life, and therefore murder. Under other circumstances it could be manslaughter in either the first or second degree. But under an information charging the death of the deceased to have been directly produced by a blow from the fist or foot of the accused, a conviction for no degree of unlawful homicide can be had upon proof that death was caused by the deceased's being trampled upon by a horse, although the wrongful act of the accused may have placed the deceased in the situation where the trampling could and did occur. Such a showing constitutes a fatal variance between the allegation and the proof.

The law is fairly liberal to the prosecution so far as the question of variance between the instrument of death alleged and that ²²⁸ proven is concerned; and where the instrument laid and that proved are substantially of the same character, capable of inflicting practically the same nature of injury in substantially the same manner, there is no variance. Thus evidence as to a dagger, sword, bayonet, hatchet, etc., have been held to support the averment of a knife; striking with a stick, club, metal bar or pistol an allegation of striking with a rock; shooting with a gun an allegation of shooting with a pistol; and strangling with a scarf or cord an averment of a strangling or choking with the hands. But if the allegation be of a stabbing or shooting and the evidence shows a poisoning or starving, the variance is fatal. The question in each case is whether the nature and character of the injury and the manner and means of inflicting it as proved are practically and substantially, though not identically, the same as that alleged. And it is held with practical uniformity that where the allegation is that the accused directly inflicted the fatal wound, and the proof shows that the same was produced by some other different and independent agency, though under such circumstances as to make

the accused criminally responsible therefor, there is a fatal variance. Thus it is said in Wharton on Homicide, third edition, section 567: "Where an indictment stated that the defendant assaulted the deceased, and struck and beat him upon the head, and thereby gave him divers mortal blows and bruises of which he died, and it appeared in evidence that the death was by the deceased falling on the ground in consequence of a blow on the head received from the defendant, it was held that the cause of death was not properly stated"; citing *Rex v. Thompson*, 1 Moody C. C. 139; *State v. Reed*, 154 Mo. 122, 55 S. W. 278; *People v. Tannan*, 4 Park. Cr. 514; *Collins v. State*, 47 Tex. Cr. 303, 83 S. W. 806; *Rocha v. State*, 43 Tex. Cr. 169, 63 S. W. 1018; *Gibson v. Commonwealth*, 2 Va. Cas. 111; *Rex v. Kelly*, 1 Moody C. C. 113; *Wrigley's Case*, 1 Lew. C. C. 127; *Rex v. Martin*, 5 Car. & P. 128; *Gipe v. State*, 165 Ind. 433, 112 Am. St. Rep. 288, 75 N. E. 881, 1 L. R. A., N. S., 419.

Greenleaf on Evidence, volume 3, section 140, states the rule thus: "But if the evidence be of a death in a manner essentially different ²²⁹ from that which is alleged—as if the allegation be of stabbing or shooting, and the evidence be of poisoning, or if the allegation be of death by blows inflicted by the prisoner, and the proof be that the deceased was knocked down by him and killed by falling on a stone, the indictment is not supported."

And the court of appeals of Kentucky, in *Helmerking v. Commonwealth*, 100 Ky. 74, 37 S. W. 264, held that "upon the trial of a defendant under an indictment charging him with murder by 'striking, beating, bruising and mortally wounding' the deceased, he cannot be convicted upon evidence that he knocked deceased down, and that in falling deceased struck his head against some hard substance which caused his death": See, also, *Clark v. Commonwealth*, 111 Ky. 443, 63 S. W. 740; *Phillips v. State*, 68 Ala. 469; and *Guedel v. People*, 43 Ill. 226.

In *State v. Reed*, 154 Mo. 122, 55 S. W. 278, it was held that "where an indictment for homicide charged that death resulted from a blow with a pick, and several witnesses testified that death resulted from a fall on the pavement caused by a blow from defendant's fist, such evidence, if true, constituted a fatal variance; and hence defendant was entitled to an instruction that if the jury found such evidence to be true, they should acquit, though there was evidence to the contrary."

In *State v. Townsend* (Del.), 1 Houst. C. C. 337, where the indictment was in two counts, one alleging the fatal wound to have been inflicted by a blow on the head delivered with a brickbat, and the other by a blow delivered with a "black-jack loaded with lead," the court said: "If the de-

ceased's skull was fractured, not by a blow of some kind inflicted by the prisoner, but by his falling after he was struck by him, with his head against a stone or some other hard substance in the street, and there is sufficient evidence to satisfy the jury that such was the case, then the prisoner could not be convicted of manslaughter or any other offense under the indictment, because it does not so allege the killing, but in a wholly different and in a much more direct manner. Or, if the fatal blow was given in any other method, or in any way substantially ²³⁰ and essentially different from those alleged in the indictment—the prisoner should be acquitted": See, also, *State v. Taylor*, 1 *Houst. C. C. (Del.)* 436, and *Witt v. State*, 46 *Tenn. (6 Cold.)* 5.

We think the instruction complained of clearly erroneous under the allegations in the information. Wherever there is doubt or uncertainty as to the means by which death was effected, all the different probable means should be alleged, either in separate counts in the indictment or information, or in the alternative in the same count, so as to provide against such contingencies in that respect as are likely to arise from the proof.

The cause is reversed and remanded with directions to set aside the judgment and grant the defendant a new trial.

Furman, Presiding Judge, and Doyle, Judge, concur.

An Indictment Charging a Killing in One Manner will not Support a Conviction for Killing in a Different Manner; thus an indictment for murder by throwing the deceased into a well will not support a conviction for murder by putting her in such fear and agitation that she lost her reason, became insane, jumped into the well, and therefrom died, and it is prejudicial error for the court to instruct the jury that they may convict on the latter facts: *Gripe v. State*, 165 *Ind.* 433, 112 *Am. St. Rep.* 238.

Different Modes or Means of Committing the Crime may be charged in the alternative in an indictment for murder, though it would not be sufficient, in a joint indictment against two persons for murder, to charge in the alternative, that one party or the other committed the crime: *Jackson v. Commonwealth*, 100 *Ky.* 239, 66 *Am. St. Rep.* 336.

SMITH v. STATE.

[4 *Okl. Cr.* 328, 111 *Pac.* 960.]

CONTINUANCE.—When an Information is Amended upon the Eve of trial and the defendant files a motion for a postponement supported by affidavit showing surprise, and that the amendment to the information requires additional preparation upon the part of the defendant before he could be ready for trial, reasonable time should be allowed the defendant, by the court, within which to make such preparation. (p. 690.)

JURY—Exclusion of Negroes.—When a Negro is Charged with violating the criminal laws of a state, and when under oath he challenges the panel of the jury upon the ground that the commissioners who selected such jury and the sheriff who summoned them had excluded from the jury all persons of African descent, solely on account of their race and color, and offers evidence to sustain this ground of challenge, the trial court should hear the evidence, and if it is of the opinion that as a matter of fact negroes were intentionally excluded from the panel, solely upon the ground of their race and color, said motion should be sustained. This has been repeatedly decided by the supreme court of the United States, and all state tribunals are bound thereby. The mere fact that the jury was composed solely of white men will not be ground for challenge in such case. There is no law requiring that negroes shall be selected to sit upon juries. The only law upon this subject is, they must not be excluded therefrom solely on account of their race or color. Officers charged with the duty of selecting and summoning jurors can exercise their own discretion in selecting those persons who, in their judgment, are competent and qualified to serve as such jurors, provided, that they do not exclude competent persons who are negroes, solely on account of their race and color. (p. 692.)

(Syllabi by the court.)

S. E. Gidney, for the appellant.

Fred S. Caldwell, for the state.

329 FURMAN, P. J. 1. The information in this case was filed on the twenty-first day of September, 1908. It charged the defendant, in general terms, with the unlawful sale of intoxicating liquor on the twenty-first day of September, 1908, but did not allege to whom such liquor was sold or that the name of the purchaser was unknown to the informant. The case came on to be tried upon this information on the sixth day of January, 1909. Defendant demurred to the information because it did not state to whom the sale was made or that the name of the purchaser was unknown to the informant. Thereupon the county attorney, with the permission of the court, filed an amended information, in which he alleged that the sale of liquor on the twenty-first day of September, 1908, was made by the defendant to Al Ayer. Defendant thereupon moved the court to postpone the case for a period of twenty-four hours to enable him to prepare to meet such charge. The motion was in conformity with the statute and duly sworn to by the defendant. This motion was by the court overruled and the defendant excepted. Defendant was immediately forced into trial. To this defendant excepted. In this there was error. Under the repeated decisions of this court an information for the sale of intoxicating liquor which does not state the name of the person to whom such sale was made, or state that the name of such party was unknown, if demurred to upon this ground in apt time, is wholly insufficient. Under our statute an information can be amended, but when such amend-

ment is allowed and it sets up any new matter which operates as a surprise to the defendant, upon his filing the motion provided for by the statute, in all fairness and justice he should be allowed reasonable time within which to prepare to make his defense. According to the record in this case defendant did not know until the amendment was filed as to what transaction he would be called upon to defend. He had no time to prepare for trial, to consult his attorneys or to summon ³³⁰ witnesses. His request for a postponement of the case for twenty-four hours to enable him to prepare to meet the amended information was reasonable and should have been allowed by the trial court.

2. Before the jury was impaneled the defendant filed the following challenge to the array of jurors.

"In the County Court of Muskogee County, State of Oklahoma.

"STATE OF OKLAHOMA

v.

PAUL SMITH.

"Comes the defendant, Paul Smith, and objects to the panel of the jury called in this court for the purpose of sitting as a jury in this cause and objects to going to trial because he says that he is a person of African descent known as a negro; and that the panel from which all jurors must be called in this cause is composed exclusively of white persons; and that all persons of color or African descent known as negroes were excluded from serving on said panel of jury by the commissioners of Muskogee county on account of their race and color, and for no other reason.

"2d. That the jury commissioners of this, Muskogee county, have for a long period of time, to wit: fourteen months last past during the entire time since the organization of Muskogee county, neglected and refused and excluded all colored persons, or persons of African descent, from serving on juries in said county solely on account of their race and color; that said exclusion, neglect and refusal is a discrimination against this defendant, who is a negro, and is a denial to him of an equal protection of the laws as guaranteed to him under the constitution of the United States.

"3d. That the persons selected by the sheriff of Muskogee county to serve upon the panel of jury during the present term of this court have all been white persons, and that said sheriff has neglected, refused and excluded all colored persons, or persons of African descent, from serving on said jury solely on account of their race and color; that said exclusion, neglect and refusal is a discrimination against this defendant, who is a negro, and is a denial to him of an equal

protection of the laws as guarantee to him under the constitution of the United States.

"4th. That during the entire period of time during which Muskogee county has been an organized county all of the jurors summoned and serving upon any jury in this court have been white men, and that there has been a studied exclusion, neglect and refusal by the officers of this county and of this court to summons ³³¹ any person who is a negro or of African descent to serve upon a jury in this court or in this county, and that such studied exclusion, neglect and refusal to summons a negro is a denial to him of an equal protection of the laws as guaranteed to him under the constitution of the United States.

"The defendant says that more than one-third of the inhabitants and more than one-fourth of the legal electors of Muskogee county are persons of color or African descent known as negroes and were excluded from such jury service by the commissioners of said Muskogee county, and other officers whose duty it was to summons juries, on account of their race and color and for no other purpose.

"PAUL SMITH.

"Subscribed and sworn to before me this 6th day of January, 1909.

"TONY MATNEY,

"Clerk District Court.

"By ROSS HOUCK,

"Deputy.

"My commission expires _____."

The defendant then offered to introduce evidence in support of the motion, but the court refused to receive such evidence and overruled the motion, to all of which the defendant excepted. In this there was error. The supreme court of the United States has repeatedly passed upon this question. The substance and effect of their decisions is that whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, persons of African descent are excluded solely on account of their race or color from serving on grand or petit juries in a criminal prosecution against a negro, the equal protection of the law is denied to such defendant, contrary to the fourteenth amendment to the constitution of the United States, and that in such cases, if a defendant makes a timely challenge to the jury, and it is denied by the state court, a conviction upon appeal to the United States courts will be set aside: See *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. Rep. 904, 40 L. ed. 1075; *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. Rep. 687, 44 L. ed. 839; *Rogers*

v. Alabama, 192 U. S. 226, 24 Sup. Ct. Rep. 257, 48 L. ed. 417. By these decisions we are ³³² bound: See, also, *Castleberry v. State*, 69 Ark. 346, 86 Am. St. Rep. 197, 63 S. W. 670; *Wilson v. State*, 69 Ga. 224; *Green v. State*, 73 Ala. 26; *Tarrance v. State*, 43 Fla. 446, 30 South. 685; *Haggard v. Commonwealth*, 79 Ky. 366; *Commonwealth v. Johnson*, 78 Ky. 509; *Cooper v. State*, 64 Md. 40, 20 Atl. 986; *Smith v. State*, 44 Tex. Cr. 90, 69 S. W. 151; *Leach v. State* (Tex. Cr. App.), 62 S. W. 422; *Kipper v. State*, 42 Tex. Cr. App. 613, 62 S. W. 420. We therefore hold that the trial court should have heard the testimony offered by the defendant, and that, if it appeared therefrom that negroes were excluded from the jury by the officers of the court solely upon the ground of their color, the challenge to the jury should have been sustained. The fourteenth amendment to the constitution of the United States does not require the jury commissioners or other officers charged with the selection of juries to place negroes upon the jury list simply because they are negroes. The allegation that the jury was composed solely of white men does not violate the fourteenth amendment to the constitution of the United States, and proof of that fact would not support the motion. The ground upon which the decisions of the supreme court of the United States rest is not that negroes were not selected to sit upon juries, but that they were excluded therefrom solely on account of their race or color. In other words, there is no law to compel the jury commissioners or other officers of the court to select or summon negroes as jurors. They can select any persons whom they regard as competent to serve as jurors without regard to their race or color, but the law prohibits them from excluding negroes solely on account of their race or color. Therefore the judge should have heard the testimony, and if he found from the evidence that there was an agreement among the jury commissioners to exclude negroes from the jury panel simply because they were negroes, or that the officers charged with the duty of selecting and summoning said jurors had refused to select or summons negroes on the jury, and had excluded them therefrom solely upon the ground that they were negroes, then the judge should have sustained said motion. There is no law requiring an officer to place negroes on the panel simply because they are negroes. ³³³ It is his duty to select the best jurors without regard to race or color. When this is done the law is satisfied. For the reasons herein pointed out, the judgment of the lower court is reversed and remanded.

Doyle and Richardson, Judges, concur.

In Granting or Refusing Applications for a Continuance in a criminal case the trial court has a wide discretion, and its action thereon will not be disturbed unless it is made to appear that its discretion has been unsoundly or oppressively exercised: *State v. Hesterly*, 182 Mo. 16, 103 Am. St. Rep. 634. Continuances in criminal cases because of the absence of witnesses are discussed in the note to *Blackburn v. State*, 122 Am. St. Rep. 745. An application for a continuance should allege that the defendant could not prove, by other witnesses, the same facts which he desires to prove by the absent witness, unless the testimony of the absent witness is intrinsically more valuable than that of the witnesses by whom the same facts could be proven, and then the facts which make this true must also be stated in the application. A statement of negative conclusions of fact is not sufficient: *Reed v. Territory*, 1 Okl. Cr. 481, 139 Am. St. Rep. 861. Where it appears on a trial for violating the local option law that the testimony of absent witnesses would corroborate the defendant's theory as testified to by himself, and would otherwise strengthen his defense, an application for a continuance should be granted: *Beard v. State*, 55 Tex. Cr. 154, 131 Am. St. Rep. 806.

JAMES v. STATE.

[4 Okl. Cr. 587, 112 Pac. 944.]

GAMING—Turf Exchange.—Under an Information charging a defendant with conducting a banking and percentage game, played with certain devices, for money and other representatives of value, a conviction cannot be had upon proof that the accused conducted a "Turf Exchange" where his patrons congregated and bet upon horse-races run at another place. (pp. 694, 695.)

GAMING—Banking or Exchange Games.—To be Guilty of Violating section 2422 of Snyder's Compiled Laws of Oklahoma, the accused must deal, play, carry on, open or conduct the game upon which money or other representative of value is wagered, and the game which he so deals, plays, carries on, opens or conducts must be one of those specially mentioned in said section, or some banking or percentage game played with dice, cards or some other device. (p. 695.)

GAMING—Banking or Exchange Games.—By the Word "Device," as used in section 2422 of Snyder's Compiled Laws of Oklahoma, is meant the means, instrument, contrivance, or thing by which a banking or percentage game is played. (pp. 696, 698.)

NUISANCE—Turf Exchange.—A House or Place Kept for the purpose of enabling persons to place bets or wagers upon horseraces is a common gambling-house, is a nuisance per se, and those who conduct it are indictable and punishable under section 2654 of Snyder's Compiled Laws of Oklahoma. (p. 698.)

(Syllabi by the court.)

Gillette, Libby & Gillette, Davidson & Malloy, Kistler & Haskell and Flynn, Ames & Chambers, for the plaintiffs in error.

Charles West, attorney general, and Smith C. Matson, assistant attorney general, for the state.

⁵⁸⁸ RICHARDSON, J. The charging part of the information in this case was as follows: "The said defendants, E. P. James, Ollie James, C. E. Hillswick and Gale Pendleton, did then and there unlawfully conduct as owners and for hire, a certain banking and percentage game, played with and by means of a certain device, to wit, a blackboard and telegraph connections, together with tickets with the name of the supposed horses and the amounts wagered on them, for money, checks and other representatives of value."

To this information plaintiffs in error interposed a demurrer on the ground that the act charged did not constitute an offense. This was overruled. After trial and verdict, plaintiffs in error filed a motion for a new trial, in which they alleged that the court erred in overruling the demurrer, and that the verdict of the jury was contrary to the law and the evidence, which motion was overruled. These are the only assignments we deem it necessary to consider. The statute under which this information was drawn being section 2422 of Snyder's Compiled Laws of Oklahoma of 1909, reads as follows: "That every person who deals, plays or carries on, or opens or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, poker, roulette, craps, or any banking or percentage game played with dice, cards, or any device, for money, checks, credit, or any representative of value, is guilty of a misdemeanor, and is punishable by a fine of not less than one hundred dollars nor more than one thousand ⁵⁸⁹ dollars, and by imprisonment in the county jail for a term not less than thirty days nor more than six months."

This statute makes it an offense for any person to conduct, either as owner or employee, whether for hire or not, any banking or percentage game played with any device, for money, checks, credit, or any representative of value. This information alleged that plaintiffs in error did conduct, as owner and for hire, a certain banking and percentage game played with and by means of certain named devices, for money, checks and other representatives of value. The information is substantially in the words of the statute, and, though artificially drawn, is probably sufficient. The devices named are unusual ones for that purpose, but the court could not say as a matter of law that they could not be so used.

We think, however, that the allegations of this information were not supported by the evidence. The evidence tended to show that plaintiffs in error were engaged in operating what is known as a "Turf Exchange" in the city of El Reno. It was shown that they had rented a building for that purpose, and kept therein a blackboard, a telegraph instrument and a telegraph operator; that this was con-

ducted for the purpose of enabling patrons of the exchange to lay bets and wagers upon horseraces run in other states: that on the day previous to the running of such races the names of the horses entered therein were sent to the exchange by leased wires, and were posted on the blackboard, as were also the odds on the horses as made by bookmakers at the tracks. When the odds were posted the patrons of the exchange selected the horse or horses which they wished to back, and placed their bets thereon. They were given tickets showing the amount of money wagered, the name of the horse upon which they had bet, and the terms of the wager. After the race was run the result was telegraphed to the exchange, and the wagers were settled accordingly. Generally all bets were taken by the exchange.

The authorities are to the effect that running a horserace is a game, but in this case the games were not played at the "Turf ⁵⁹⁰ Exchange," and were not conducted by plaintiffs in error. They did not conduct the races and therefore did not conduct the game. Neither was the game played by means of the devices alleged in the information; that is, the races upon which the money, checks, credits or representatives of value were wagered and were won or lost, were not run in any sense by means of telegraph wires, telegraph instruments, blackboards or tickets. The game, the horserace, was run and played by means of horses. All that was done in the "Turf Exchange" was to make bets upon the result of the races. The tickets given the gamblers were only memoranda of their bets, and the telegraph wire and instrument and the blackboard were merely means of showing what horses were to run, the odds placed, and of making known the result of the race. They furnished advance information in regard to the game, and made known the result as determined upon the track.

Section 2019 of Snyder's Compiled Laws of Oklahoma of 1909 provides that no act or omission shall be deemed criminal or punishable except as prescribed or authorized by the code. In *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37, it is said by Chief Justice Marshall: "To determine that a case is within the intention of the statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

We think the above quotation applicable to this case, and are of the opinion that the facts proven herein are within neither the letter nor the spirit of the statute under which the information was drawn. Statutes identical with or

similar to the one under consideration have been enacted in many of the states, and have often been construed by the courts; and, so far as we have been able to ascertain, it has been uniformly held that the conducting of a turf exchange or the selling of pools upon races in the manner shown here was not a violation of such statute. Thus it is said in *State v. Hayden*, 31 Mo. 35: ⁵⁹¹ "It is a great perversion of language to call a horserace a gambling device. If the legislature desires to prohibit horseraces it is easy for them to say so in plain terms. No one would even suppose that penalties inflicted upon keepers of faro banks and tables and such like gaming devices were intended to apply to horseraces, or foot races, or boat races. A criminal code cannot be so loosely interpreted."

The same question was before the supreme court of New York in the case of *People v. Engeman*, 129 App. Div. 463, 114 N. Y. Supp. 174, the syllabus of which case is as follows: "A 'device or apparatus for gambling' is a device or apparatus designed for carrying on actual gambling, or determining whether the player is to win or lose, like a wheel of fortune and contrivances of that sort. A paper commonly called 'advance information,' conveying information as to horses entered to take part in a race to be run, the names of the jockeys, the names of the horses withdrawn, the length of the race and its number, though useful to a gambler in placing his wager, is not a 'device or apparatus for gambling' denounced by Penal Code, paragraph 344."

And in the body of the opinion it is said: "This is the test: Whether the implement or device is used in determining who shall win or lose; whether it is an integral part of the actual gambling. A gambling device is defined (20 Cyc. 871) as an invention often used to determine the question of who wins and who loses, that risk their money on a contest or chance of any kind; anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill."

And this decision was affirmed by the court of appeals of New York in 195 N. Y. 591; 89 N. E. 1107. In construing a similar statute the supreme court of Minnesota, in the case of *State v. Shaw*, 39 Minn. 153, 39 N. W. 305, said: "The statute enumerates cards, dice and gaming tables, which are well-defined devices used in gambling, and then follow the word 'or any other gambling devices whatever.' Gambling is defined to be 'a risking of money or other property between two or more persons on a contest of chance of any kind, where one must be the loser and the other the gainer.' A horserace may therefore be a game, and betting on a horserace gambling, and ⁵⁹² undoubtedly the parties charged in the indictment were gambling, and it might well be held that persons betting

on such games would be liable to prosecution under section 296 of the Penal Code, and that the house or place kept by defendants was a common nuisance, and the keepers might have been indicted under the common law 'for keeping a common gaming-house.' But the offense here charged is gambling with 'gambling devices,' and 'keeping gambling devices designed to be used in gambling.' The term 'device' has the same meaning in both sections. Though the words, 'any other gambling device whatever,' are doubtless intended to include any kind of apparatus, contrivance, or any instrument which may be used in games of chance, and upon the manipulation or operation of which the result of the game is determined, yet these terms, 'gambling devices,' must be construed ejusdem generis with the particular devices which are described in the preceding portion of the same section in fixing the general character of such device referred to in the statute: In re Lee Tong, 9 Saw. 333, 18 Fed. 253. A horse-race is not a gambling device, nor are descriptive lists of such races, or statements or announcements of the particulars thereof, from which those desiring to bet on the races may more conveniently obtain information in respect to the same, and we are unable to see that the boards and lists or records of pool sold described in the indictment are anything more. There is no element of chance in their use, which we think is the test. The defendants' methods undoubtedly serve to facilitate gambling, and so does the fact that they keep open a place for gambling, and the same may be said also of the published schedule of races and games, and many other acts and things, which, however, cannot be denominated 'gambling devices' within the meaning of the statute. The betting is on the races exclusively and the result is in no way determined by the use of the instrumentalities in question, and no additional element of chance is introduced thereby."

A similar statute was passed upon in the case of Ives v. Boyce, 85 Neb. 324, 124 N. W. 318, 25 L. R. A., N. S., 157, and it was there held that the telegraph wires and instruments, blackboard and tickets alleged in this information to be gambling devices, were not such within the meaning of the statute. In that opinion the court said: "Plaintiff seeks to bring the action within the scope of the above proviso by alleging that the telegraph wire, the blackboard ⁵⁹³ and the ticket constituted a 'gambling device'; but we think this would be a forced and strained construction of the same. The appliances mentioned may be and are used for legitimate purposes, and are no more 'gambling devices' than many other instrumentalities of trade and commerce."

And the supreme court of the territory of Oklahoma, in Proctor v. Territory, 18 Okl. 378, 92 Pac. 389, in construing this statute, said: "When the charge is for playing at some

one of these unnamed games, it will be necessary to set out the description of the game or device sufficiently to show that it was played with dice or cards, or some other device upon which something was hazarded, for money or something of value." See, also, *James v. State*, 63 Md. 242; *Crow v. State*, 6 Tex. 334; *McElroy v. Carmichael*, 6 Tex. 454, and *State v. Bryant*, 90 Mo. 534, 2 S. W. 836. We deem it useless to multiply authorities upon this question; we believe that none can be found holding that the acts proved constituted a violation of this statute, and we do not think that any such conclusion can be drawn from even a casual reading of the section in question.

We concur with many good people in believing that the operation of these so-called "Turf Exchanges" are pernicious and should be specifically prohibited, but the making of laws to that end is a legislative and not a judicial function; and the legislature has clearly negatived its intention to bring them within the terms of this particular statute by the language it employed in framing the statute.

There is no doubt but that the making of bets and wagers in these exchanges constitutes gambling, and the exchanges themselves are common gambling houses, and are therefore nuisances per se: *Rex v. Rogier*, 1 Barn. & C. 272, 8 Eng. Com. L. 117, 2 Dowl. & R. 431; *United States v. Dixon*, 4 Cranch, 107, Fed. Cas. No. 14,970; *Vanderworker v. State*, 13 Ark. 700; *State v. Layman*, 5 Harr. (Del.) 510; *State v. Black*, 94 N. C. 809; *People v. Weithoff*, 51 Mich. 203, 47 Am. Rep. 557, 16 N. W. 442; *Anderson v. State (Tex.)*, 12 S. W. 868. See, also, 14 Am. & Eng. Ency. of Law, p. 694, and cases there cited. They are such under our statutes. Under section 5771 of Snyder's Compiled ⁵⁹⁴ Laws of Oklahoma, their operation may be enjoined; they may be abated as provided in chapter 71 of said laws; and under section 2465 of said laws their operation constitutes a misdemeanor, and those who conduct them may be prosecuted criminally and have inflicted upon them the punishment prescribed by section 2032; but a prosecution will not lie on an information based upon section 2422. Reversed and remanded.

Furman, Presiding Judge, and Doyle, Judge, concur.

Keeping a Poolroom to which there is a common resort for betting on horseraces is per se a nuisance at common law: *Ehrleek v. Commonwealth*, 125 Ky. 742, 128 Am. St. Rep. 269. The act of selling for gain pools upon a horserace grossly disturbs the public peace and welfare and openly outrages public decency, within the meaning of a statute providing a punishment for the commission of such an act: *State v. Ayers*, 49 Or. 61, 124 Am. St. Rep. 1036. A poolroom or turf exchange maintained to facilitate betting on horseraces, is a common-law nuisance, whether or not such betting is prohibited by statute: *State v. Vaughan*, 81 Ark. 117, 118 Am. St. Rep. 29. A

room used to facilitate betting on horseraces is a gaming-room: *People v. Weithoff*, 93 Mich. 631, 32 Am. St. Rep. 532; and see the note to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 230.

A Pool Ticket on a Horserace is not a Gambling Device, and the selling of pools upon a horserace is not the playing of a game by a device within the meaning of a statute constituting such act a crime: *State v. Ayers*, 49 Or. 61, 124 Am. St. Rep. 1036. Betting on horseracing is not within a statute making it a crime to bet "on any game of hazard or skill": *State v. Vaughan*, 81 Ark. 117, 118 Am. St. Rep. 29.

Bookmaking and Pool Selling Constitute Gambling or Gaming: *State v. Thompson*, 160 Mo. 333, 83 Am. St. Rep. 468; *St. Louis Fair Assn. v. Carmody*, 151 Mo. 566, 74 Am. St. Rep. 571. And betting on the result of a horserace is gaming: *People v. Weithoff*, 51 Mich. 203, 47 Am. Rep. 557.

What is Gaming is the subject of a note to *State v. Smith*, 33 Am. Dec. 134,

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

**HILLSDALE COAL AND COKE COMPANY v. PENN-
SYLVANIA RAILROAD COMPANY.**

[229 Pa. 61, 78 Atl. 28.]

CARRIERS—Discrimination—Interstate and Intrastate Commerce.—The pendency of a suit before the Interstate Commerce Commission for damages from unlawful discrimination in interstate commerce is not a bar to an action for damages for such discrimination in intrastate commerce. (p. 702.)

CARRIERS—Discrimination.—The Interstate Commerce Commission has no jurisdiction over a claim for damages sustained for unlawful discrimination between shippers by a carrier in connection with commerce wholly within a state. (p. 702.)

CARRIERS—Discrimination—Measure of Damages—Instructions.—An instruction that "as we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from such mine," states the correct measure of damages in an action by the owner of a mine against a carrier for damages for unlawful discrimination. (p. 703.)

CARRIERS—Discrimination—Measure of Damages.—Loss of Profits, in order to be recovered as damages in an action by a mine owner against a carrier for unlawful discrimination, must be clearly shown, and the proof should not present merely a speculative basis for the claim. (p. 703.)

CARRIERS—Discrimination—Mitigation of Damages.—The Burden of Proof is on the carrier, in an action against it to recover damages for an unlawful discrimination, to show that the plaintiff would in the future receive as much profit from the shipment and sale of his goods as if no discrimination had been made, or any other facts in mitigation of the damages. (p. 703.)

DAMAGES—Action in Contract or in Tort.—A Greater Latitude is allowed by the court to the jury in the assessment of damages in actions of tort than is allowed in actions of contract. (p. 704.)

John G. Johnson, Francis I. Gowen, Thomas H. Murray, James P. O'Laughlin and Hazard Alex. Murray, for the appellant.

David L. Krebs and A. M. Liveright, for the appellee.

⁶⁵ POTTER, J. In this action, the plaintiff, a mining corporation, sought to recover damages from the defendant company, for injuries resulting from the discrimination exercised against it by the defendant, in the refusal to furnish proper transportation facilities. The plaintiff alleged discrimination particularly in favor of certain competitive mines situated upon the same branch of defendant's railroad, which were operated and controlled by David E. Williams & Company. In the statement of claim it was averred that plaintiff's mines in Indiana county, known as Hillsdale No. 2 and No. 3, were fully equipped for mining coal, and had an actual output capacity of 800 tons per day from the two mines, if given the same pro rata distribution of cars as was awarded by defendant to the competing mines of Williams & Company. It was alleged that the actual output capacity of the latter mines did not greatly, if at all, exceed that of plaintiff. But that the defendant company, in violation of its duty under the law, did for the purposes of distributing cars to the several mines, rate the mines operated and controlled by Williams & Company with an output capacity of 2,300 tons per diem during the years 1904 and 1905, and in the early part of 1906, increased the same to 2,550 tons per diem, while it rated plaintiff's mines with an output capacity of only 475 tons per diem during the same period of time. That the said rating, upon which was based the number of cars to be awarded, was an undue and unreasonable discrimination in favor of the mines of ⁶⁶ Williams & Company to the prejudice and disadvantage of plaintiff, and was a violation of defendant's duty, as a common carrier, to render fair and proportionate service to shippers on its lines, in furnishing facilities for transportation. That between October 1, 1903, and May 1, 1907, the plaintiff at its two mines received from defendant but 3,134 cars of thirty-five tons capacity each, while during the same period of time the defendants furnished the mines of Williams & Company with 26,691 cars of the same capacity. That plaintiff at its mine, Hillsdale No. 2, constructed at its own expense, a sidetrack connecting with the track over and from which coal from Hillsdale No. 3 mine had for a long time prior thereto been handled by defendant to its Cush creek branch; but that defendant, by its servants and agents, spiked down the switches of the said sidetrack leading to the tippie of mine No. 2, so that the same could not be used for a period of about

eighteen months, entirely prohibiting plaintiff from shipping any coal from the said mine during that time.

The question of discrimination was submitted to the jury as one of fact, and the uncontradicted evidence was ample to warrant them in finding that the defendant subjected the plaintiff to unjust and unreasonable discrimination, both in the rating of the mines as to capacity and in the allotment of the cars; and that this discrimination prevented it from making sale of a portion of its coal. As to the general policy of discrimination against the plaintiff, no evidence was offered with reference thereto by defendant. No excuse was made for spiking down the switch to one of plaintiff's mines, nor for its refusal to furnish cars to plaintiff on many days when they were furnished by it to the competing mines. The trial in the court below resulted in a verdict in favor of plaintiff for \$17,500; and from the judgment entered thereon, defendant has appealed. We see nothing in the record of which defendant can fairly complain, as to the manner in which the case was submitted to the jury on ⁶⁷ the questions of fact, as to the various acts of discrimination. In his charge the trial judge carefully reviewed the evidence as to the rating of plaintiff's mines, and that of the competing mines of Williams & Company, and as to the failure of defendant to furnish cars, and their irregular distribution; as to the amount of coal shipped by the plaintiff, and the amount it could have shipped had its quota of cars been furnished, and the prices at which the coal could have been sold, and as to the cost of production and transportation. Nor is there any merit in the suggestion that the pendency of a suit between these same parties before the Interstate Commerce Commission should be a bar to the present action. Plaintiff only claimed to recover in this action for profits on coal which it was prevented from shipping "to points and places within the state of Pennsylvania." The evidence on the trial was restricted to such business only. The Interstate Commerce Commission would have no jurisdiction over a claim for damages sustained in connection with commerce wholly within the state, and therefore the suit pending before that body could not affect the plaintiff's right to recover for the damages here claimed.

Plaintiff's claim for damages was based upon the act of June 4, 1883 (Pub. Laws, 72), which forbids discrimination in the furnishing of facilities for transportation, and makes the offending common carrier liable for treble damages to the party injured. The claim in this case was, however, not pressed to the full extent, but was for single damages only. Counsel for appellant complain that in instructing the jury as to the measure of damages to be applied, the trial judge said: "As we look at it, the only known method to get at

data from which to estimate what a man is damaged by reason of discrimination in not furnishing cars or other facilities of transportation is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from such mine." And ⁶⁸ it was upon that basis that the data of plaintiff was presented. We think the measure thus applied was reasonable and proper. If the defendant, a common carrier, wrongfully refused to transport the coal of the plaintiff, it ought to place the plaintiff in the same situation it would have been in had the carrier performed its duty. The actual loss suffered by the plaintiff by reason of the defendant's failure to discharge its duty, is a fair measure of the damage. Loss of profits in such a case must of course be clearly shown, and the proof should not present merely a speculative basis for the claim. In that respect we think the evidence was satisfactory here. In *Wilson v. Wernwag*, 217 Pa. 82, 66 Atl. 242, 10 Ann. Cas. 649, the principle is referred to with approval, as set forth in *Hitchcock v. Supreme Tent*, 140 Mich. 40, 43 Am. St. Rep. 423, 58 N. W. 640, that "the profits lost constitute the legitimate measure of damages. The law is not so blind to justice as not to require the defendant to respond in damages, if there is any reasonable basis for their ascertainment." The Interstate Commerce Commission seems to have adopted the rule that where discrimination is found to have been made by the carrier in the distribution of coal-cars, damages are to be awarded in the amount of the profits that the shipper would have gained by the sale of his coal at the place to which he desired to ship it, had he not been discriminated against, less the cost of transportation: *Eaton v. C. H. & D. Ry. Co.*, 11 Inter. Com. Rep. 619; *Paxton Tie Co. v. Detroit Southern R. R. Co.*, 10 Inter. Com. Rep. 422; *Glade Coal Co. v. B. & O. R. R. Co.*, 10 Inter. Com. Rep. 226. Counsel for appellant argue that because, as a result of defendant's discrimination, the coal of the plaintiff was left in the ground, and might be available for future shipment, and as there was no evidence that the prices which prevailed throughout the period of the action were abnormal, or in excess of those reasonably ruling, there was no room for the inference that the plaintiff would realize for its coal, when it might be shipped in the future, less than it would have realized if shipped ⁶⁹ during the period of the action. But the burden was upon the defendant to show anything of this kind by way of mitigation of damages, if it could do so, and it offered no evidence for any other purpose. Counsel for appellant admit in their argument that plaintiff "showed the profit which would have been secured if it had not been

prevented from making the sale"; but they suggest that the loss of this profit may not have been permanent, as it may be that the coal will be sold at some subsequent time at equally as great a profit. But if such possible future profits could properly be set up in mitigation of the ascertained damages, which we doubt, it would be the duty of the defendant to show in its defense the probability and the amount of such profits. It attempted no such proof. It should be remembered, too, that "in the action of tort, a greater latitude is allowed by the court to the jury in the assessment of damages than is allowed in action of contract." And that "All damages which ordinarily and in the natural course of things have resulted from the commission of the wrongful act are recoverable": 1 Addison on Torts, 6th ed., Am. note, secs. 64, 65. Many elements enter into the successful prosecution of a mining business beside the fact of the existence of the raw coal itself. That is only the material upon which those engaged in preparing it for market expend their time, energy and capital. The fact that plaintiff may be able profitably to expend time, energy and capital in the future in connection with the mining of the coal which it was prevented from using during the period of which complaint is made, by the discrimination of defendant against it, is no good reason why it should not now be compensated for loss shown to have been incurred by it in the past, through the wrongful acts of the defendant.

Plaintiff suffered more than a mere detention of its product, as it was kept from the market by the discrimination of defendant. It was put to the expense of care and maintenance of the mines and machinery and mules. ⁷⁰ Its working force was subject to disorganization, and many other items of expense were necessarily incurred. No other rule than the allowance of the reasonable profits it would have made can fairly cover these items and make good to plaintiff the loss resulting from the interruption of its business.

The assignments of error are overruled and the judgment is affirmed.

Stewart, J., Dissented and Said: "I cannot agree that the measure of damages here applied was correct. Punitive damages were not claimed, but single and compensatory for the loss sustained by the plaintiff by reason of the defendant's failure, for a definite period, to furnish it with as many cars for the transportation of its coal as it was entitled to under a fair and equitable allotment. In other words, the plaintiff complains that it was denied the privilege of a market for so much of its coal as represents the difference between what it did ship and what it would have shipped had its quota of cars been furnished covering the period of the defendant's default.

This coal remained unmined and in place. The time came when the defendant lifted its embargo and the way was opened for the plaintiff to mine and ship its coal. Mining operations were continued. Presumably, this very coal which was left unmined because of defendant's default was thereupon mined and shipped. If the prices then ruling for coal were lower than during the period of the embargo, the difference would accurately measure the plaintiff's loss. If other incidents increased the loss, it was for the plaintiff to establish such additional loss. If the prices were so much in excess of the prices ruling during the embargo as to more than compensate for the delay, while such circumstances would not excuse the defendant for its default, it would follow that the plaintiff was without injury. The case assimilates itself to an action against a carrier for detention of goods, and the same measure of damages should apply. The measure adopted permitted recovery for damages purely speculative." Brown, J., concurs in this dissent.

What are Unreasonable and Unlawful Discriminations by Carriers are considered in the notes to Root v. Long Island R. R. Co., 11 Am. St. Rep. 647; Scofield v. Railway Co., 54 Am. Rep. 862; and Ex parte Benson, 44 Am. Rep. 568. At the common law, common carriers of freight were not bound to treat all shippers alike. They were bound only to carry for every shipper at a reasonable rate, and might favor any shipper or class of shippers where the circumstances warranted the distinction, as where the preferred shipper offered goods in larger quantities or under such conditions that they could be transported with less expense: State v. Central Vermont Ry. Co., 81 Vt. 463, 130 Am. St. Rep. 1065.

As to the Duty of Railroad Companies to Furnish Cars to Shippers Without Discrimination and the remedies for their failure to do so, see St. Louis Southwestern Ry. Co. v. State, 85 Ark. 311, 122 Am. St. Rep. 33; and Louisville etc. R. R. Co. v. Pittsburg etc. Coal Co., 111 Ky. 960, 98 Am. St. Rep. 447. A common carrier owes the same duty relatively to all shippers at stations of the same business importance as to supplying cars, and no station, much less any one shipper, has the right to command the entire resources of the carrier, to the exclusion of other stations and shippers; but the cars must be so distributed at the different stations as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity: Ayers v. Chicago Northwestern Ry. Co., 71 Wis. 372, 5 Am. St. Rep. 226. See Ocean Steamship Co. v. Savannah L. W. & S. Co., 131 Ga. 831, 127 Am. St. Rep. 265.

A Mandatory Injunction may be issued to compel a railroad company to furnish cars to a shipper when it refuses to fulfill its obligations in that respect, notwithstanding the shipper's remedy at law for damages: Louisville etc. R. R. Co. v. Pittsburg etc. Coal Co., 111 Ky. 960, 98 Am. St. Rep. 447, and see the cases cited in the cross-reference note thereto.

BENNER v. FIRE ASSOCIATION OF PHILADELPHIA.

[229 Pa. 75, 78 Atl. 44.]

FIRE INSURANCE.—Oral Contracts of insurance are permitted by the law of Pennsylvania. (p. 707.)

FIRE INSURANCE.—Executory Contracts to insure in the future are valid. (p. 708.)

FIRE INSURANCE.—Oral Contracts of Insurance must be clearly established in every particular. The testimony must make clear the subject matter, the amount and elements of the risk, including its duration in point of time and extent of hazard assumed, the rate of premium, and generally all the circumstances peculiar to the contract, so that nothing remains to be done but to fill up the policy and deliver it on one hand and to pay the premium on the other. (pp. 708, 709.)

FIRE INSURANCE.—Oral Preliminary Contract.—A Presumption that the parties to an oral preliminary contract of insurance contemplated such a form of policy as has been usual between them, or is usual in such cases, may be applied in some instances. (p. 709.)

FIRE INSURANCE.—Oral Contract—Certainty Required.—Evidence of a conversation between the owner of certain property and the agent of an insurance company about renewing certain insurance, during which the former said, "Don't forget the barn. Renew the barn as quick as that comes due," and received the reply, "I will attend to it; you don't need to worry"—is too vague and uncertain to constitute an oral contract to insure in the future. (p. 709.)

FIRE INSURANCE.—Oral Contract—Authority of Agent.—A commission from an insurance company to its agent to act within certain territory, "with full power to receive proposals for insurance against loss or damage by fire, . . . with authority to issue and countersign policies and renewal receipts, . . . to collect premiums . . . and to transact such other business as may be intrusted to his care," is not sufficient evidence of the agent's authority to bind the company by an unusual oral contract of future insurance. (p. 710.)

FIRE INSURANCE.—Oral Contract—Authority of Agent.—An offer to prove that insurance agents are accustomed to agree to renewals in advance of the expiration of current policies and give credit for premiums properly refused when offered to establish the authority of the agent to make an oral contract for future insurance or the renewal of insurance. (p. 710.)

FIRE INSURANCE.—Oral Contract—Prohibition of Charter.—Where the charter of an insurance company, after granting the right to make contracts of insurance, provides, "and every such contract, bargain, agreement and policy to be made by the said corporation shall be in writing or in print," any attempted oral contract of insurance by an agent is, in the absence of an estoppel, not binding on the company. (p. 711.)

APPEAL.—Stare Decisis.—Where in a Former Case a construction has been placed by the supreme court upon the same words in the charter of a corporation as are in question in a subsequent case, such construction will not be departed from. (p. 712.)

APPEAL.—Objection to Admission of Evidence.—The party complaining on appeal of the admission of evidence objected to in the court below will be limited to the specific objections made to it there. (p. 713.)

William R. Follmer and Andrew A. Leiser, for the appellant.

Albert L. Moise, William H. Hackenberg, Samuel D. Matlack and S. H. Alleman, for the appellee.

⁸⁰ MOSCHZISKER, J. The plaintiff owned a piece of real estate with a dwelling-house and a barn erected thereon, which improvements were insured with the defendant company under separate policies; the policy on the house expired August 19, 1905, and that on the barn November 2, 1905. The insurance had been placed by one Hock, an agent of the defendant company. According to the plaintiff's testimony, sometime in August, 1905, Hoch met him on the street and said, "The policy on your house will expire shortly." A few days after this the plaintiff met Hoch and said, "Renew the policy, and we will leave it the same as it is, but I have not the money to pay you to-day, but I will pay you inside of a week or so"; to which Hoch replied, "That will be all right." The plaintiff testified further: "And I said, 'Don't forget the barn, and renew the barn as quick as that comes due and send it up, or send it up and I will pay you the same as I did previous to this time with the cash. . . . ' I told him he should renew the policy on the barn and watch it up, and I would attend to it. . . . I told him, 'If I can't pay you at once I will pay you like this time'; and he said, 'That will be all right and I will attend to it, you don't need to worry.' " Plaintiff further stated that subsequently he said to Hoch in reference to the insurance, "Watch the other"; and Hoch replied, "I will attend to them; you don't need to worry"; and, "I told ⁸¹ him again in front of my wife, 'You watch all the insurance.' " The insurance on the barn was not renewed, and on November 6, 1905, it was destroyed by fire. The plaintiff brought an action against the defendant company, and sought to maintain his claim on the theory that the conversation between himself and Hoch constituted a parol contract whereby the company agreed that upon the expiration of the then existing policy it would insure the barn by a renewal thereof. Binding instructions were given for the defendant, and the plaintiff has appealed.

We cannot agree in all respects with the views of the learned trial judge as expressed in his rulings upon the evidence and in his charge to the jury, but we concur in the conclusion reached.

In Pennsylvania the law permits oral contracts of insurance: *Lenox v. Greenwich Ins. Co.*, 165 Pa. 575; *Ripka v. Insurance Co.*, 36 Pa. Super. Ct. 517. Although there is a difference of opinion in the various jurisdictions and among

the text-writers as to whether or not an executory contract can be made to insure in the future, yet the clear preponderance of authority seems to be that such contracts are valid: *Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co.*, 7 Bush (Ky.), 81, 3 Am. Rep. 301; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Cohen v. Continental Fire Ins. Co.*, 67 Tex. 325, 60 Am. Rep. 24, 3 S. W. 296; *Commercial Mut. Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 318, 15 L. ed. 636; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. ed. 187; *Post v. Aetna Ins. Co.*, 43 Barb. 351; *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495; *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Van Loan v. Farmers' Mutual Fire Ins. Assn.*, 90 N. Y. 280; *Moore v. New York Bowery Fire Ins. Co.*, 130 N. Y. 523, 29 N. E. 997, 14 L. R. A. 731; *Stickley v. Mobile Ins. Co.*, 37 S. C. 56, 16 S. E. 280, 838; *Baubie v. Aetna Ins. Co.*, 2 Dill. 156, Fed. Cas. No. 1111; *Taylor v. Germania Ins. Co.*, 2 Dill. 282 Fed. Cas. No. 13,793; *King v. Cox*, 63 Ark. 204, 37 S. W. 877; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768. The leading cases pro and con are discussed in ⁸² *McCabe Bros. v. Aetna Ins. Co.*, 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641, and the conclusion is stated: "That an insurance company can by a preliminary parol contract bind itself to issue or to renew a policy in the future seems too well settled to admit doubt." The argument against the validity of such contracts as stated by Ostrander on Insurance, second edition, section 12, and adopted by the court below, is not convincing.

In these days of great commercial activity, one can readily conceive of many instances where a man would not be willing to set aside capital and agree to place it in a prospective enterprise, unless he could be positively assured of indemnity against fire risk, and this can only be accomplished by contracts to insure in the future. We find no Pennsylvania authority which holds directly against their validity, and in *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. 339, Chief Justice Gibson says: "In commercial towns, where the members of the profession are familiar with the law of insurance, actions or mere agreements to insure, whether against fire or perils of the sea, are not uncommon. They are noticed in 1 Phillips on Insurance, section 3, page 9; but it appears that the terms of the contract must have been settled by the concurrent assent of the parties, and that nothing must have remained to be done but to deliver the policy, else the risk will not have been begun; in other words, that the agreement must have had, at some particular instant, that aggregatio mentium which is indispensable in the constitution of every contract." The tendency of our cases is to favor the validity of such

contracts, but they uniformly hold that all parol contracts of insurance, even those to take effect in praesenti, must be clearly established in every particular: *Patterson v. Benjamin Franklin Ins. Co.*, 81* Pa. 454; *Ripka v. Fire Ins. Co.*, 36 Pa. Super. Ct. 517. "To constitute a verbal contract of insurance the minds of the parties must have met upon all the essentials of the contract. The testimony must make clear the subject matter of insurance, ⁸³ the amount and elements of the risk, including its duration in point of time and extent in point of hazard assumed, the rate of premium, and generally all the circumstances which are peculiar to the contract and distinguish it from every other so that nothing remains to be done but to fill up the policy and deliver it, on the one hand, and pay the premium on the other": *Keystone Mattress etc. Co. v. Pittsburgh Underwriters*, 21 Pa. Super. Ct. 42. This is a wise and salutary rule which bears hard upon no one; for oral contracts of insurance are not usual, and if for any reason one should desire to make such a contract, he ought to do so in a proper manner, so that in any future controversy on the subject it can be made plain to the tribunal which has to pass upon it. Otherwise, wherever a careless man becomes in the habit of depending upon the insurance agent to notify him of the expiration of his policy, and the insurance runs out, he will be too apt to assume the right to set up such a contract.

We do not overlook the cases that hold to the rule that where an oral preliminary contract of insurance is shown, it will be presumed that the parties contemplated such a form of policy as has been usual between them, or is usual in such cases, and we can conceive of instances where this rule might well be applied, but this is not one of them.

In the present case the testimony to establish the alleged contract is too vague. Although it is repeated in several different forms upon the notes, we have stated it most strongly for the plaintiff. And yet what have we? A conversation between the plaintiff and the agent of the defendant company about renewing another insurance, in which the former said to the latter, "Don't forget the barn. Renew the barn as quick as that comes due," and received the reply, "I will attend to it; you don't need to worry." How can we from this say with any safety that the defendant company thereby agreed upon an insurance on any fixed amount for any fixed ⁸⁴ term either in the present or future. The very words used by the agent indicate an intent to attend to something in the future for the plaintiff, rather than a then present assumption of an obligation binding upon his company. The old policy on the barn was in the possession of the plaintiff, so he as well as Hoch had means of information as to the date of its expiration. The whole surround-

ings negative the idea of a serious contract being made; the conversation consisted of a few words on the street; no money was passed, no memorandum was made, and no definite promise given on either side. After the conversation the plaintiff again instructed Hoch to watch the insurance, which would indicate that he did not consider himself protected by any binding contract at the time of the first conversation. The testimony is lacking in details essential to show clearly a contract to insurance in the future, and it is also lacking in proper proof of the authority of the agent to make such a contract.

As evidence of Hoch's authority, the plaintiff offered a written commission from the defendant company appointing Hoch agent in the territory in question, "with full power to receive proposals for insurance against loss or damage by fire . . . with authority to issue and counter-sign policies and renewal receipts, furnished by said associations; to assent to assignments and transfers, to collect premiums . . . and to transact such other business as may be intrusted to his care." This commission cannot be construed as conferring upon the agent authority to bind and obligate his company on the unusual contract here sought to be established. True it is that the third specification of error contains an offer to show that insurance agents "are accustomed to agree to renewals in advance of the expiration of the current policies and give credit for premiums, accounting to the company monthly for the premiums, whether they are paid or not by the insured"; and that the fifth specification presents a similar offer "for the purpose of showing this is the usage and custom ⁸⁵ of this particular company." But the offers were properly refused. While it was admitted by the plaintiff that he had never paid the premium on the insurance claimed, yet there was no defense on that ground, so the question of credits for premiums was out of the case. With this out, the offers were merely to show that the agents were accustomed to agree to renewals in advance of the expiration of current policies; not that they were accustomed to make such oral contracts for future insurance or renewals as contended for by the plaintiff. Therefore, the offers were irrelevant and immaterial to the issue. "We have no right to reverse the action of the court below upon a surmise that the defendants might have made their offer broader": *Silliman v. Whitmer*, 11 Pa. Super. Ct. 243. Assuming that the plaintiff could have made the offers as stated good, there is not enough in the case to show either that the agent had authority to make the contract contended for by the plaintiff or that in point of fact such a contract was ever actually consummated.

There is another serious point in this case. The defendant company was incorporated under the act of May 5, 1871 (Pub. Laws 572), the sixth section of which provides: "The president and directors shall have full power, on behalf of said corporation, to make insurance . . . and to make, execute and perfect such and so many contracts, bargains, agreements, policies and other instruments as shall or may be necessary and as the nature of the case shall or may require; and every such contract, bargain, agreement and policy to be made by the said corporation shall be in writing or in print. . . ." The defendant contends that this charter requirement is in itself a sufficient defense against an oral contract of insurance; while the plaintiff contends that the provision refers only to executed contracts or policies of insurance, and not to preliminary contracts to make or renew policies; and he makes a most convincing argument on this point, citing many respectable authorities.

⁸⁶ But no matter what the view be elsewhere, in Pennsylvania we have an authority which settles the question here. In *Hazlett v. Allegheny Ins. Co.*, 1 Walk. 336, the defendant company was chartered under the act of April 2, 1856 (Pub. Laws 211), the tenth section of which is to all intents and purposes identical with section 6 of the act of 1871. The claim was on a verbal contract of insurance. The court below reserved the question, "Whether a contract of insurance such as specified in plaintiff's first point is binding upon defendant, and entitles plaintiff to recover in this case." In entering judgment for the defendant non obstante veredicto the court said: "Upon the first question, I think the law under the charter of the defendant is clearly with the defendant"; and in affirming this judgment we said: "Contracts of insurance are expressly required by defendant's charter to be in writing. . . . There being no sufficient ground of estoppel alleged the case fell back . . . upon the mere binding effect of a verbal contract for insurance, and this the charter answers in the negative." It will not do to say that the construction of this charter requirement contended for by the plaintiff in the present case was not considered by this court in the *Hazlett* case, for it appears in the report that "George Shiras, Esq., for plaintiff in error argued that a verbal contract of insurance is binding. . . . The company would still be liable on an agreement to issue the policy, though the statute requires the formal insurance policies to be in writing. . . . This company could make arrangements, and even parol promises, as to the terms on which a policy shall be issued, so that a court of equity will compel the company to execute the contract specifically, and where

the loss has happened, to avoid a circuitry of action, the chancellor will enter a decree directly for the amount of an insurance for which the company ought to have delivered their policy properly attested." And "M. W. Acheson and W. G. Hawkins, Jr., Esqs., contra, replied, the company could not make a formal policy of insurance; for by its charter it is subject to the insurance ⁸⁷ act of April 2, 1856 as follows: 'And every such contract, bargain, policy and other agreement shall be in writing or print.'" This shows that the point was clearly presented by most able counsel, and although the opinion is brief, we must assume that it was passed upon after full consideration.

In *Ripka v. Fire Ins. Co.*, 36 Pa. Super. Ct. 517, President Judge Rice states the rule: "An agent duly authorized may make contracts by parol unless there be specific charter requirements that all insurance contracts shall be in writing." The act of 1856 was a general insurance act which by its terms was made applicable to companies to be incorporated by special acts in the future. It was in force until its repeal by the act of May 1, 1876 (Pub. Laws, 53): *Moise & Matlack on Insurance*, col. 15,479. The defendant company was incorporated by a special act in 1871. Both of these acts contain the same provisions requiring insurance contracts to be in writing; so that even if this provision had been omitted from the act of 1871, the company would still have been bound by the provision under the act of 1856, and therefore it was in the same position as the defendant in the *Hazlett* case. Under such circumstances, a construction having already been placed by this court upon the very words contained in the charter of the defendant company, we cannot depart therefrom on the facts in the present case. We do not mean to rule that this charter provision would be a protection against all verbal contracts of insurance. There might be cases where certain elements of estoppel would exist which would afford life to such contracts; but there are no such elements in the present case any more than in the *Hazlett* case, where the plaintiff claimed that the understanding and agreement was that the insurance "was to take place immediately," and he failed to insure elsewhere and met with a consequent loss.

But the plaintiff contends that the effect of the act of 1871 cannot be considered, for two reasons: First, under the rule of the local court a specification in writing of all ⁸⁸ special matters of defense must be furnished before trial, and this act was not referred to in defendant's specification; next, the act of May 11, 1881 (Pub. Laws, 20), forbids consideration of the defense. As to the first

contention, an examination of the record shows that no such objection was made in the court below. "It is well settled that the party complaining on appeal of the admission of the evidence objected to in the court below, will be limited to the specific objections made to it there": *Danley v. Danley*, 179 Pa. 170, 36 Atl. 225; *Messmore v. Morrison*, 172 Pa. 300, 34 Atl. 45. When a party relies upon the want of special notice, he must place his objection on that ground: *Hawk v. Geddis*, 16 Serg. & R. 23; *Rearich v. Swinehart*, 11 Pa. 233, 50 Am. Dec. 540; *Miller v. Stem*, 12 Pa. 383; *Hobson v. Croft*, 9 Pa. 363. Concerning the next point, it is sufficient to say that the act of 1881 is limited in every particular to written policies, and has nothing to do with oral contracts of insurance: *Lenox v. Greenwich Ins. Co.*, 165 Pa. 575, 30 Atl. 940.

We have considered all the assignments of error, and although we do not entirely agree with the views of the learned trial judge as expressed and brought upon the record in the second, tenth and eleventh specifications, we find no reversible error.

The judgment is affirmed.

A Contract of Insurance may Rest in Parol: King v. Phoenix Ins. Co., 195 Mo. 290, 113 Am. St. Rep. 678; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358; and if completed by a meeting of the minds of the parties, the insurer will be liable for a loss occurring before the issuance and delivery of the policy; but where the delivery and acceptance of the policy are necessary to put the insurance into effect, there can be no risk until the things precedent agreed upon shall happen: *Summers v. Mutual Life Ins. Co.*, 12 Wyo. 369, 109 Am. St. Rep. 992; note to *Stephenson v. Allison*, 138 Am. St. Rep. 31, 32. An application to an insurance company for a policy of fire insurance, and a promise by its agent to attend in due time to the matter of taking such further steps as are necessary to effect the insurance, subject to the action of the insurer, do not constitute a valid contract for insurance in praesenti: *Whitman v. Milwaukee Fire Ins. Co.*, 128 Wis. 124, 116 Am. St. Rep. 25.

ALLEN v. TUSCARORA VALLEY RAILROAD COMPANY.

[229 Pa. 97, 78 Atl. 34.]

RAILROADS—Injury in Car Coupling—Federal Statute.—Prior to the act of Congress requiring the use of automatic car couplers, railway employees assumed the risks and dangers naturally and ordinarily incident to their employment, including those arising from the performance of their duty in coupling cars. But this act changes the liability of the carrier while engaged in interstate commerce, imposing a liability different from that imposed by the common law, and depriving the carrier of the protection and risk assumed by the employee which it had at the common law. (p. 716.)

PLEADING—Amendment—Statute of Limitations.—The amendment of a complaint for damages for personal injuries by a railroad employee, sustained while coupling cars, so as to seek damages under the provisions of the act of Congress requiring all cars to be equipped with automatic couplers, is a change in the cause of action, and should not be allowed after the statute of limitations has barred the action on the statute. (p. 717.)

PLEADING—Amendment—Change of Cause of Action.—One of the tests in determining whether an amendment introduces a different cause of action is whether proof of the existence of additional facts will be required. (p. 717.)

PLEADING—Complaint—Statutory Actions.—Where All the Facts necessary to bring the case within a statute are alleged, the complaint is sufficient as one under the statute without a reference to it. (p. 717.)

PLEADING—Amendment—Change of Cause of Action.—Where a complaint, containing all the allegations essential to a cause of action under a statute, is founded on a common-law liability, an amendment seeking a recovery upon the liability imposed by the statute constitutes a departure from the original cause of action, not from fact to fact, but from law to law, which is equally effective to prevent an allowance of the amendment where the cause of action on the statutory liability is barred by the statute of limitations. (p. 720.)

F. M. M. Pennell, for the appellant.

J. H. Neely and James M. Barnett & Son, for the appellee.

⁹⁸ **MESTREZAT, J.** This was an action of trespass at common law, brought July 1, 1904, by the plaintiff, a brakeman in the employ of the defendant company, to recover damages for injuries received in its service while he was in the act of coupling cars. The statement was filed with the praecipe and averred, inter alia, as follows: "It then and there was the duty of defendant corporation to adopt and use couplings for its cars of ordinary character and reasonable safety, according to the usages, habits and ordinary risks of the business, but the defendant corporation, not regarding its duty in the premises, at or about February 29, 1904, at Juniata county aforesaid, carelessly and

negligently adopted and used the pin and link coupler, a kind of coupler not then in ordinary use but more dangerous than the usual and ordinary coupling employed by railroads, by reason whereof plaintiff, while engaged in coupling cars, so as aforesaid supplied and fitted with ⁹⁹ the pin and link coupler due to the negligence of defendant corporation, in the lawful performance of his work and exercising due and proper care, on or about February 29, 1904, aforesaid, at the county of Juniata, was caught by the left hand between the two protruding irons, called bull noses, parts of the couplings, and thereby his left hand was badly cut, bruised, lacerated and torn," etc.

In December, 1908, a rule was granted on the defendant to show cause why the statement should not be amended, and on January 21, 1909, the rule was made absolute and the statement was amended so as to read, inter alia, as follows: "That said defendant corporation at the time of committing the grievances hereinafter mentioned was engaged in interstate commerce by railroad and a common carrier and did haul on its line cars used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars, none of its cars being so equipped with couplers as aforesaid, in violation of the acts of Congress of March 2, 1893, chapter 196, section 2, 27 Statutes at Large, 531, and its supplements; that the train aforesaid was not composed of four wheel cars or eight wheel standard logging cars where the height of such cars from top of same to center of coupling does not exceed twenty-five inches used exclusively for the transportation of logs."

The defendant objected to the allowance of the amendment on the ground that it introduced a new and different cause of action which was barred by the statute of limitations. The first assignment alleges error in making the rule absolute and permitting the plaintiff to amend the statement of claim. As we are of opinion that this assignment must be sustained, the other assignments become immaterial and need not be considered or determined.

The amendment to the statement of claim, allowed by the court, brought the case within the act of Congress of ¹⁰⁰ March 2, 1893, and alleges that the cars were equipped with couplers in violation of the act. This statute was enacted, as its title declares, to promote the safety of employees and travelers upon railroads engaged in interstate commerce by compelling common carriers to equip their cars with automatic couplers, etc., and makes it unlawful for a common carrier to haul or permit to be hauled any car used in moving interstate traffic not equipped with

couplers coupling automatically by impact. Section 8 of the act provides: "That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The original statement, as observed, was at common law and alleges that the plaintiff's injuries resulted from the defendant company having carelessly and negligently adopted and used the pin and link coupler, more dangerous than the usual and ordinary coupling employed by railroads. Prior to the act of Congress, employees of common carriers assumed the risks and dangers naturally and ordinarily incident to their employment, which included the risks and hazards arising from the performance of their duty in coupling cars. If the employee was injured in the discharge of that duty, and it was a risk which he assumed, the carrier was not responsible. But the act changes the liability of the carrier when engaged in interstate commerce, and what was lawful at common law before the passage of the act is made unlawful by the act. The statute abrogates the common law *pro tanto* and imposes a liability on the carrier different from that imposed by the common law. The latter gives the employee a right of action for an injury resulting from a negligent act exposing him to a danger which he did not assume in entering the carrier's service; but the ¹⁰¹ statute deprives the carrier of the protection and defense of the risk assumed by the employee, which it had at common law. The act of the carrier in failing to equip its cars with automatic couplers is declared to be unlawful, and is forbidden under the penalty, imposed by section 8, that the employee if injured shall not be deemed to have assumed the risk of his employment. The act of Congress is the basis of the plaintiff's claim, as laid in the amended statement; while, in the original statement, the basis of the claim is the failure of the carrier to perform its common-law duty to him as its employee. The amendment is not a restatement or the statement in a different form of the same cause of action, but the averment of a statutory cause of action in which the liability is different and greater than in an action at common law. It deprives the defendant of a valuable right, viz., the defense of the assumption of risk by the plaintiff, which is not permissible: *Kaul v. Lawrence*, 73 Pa. 410. We think it clear that the amendment to the statement of claim introduced a new and different cause of action, which

was barred by the statute of limitations, and, therefore, under the well-settled rule in this state, it should not have been allowed.

In support of the contention that the amendment did not change the cause of action, the learned counsel for the plaintiff claims that the language of the original statement was not changed in any way by the amendment which, it is alleged, consisted simply of an addition to the original statement and directed attention to the act of Congress and its supplement as being applicable to the facts of the case. But, it will be observed, in the amendment there was a departure not only from the facts as laid in the original statement, but also from the law as applicable to the facts in the original statement. In other words, there was a departure, not only from fact to fact, but from law to law. A departure in pleading may be either in the substance of the action or defense or the law on which it is founded: 2 Saunders ¹⁰² on Pleading and Evidence, *807. The original statement, it is true, averred the injuries of the plaintiff and the alleged negligent act of the defendant by which they were caused, but there was no intimation in the statement that the carrier was engaged in interstate commerce or that the defendant's cars were equipped with couplers in violation of the act of Congress. Proof of the existence of these two additional facts was required to sustain the action as amended, and this is one of the tests in determining whether the amendment introduces a different cause of action: *Wabash R. R. Co. v. Bhymer*, 214 Ill. 579, 73 N. E. 879. It is apparent that without this amendment the act of Congress could have had no place in the case, and could not have been invoked to deprive the company of its defense that the plaintiff assumed the risks or dangers of his employment. If, however, all the facts necessary to bring the case within the act of Congress had been included in the original statement, it would have been insufficient as a statement under the act without a reference to the statute: *Bolton v. Georgia Pacific Ry. Co.*, 83 Ga. 659, 10 S. E. 352. It is also true that if, as claimed by the plaintiff, all the facts necessary to sustain a recovery on the amended statement were set forth in the original statement, the amendment would still be a change or departure from the original statement, not from fact to fact, but from law to law, from an action founded on the common law to one founded on a statute abrogating the common law, which is equally effective to prevent an allowance of the amendment. In such case, the plaintiff bases his right of recovery upon other and different law, instead of other and different facts, and it constitutes a departure from the original

cause of action: *Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. Rep. 877, 39 L. ed. 983; *Boston & Maine R. R. Co. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193.

Our conclusion is supported by numerous decisions in this and other jurisdictions in which the same doctrine has been announced and applied. *Dunbar Furnace Co. v. Fairchild*, 121 Pa. 563, 15 Atl. 656, was a common-law action of ¹⁰³ trespass to recover damages for cutting and carrying away timber standing on the plaintiff's land. After the statute of limitations had run, the court allowed the plaintiff to amend his statement so as to permit him to recover treble damages under the act of March 29, 1824, for cutting and converting timber trees. This court reversed the common pleas and held that the amendment introduced a new cause of action and should not have been allowed. In the opinion it is said (page 571): "It has been many times decided that in order to recover under that act (of 1824), it is necessary to declare specially upon its terms, and that a common-law action of trespass will not suffice. . . . The difficulty with the present case is, that there is not only no conclusion contrary to the form of the statute, etc., but there is no allegation of any other kind that the action is brought under the statute." The case was again in this court, *Fairchild v. Dunbar Furnace Co.*, 128 Pa. 485, 18 Atl. 443, 444, and again it was held that the amendment could not be allowed. In delivering the opinion, Mr. Justice Clark said (page 498): "This action of trespass, being brought at the common law, was brought to redress the injury done, by an award of compensation; but the action under the statute is not for a redress of the injury; it is to recover a penalty prescribed by the statute, which, as a police regulation, is intended for the protection of real property from waste by those who either negligently or willfully intrude upon the lands of others. The cause of action accruing under this statute, although arising on the same matter, is different from that accruing at common law, and whilst, perhaps, they may be joined in one action, there can be but one recovery. An amendment to a declaration will not be allowed if a new cause of action is thereby introduced."

In *Bolton v. Railway Co.*, 83 Ga. 659, 10 S. E. 352, an action by an employee against the defendant company, it was said, in refusing an amendment to the statement (page 660): "If, however, he commences his action and relies upon his ¹⁰⁴ common-law right, we do not think he can amend his common-law declaration by setting out the statute and relying upon that for his right to sue and for his recovery. In this case the original declaration was founded

upon the common-law right. Nothing was even intimated therein to the effect that he relied upon the statute. According to the decision in *Exposition Cotton Mills v. Western & Atlantic R. R. Co.*, 83 Ga. 441, 10 S. E. 113, and cases cited therein, made at this term, this amendment would have added a new and distinct cause of action." This case also meets the argument of the plaintiff's counsel in the present case, that the language of the original statement was not changed by the amendment. The court says (page 661): "But it is argued by counsel for plaintiff in error that all of the facts required by the Alabama statute to be pleaded were already pleaded in the declaration, and that simply to mention the statute in the amendment and recite the same facts therein would not be a new cause of action. While it may be true that all the facts required by the Alabama statute had been set out in the declaration, still those facts alleged in the common-law declaration were mere surplusage and had no legal vitality, and would have been so regarded by the court trying the case. It required the pleading of the statute to give them any vitality at all. As we have seen, that statute is not mentioned or intimated in the original declaration, and hence to have allowed the amendment offered would have been allowing the introduction of a new cause of action."

Union Pacific Ry. Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. Rep. 877, 39 L. ed. 983, was an action by an employee against a railroad company based upon the common law of master and servant, and was brought to recover damages for an injury which had happened to the plaintiff in Kansas while on duty there. It was held that an amended petition which changes the nature of the claim and bases it upon a statute of Kansas giving the employee in such a case a right of action against the company in derogation of the common law is a departure ¹⁰⁵ in pleading, and sets up a new cause of action. The trial court allowed the amendment, and in reversing the judgment Mr. Justice White, in an exhaustive opinion, discusses the right to amend an original statement in such cases. He says, *inter alia* (page 295): "A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow-servant then the averment of negligence apart from incompetency was a departure from fact to fact, and therefore, a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a

departure from law to law. . . . It is argued, however, that, as all the facts necessary to recover were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recovery were contained in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right."

We are all of opinion that the amendment allowed by the court below introduced a new cause of action, barred ¹⁰⁶ by the statute of limitations. The first assignment of error must, therefore, be sustained.

The judgment is reversed with a venire facias de novo.

As to the Effect of Statutes Requiring Automatic Car Couplers, see Luken v. Lake Shore etc. Ry. Co., 248 Ill. 377, ante, p. 220.

How Far Amendments Which Vary or Alter the Cause of Action Sued upon are Allowable is considered in the notes to *Flanders v. Cobb*, 51 Am. St. Rep. 414, *Stevenson v. Mudgett*, 34 Am. Dec. 158. The changing of the form of an action on an insurance policy from covenant to assumpsit is not the commencement of a new suit, and may be allowed after the time limited by the policy for bringing suit has expired: *Monahan v. Fidelity Life Ins. Co.*, 242 Ill. 488, 134 Am. St. Rep. 337. A complaint in an action against a carrier for the value of goods whose transportation was delayed, and for the statutory penalty for the delay, may be amended to include the penalty imposed by statute for failure to give notice of the arrival of the shipment: *Hockfield v. Southern Ry. Co.*, 150 N. C. 419, 134 Am. St. Rep. 945. A substituted complaint alleging the generally dangerous condition of a sidewalk complained of, whereas the original complaint had complained of specific defects only, does not plead a new cause of action: *Woods v. Incorporated Town of Lisbon*, 138 Iowa, 402, 128 Am. St. Rep. 208. The amendment of a bill to enforce a vendor's lien seeking to make clear the lands intended to be conveyed by explaining the description contained in the deed is not a departure from the cause of action stated in the original bill: *Reynolds v. Lawrence*, 147 Ala. 216, 119 Am. St. Rep. 78. It is not permissible to entirely change the nature of a cause of action by amendment, as substituting one in equity for one at law, or one in contract for one sounding in tort: *Charmley v. Charmley*, 125 Wis. 297, 110 Am. St. Rep. 827.

REA v. PITTSBURG AND CONNELLSVILLE RAILROAD COMPANY.

[229 Pa. 106, 78 Atl. 73.]

EMINENT DOMAIN—Damages—Delay in Payment.—It is for the jury to say, in the exercise of a sound discretion, whether the parties in an eminent domain proceeding are entitled to compensation for delay in receiving their money. If the delay was not the fault of the land owner, compensation for the time lost may be given, but not if the delay was by reason of his own conduct. (p. 723.)

EMINENT DOMAIN—Damages—Delay in Payment.—If the demands of the land owner are extortionate and inordinate, so that the corporation seeking condemnation is justified in contesting, then no damages for delay in payment should be allowed, but where there is an honest difference of opinion as to the value of the property, such may be recovered. (p. 723.)

EMINENT DOMAIN—Appeal—Excessive Damages.—The power conferred upon the supreme court by the act of May 20, 1891 (Pub. Laws, 101), has never been exercised on the plea of the excessiveness of the verdict except in a most extreme case. (p. 724.)

EMINENT DOMAIN—New Trial—Excessive Damages.—The question of the amount of the verdict in eminent domain is ordinarily for the trial court, and where a grossly excessive amount is returned, the trial court should never allow it to stand, no matter how many new trials it may be obliged to grant. (p. 724.)

EMINENT DOMAIN—Evidence of Value—Cost of Property.—In an eminent domain proceeding, after one of the land owners has testified as to the value of the property, it is proper cross-examination to inquire what the father of the witness paid for the property some three years before. (p. 725.)

EMINENT DOMAIN—Evidence of Value—Sales in Vicinity. A consideration of particular sales in the neighborhood, as fixing the value of property in an eminent domain proceeding, will not be allowed. (p. 725.)

EMINENT DOMAIN—Evidence of Value—Particular Sales.—On cross-examination a witness as to the value of the property in an eminent domain proceeding may be questioned as to particular sales in the neighborhood, for the purpose of testing his good faith and accuracy and the extent of his knowledge. (p. 725.)

EMINENT DOMAIN—Evidence of Value—Sale of the Property.—The objection that evidence of particular sales of property in the neighborhood would lead to the investigation of collateral issues in fixing the value of the property in an eminent domain proceeding does not apply to testimony of a single sale of the property in controversy. Such testimony may be admitted, provided the sale in question is not too remote from the date of the appropriation. (p. 726.)

EMINENT DOMAIN—Evidence of Value—Sale of the Particular Property in Controversy.—Whether testimony of a sale of the property in controversy in an eminent domain proceeding is admissible necessarily depends upon the circumstances of each particular case, the disparity between the price paid and the value claimed, the length of time between the sale and the appropriation, and other elements which may present themselves tending to show the worth of the testimony as evidence affecting the importance, and throwing

light upon the accuracy and good faith, of the opinion expressed by the witness. (p. 728.)

EMINENT DOMAIN.—The Market Value of a Particular piece of real estate is to be measured by the price usually given for such property in that neighborhood, making due allowance for differences of position, soil and improvements. (p. 729.)

EMINENT DOMAIN—Evidence of Value—Improvements.—In arriving at the value of the property in eminent domain proceeding, by showing the sale of other real estate in the neighborhood, testimony of the value of the improvements on the property sold should be admitted. (p. 729.)

EMINENT DOMAIN—Evidence of Value—Opinions of Witnesses.—While the market value of land is not a question of science and skill upon which only an expert can give an opinion, yet in each case the trial judge should see to it that every witness called to prove the value has a proper foundation of knowledge to make his opinion of some real worth. (p. 730.)

EMINENT DOMAIN—Words and Phrases.—"Neighborhood," as used in the law of eminent domain, regarding property in large cities, is a relative term, and the field which a witness may take into consideration in forming an opinion of the selling price of land in the vicinity of a particular property should not only be reasonably adjacent thereto, but should be of the same general character as the immediate locality in which the property is situated; otherwise the opinion is of little value. (p. 730.)

Johns McCleave, Clarence Burleigh and Owen S. Cecil, for the appellant.

William B. Rodgers and Gordon & Smith, for the appellees.

¹¹¹ **MOSCHZISKER, J.** The plaintiffs claimed compensation for eighty-eight thousand square feet of land lying between Greenough street and the yard tracks of the defendant railroad in the city of Pittsburg appropriated by the defendant company in March, 1903. Viewers were appointed April 13, 1903, and awarded \$416,000, from which award both sides appealed. The appeals were tried May 4, 1908, and resulted in a verdict for \$775,133.33, which the parties agreed was composed of \$616,000 principal and \$159,133.33 compensation for delay ¹¹² in payment. On motion of the defendant the court below granted a new trial, without indicating its reason for so doing. At the retrial on April 5, 1909, a verdict was rendered for \$765,893.33, which the parties agree was made up, \$616,000 principal, and \$149,893.33 compensation for delay. Defendant's motion for a new trial was refused, and it has appealed.

The first question we have to consider is whether the defendant was properly chargeable with compensation for delay. The defendant claims that this case is governed by the rule in *Philadelphia Ball Club v. Philadelphia*, 192 Pa. 632, 73 Am. St. Rep. 835, 44 Atl. 265, 44 L. R. A. 724, and *Stevenson v. Ebervale Coal Co.*, 203 Pa. 316, 52 Atl. 201, to the effect that where the delay is due to the unconscionably high de-

mands of the claimant, no such compensation should be allowed. The facts at bar are quite different from those in the cases relied upon by the defendant. There was no actual taking of property in either of those cases. The ball club case was an instance of a change of grade. A claim for \$85,000 was "sought to be supported by theories and testimony of an illegitimate character," and a verdict obtained for \$29,000 was reversed. On a new trial "other theories and testimony were set up in support of a demand for \$62,000, quite as indefensible and unreasonable as the demand in the first trial," and a verdict for \$39,000 was cut by the court below to \$30,000. But the trial judge had instructed the jury, "You must add to the damages which the plaintiff has suffered reasonable compensation for the detention of those damages." We said it was manifest that "the oppressive and unreasonable demands of the plaintiff" caused the delay, and reversed holding that the plaintiff was not entitled to any damages on that score. The Stevenson case was an action of trespass to recover damages for the pollution of a stream with coal dirt, and this court characterized the plaintiff's claim as "extortionate, unconscionable and incredible."

In the present case the defendant company took actual possession of the plaintiff's property in 1903, and has ever since enjoyed whatever revenues there were to be ¹¹³ derived therefrom. At the trial the highest value claimed by the plaintiff was twelve dollars a square foot, and the court below states in its opinion refusing a new trial that the jury were not asked for a verdict of more than nine dollars a square foot. The defendant in its plea declared the land only to be of a value of one dollar per square foot, and gave testimony of a value of less than three dollars a square foot. The jury rendered a verdict of seven dollars a square foot. Both parties appealed from the award of the viewers, and all of the seven years' delay, excepting two months occurred subsequent to these appeals. In his instructions to the jury the trial judge said: "It is for you to say in the exercise of your sound discretion whether the parties are entitled to compensation for delay in receiving their money. That amount you may give or you may not, just as you conclude . . . remembering that as a general principle where there has been delay which is not the fault of the plaintiff, and he has been kept out of his money, for the time lost the jury could give compensation by way of damages. But, on the other hand, if it is the plaintiff's fault and the plaintiff's own conduct caused the delay, there can be no compensation by way of damages. . . . When you have fixed the market value at so much a foot, compare that with Mr. Rea's price, and if you are fairly of the opinion and come to a fair and honest conclusion that the difference between the price you fix and the valuation

placed by Mr. Rea was so great that you would say that it was an extortionate demand, that it was an inordinate demand, so that the officers of the railroad company were justified in contesting, . . . then it would be your duty, and I so instruct you, to refuse to give any damages for delay in payment." And after referring to the testimony, the charge continued: "But if . . . this was merely an honest difference of opinion . . . you could give compensation for delay." These instructions are practically in accord with those approved by us in the case of *James v. West Chester Borough*, 220 Pa. 490, 69 Atl. 1042, and with the rule laid ¹¹⁴ down in the cases relied upon by the defendants. It could not be said by the trial judge that the delay was due entirely to the size of the demands made by the claimants. The record shows no offer of settlement at any figure, nor do we find any indication therein that reasonably lower demands would have met with payment. The court left the question squarely and fairly to the jury, and we cannot say that there was any error in so doing. In addition to this, the court could not have affirmed the request covered by the first assignment of error, for it states that Henry B. Rea testified before the viewers that the market value of the property was fifteen dollars a square foot. As pointed out by the trial judge in his charge, Mr. Rea denied this fact, claiming that he had merely said, "it was worth that to us." The assignment is overruled.

Although it well may be contended that the verdict approaches the verge of excessiveness, this is not a case which moves us to interfere under the act of May 20, 1891 (Pub. Laws, 101). The power conferred upon this court by that act has never been exercised on the plea of the excessiveness of the verdict, except in a most extreme case: *Stevenson v. Ebervale Coal Co.*, 203 Pa. 316, 52 Atl. 201. The question of the amount of the verdict is ordinarily for the court below, and where a grossly excessive amount is returned, the trial court should never allow it to stand, no matter how many new trials it may be obliged to grant. The third assignment of error is overruled.

The plaintiffs offered in evidence for the purpose of proving title the deed of the Consolidated Gas Company to Henry Rea, Jr., dated June 21, 1900, showing a consideration of \$140,000 paid by the grantee. When Henry B. Rea, one of the claimants, was upon the stand, he testified that the value of the property was twelve dollars a square foot, which would give a total of \$1,056,000, and under cross-examination he was asked, "In June, 1900, what did you or your father pay for this property?" This was objected to, and the objection was sustained. ¹¹⁵ The record then discloses that "Counsel for defendant offer on cross-examination to show by the witness for the purpose of testing the credibility of his

testimony and the competency of his knowledge as to the value of this property in March, 1903, the fact that his father purchased the property appropriated by the railroad company in question in this case in the month of June, 1900, from the Consolidated Gas Company; that the said company had it upon the market for a number of years for sale, and was able to hold the property until it realized the fair market value of the same, and the price at the date of such purchase for which the said Consolidated Gas Company sold the property to the witness' father. Also to show that there was no such increase in the market value of the property between June, 1900, and March, 1903, as would be indicated by the price paid for the property in June, 1900, and the estimate now given by the witness of its market value in March, 1903." An objection to the offer was sustained. The defendant made practically the same offer in its case in chief, and this was refused. These rulings are assigned for error. The offers as a whole were properly refused. They contain too many points collateral to the main one sought to be proved, and the proffered evidence was not part of the defendant's case in chief.

But after serious consideration we have reached the conclusion that under the peculiar facts of this case the question as to the purchase price of the property in June, 1900, was proper cross-examination and should have been allowed. In *Davis v. Pennsylvania R. R. Co.*, 215 Pa. 581, 64 Atl. 774, 7 Ann. Cas. 581, we said: "But after a witness has testified in chief . . . the largest latitude should be allowed on cross-examination. . . . In fact, any and every pertinent question may be put to him on cross-examination which will enable the jury to place a fair estimate on his testimony as to the damages sustained by the plaintiff by the construction of the road through the latter's premises. The learned judge in his rulings failed to observe the difference between the ¹¹⁶ well-recognized measure of damages in such cases and the right of defendant's counsel to cross-examine the plaintiff's witnesses so as to enable the jury to give due weight to their testimony." It has been held in Pennsylvania from an early date that a consideration of particular sales in the neighborhood as fixing market value will not be allowed: *Pittsburg etc. R. R. Co. v. Patterson*, 107 Pa. 461. But as early as 1861, in *East Pennsylvania R. R. Co. v. Hiester*, 40 Pa. 53, we said on this subject: "The question might be proper by way of cross-examination to test the accuracy of the witness; and in *Becker v. Philadelphia & R. R. Co.*, 177 Pa. 252, 35 Atl. 617, 35 L. R. A. 583: "Of course, such evidence may be brought out by the cross-examination of witnesses"; in *Henkel v. Terminal R. R. Co.*, 213 Pa. 485, 62 Atl. 1085, "The good faith of a witness and the accuracy and extent of his knowledge may be tested by questioning him as to particular

sales, to ascertain whether he knew of and considered them in forming an opinion. These inquiries go directly to the value of the opinion expressed"; in *Gorgas v. Philadelphia etc. R. R. Co.*, 215 Pa. 501, 114 Am. St. Rep. 974, 64 Atl. 680. "The witness may be asked in cross-examination as to his knowledge of particular sales and the prices asked for property in the community for the purpose of testing his competency to testify; but such evidence in chief is clearly incompetent"; in *Schonhardt v. Pennsylvania R. R. Co.*, 216 Pa. 224, 65 Atl. 543, "Where the witness has testified to value, his good faith and accuracy and the extent of his knowledge may be tested on cross-examination by questioning him as to particular sales of property similarly situated to ascertain whether he knew of them and considered them in forming an opinion." The objection to the admission of testimony of particular sales is placed upon the theory that it would lead to the investigation of "collateral issues as numerous as the sales": *Pittsburg etc. R. R. Co. v. Rose*, 74 Pa. 362. It is plain that this does not apply to the admission of testimony concerning a single sale of the very property in controversy.

If a claimant who has expressed an opinion on the value ¹¹⁷ of his own property may be asked concerning sales of other properties in the neighborhood, for the purpose of testing his good faith, the question presents itself, why may he not be asked as to a sale of his own property, provided the sale in question is not too remote from the date of the appropriation? Surely, in a case like the present, where there is evidence showing *prima facie* a purchase price of \$140,000, and the witness claims a value of \$1,056,000, or an increase of over six hundred and fifty per cent in two years and eight months, such an inquiry is relevant to test his "good faith," if for no other reasons; subject, of course, to his right to prove any relevant explanatory facts: *Sanitary District of Chicago v. Pearce*, 110 Ill. App. 592; *St. Louis etc. R. R. Co. v. Smith*, 42 Ark. 265; *Ham v. City of Salem*, 100 Mass. 350. In many jurisdictions evidence of this character is considered directly pertinent on the question of value: *St. Louis etc. R. R. Co. v. Smith*, 42 Ark. 265; *Guyandotte Valley Ry. Co. v. Buskirk*, 39 Am. & Eng. R. R. Cas., N. S., 317; *In re Department of Public Works*, 53 Hun, 280, 6 N. Y. Supp. 750; *Enterprise Lumber Co. v. Porter*, 155 Ala. 426, 46 South, 773; *New Orleans etc. R. R. Co. v. Barton*, 43 La. Ann. 171, 9 South. 19; *Cobb v. City of Boston*, 109 Mass. 438; *Indianapolis etc. Traction Co. v. Shepherd*, 35 Ind. App. 601, 74 N. E. 904; *Ham v. City of Salem*, 100 Mass. 350; *Peabody v. New York etc. R. R. Co.*, 187 Mass. 489, 73 N. E. 649; *Lanquist v. City of Chicago*, 200 Ill. 69, 65 N. E. 681; *Sanitary District of Chicago v. Pearce*, 110 Ill. App. 592; *Swanson v. Keokuk & Western R. R. Co.*, 116 Iowa, 304, 89 N. W. 1088. But it is

not necessary to go so far in the present case, for the defendant here sought to have the testimony admitted as proper cross-examination.

We have examined the cases called to our attention by counsel for the plaintiff, and we find nothing in them which necessarily excludes the question on cross-examination. *Schuylkill Nav. Co. v. Farr*, 4 Watts & S. 362, was an action to recover damages for injuries to a grist-mill and furnace caused by the raising of a dam. The plaintiffs sought to introduce into their testimony in chief evidence ¹¹⁸ of the amount of money expended in the erection of a furnace which they claimed had been rendered useless. We said: "If the measure of damages is the injury done to the property estimated by its decreased value, then it is plain that the defendants cannot be made to pay the expenses of erecting the furnace, which may have exceeded the real value of the property." There is nothing in this case on the question of the right of cross-examination. *Commonwealth v. Pittsburgh & Connellsville R. R. Co.*, 58 Pa. 26, 98 Am. Dec. 298, was a proceeding by the state to take the franchise and property of the defendant company under an act of assembly which provided that as full compensation the company should be entitled to receive payment for expenditures made in connection with work or construction upon its road. We held this rule of valuation to be inadequate and unjust, and in so doing Mr. Justice Sharswood said by way of illustration: "It would be no just compensation to an individual to pay him for his land and improvements merely what they had cost him. Their value may have been doubled in the lapse of time and by the change of circumstances." This is quite true as a general proposition, the application of which would depend upon the facts in each particular case; but it has no relevancy to the question we have under consideration.

Mifflin Bridge Co. v. Juniata County, 144 Pa. 365, 22 Atl. 896, 13 L. R. A. 431, was a proceeding to condemn the bridge and the franchise of the owning company. A witness who had taken the contract for the erection of the bridge was called by the company and asked the value of the structure. This was objected to on the ground that he should have been asked the contract price. We held that the objection was not well taken, and said: "The true question was the value of the bridge, not what it cost. The contractor may have taken it at too low a figure, or the owner may have paid too much. The county is entitled to pay for it at its actual value at the time of taking." So many elements enter into the contract price of a ¹¹⁹ bridge, dependent upon the cost of materials and labor at the time of its construction, the competition in the letting of the contract, and a hundred and one other things, that the price paid would be a most uncertain guide,

This case must be taken on its own facts, and has not controlling force on the question before us. In *Davis v. Pennsylvania R. R. Co.*, 215 Pa. 581, 64 Atl. 774, 7 Ann. Cas. 581, an effort was made to show the price which the claimant had paid for his farm seventeen years prior to the appropriation. We said: "Such evidence would have given the jury no proper estimate of its value immediately before the taking by the railroad." The time was too remote. In *Schonhardt v. Pennsylvania R. R. Co.*, 216 Pa. 224, 65 Atl. 543, counsel for the defendant proposed to ask the plaintiff on cross-examination what the two adjoining properties sold for within the past two years, "for the purpose of having the testimony go to the jury on the question of the value" of the plaintiff's property. We said: "The offer was properly rejected. . . . It is within the limits of proper cross-examination to show that the witness is unfair or that his opinion is founded on a misapprehension of facts, but it is not proper under the guise of cross-examination to develop as affirmative evidence of value facts that neither party could have shown in chief." Here one of the avowed purposes was to have the testimony go to the jury on the question of value, not to test the credibility of good faith of the witness. Of course, under our authorities, the offer was rejected. These are the only cases approaching the point under investigation to which we have been referred.

In *East Brandywine etc. R. R. Co. v. Ranck*, 78 Pa. 454, the defendant proffered evidence that the plaintiff had offered to sell his farm for a certain price, and the rejection of this evidence was assigned for error. In reversing we said: "While the evidence referred to was not conclusive, nor perhaps very important, it ought not to have been excluded." The fact that the plaintiff had offered to sell his farm at a ¹²⁰certain price did not fix its value, but under the circumstances of that case we viewed it as some evidence to go to the jury; and so under the circumstances of this case, while the testimony sought to be elicited by the question propounded to the claimant concerning the price paid for the land would not fix the value of the property, it would be some evidence to be considered in weighing his opinion as to its value: *Kentucky & Indiana Bridge Co. v. Held*, 16 Ky. Law Rep. 160; *Rosenstein v. Fairhaven & Westville R. R. Co.*, 78 Conn. 29, 60 Atl. 1061. Where such testimony is offered, the question of its acceptance or rejection will necessarily depend upon the circumstances in each particular case, the disparity between the price paid and the value claimed, the length of time between the sale and the appropriation, and other elements which may present themselves tending to show the worth of the testimony as evidence affecting the importance, and throwing light upon the accuracy and good faith, of the opinion

expressed by the witness. Therefore, the question will always be one for the exercise of discretion on the part of the trial judge. But in the present case the record indicates that the trial judge did not reject the testimony in the exercise of such discretion, but rather because he considered it not proper cross-examination. We are of opinion that it was proper cross-examination and should have been admitted. We overrule the twelfth and thirteenth assignments of error and sustain the eleventh.

The market value of a particular piece of real estate is to be measured by the price usually given for such property in that neighborhood, "making due allowance for differences of position, soil and improvement": *Searle v. Lackawanna & Bloomburg R. R. Co.*, 33 Pa. 57. In *Henkel v. Wabash P. Terminal R. R. Co.*, 213 Pa. 485, 62 Atl. 1085, we said: "We see no reason why a party against whose interest a witness has testified may not show that the opinion expressed is valueless as evidence because it is founded on a misapprehension of the facts. . . . This does not ¹²¹ lead . . . to the trial of collateral issues. It goes only to impair the value of an opinion which has become evidence in the case by showing it is based on a misapprehension of the real facts." In the case at bar the price paid in the sale of a property known as the Klondike Warehouse figured very largely with nearly all of the witnesses as a standard of value of real estate in the vicinity. In the examination of witnesses counsel for the plaintiff called attention to the fact that this sale was the nearest in locality to the plaintiff's property, and he examined the owner of this Klondike property with great particularity concerning the sale. Both counsel for plaintiff and defendant interrogated witnesses regarding the value of the buildings as distinguished from the value of the property as a whole, and in this way they derived the square foot value of the land. Plaintiff's witnesses fixed the value of the improvements at a comparatively low figure, which of course proportionately increased the value of the lot. The defendant's offer to prove the fair value of the buildings at the time of the sale was rejected, and counsel contends that had this testimony been admitted it would have shown the improvements to have been worth at least double the value placed on them by certain of the plaintiff's witnesses; which well might have materially affected the value of the opinion expressed by these witnesses. On this state of facts we are of opinion that the testimony should have been received. The fourth assignment of error is sustained.

It becomes unnecessary for us to pass upon the remaining assignment of error. To enter upon a discussion of those which question the competency of certain of the witnesses called by plaintiff to prove value would unduly extend this

opinion. The competency of at least six of the witnesses called for that purpose is not questioned in the assignments, and presumably their testimony would have been sufficient to take the case to the jury. But as the case must go back for another trial, we take occasion to say that although "the market value of ¹²³ land is not a question of science and skill upon which only an expert can give opinion" (Pennsylvania etc. Canal Co. v. Bunnell, 81 Pa. 414), yet in each case the trial judge should see to it that every witness called to prove value has a proper foundation of knowledge to make his opinion of some real worth, before admitting it as evidence: Friday v. Pennsylvania R. R. Co., 204 Pa. 405, 54 Atl. 339. In large cities "neighborhood" is a relative term, and the field which a witness may take into consideration in forming an opinion of the selling price of land in the vicinity of a particular property should not only be reasonably adjacent thereto, but it should be of the same general character as the immediate locality in which such property is situated; otherwise the opinion is of little value.

The judgment is reversed with a venire facias de novo.

Eminent Domain—Measure of Damages.—Where the character of structures is well adapted to the kind of land upon which they are erected, the value of the buildings enhances the value of the land, and such enhanced value of the land is the measure of the owner's compensation when the property is condemned for public use: In re City of New York, 198 N. Y. 84, 139 Am. St. Rep. 791, and see authorities cited in the cross-reference note thereto.

MAHAFFEY v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[229 Pa. 285, 78 Atl. 143.]

FIRES—Damages for Burning Standing Timber.—The measure of damages for negligently burning over woodland is the difference in the market value of the land before and after the fire. (p. 731.)

FIRES—Damages for Burning Standing Timber.—In an action for the negligent burning over of woodland covered with a growth, none of which was matured as timber, strictly speaking, but much of sufficient size to be merchantable for certain purposes, and the remainder a smaller growth ripening into marketable material, two standards of measurement of loss cannot be applied, one for the material that was marketable, and another for that not marketable. The loss is an entire one, and the only standard applicable is one covering every element of loss—the difference in the market value of the land before and after the fire. (p. 731.)

TREES—Measure of Damages for Destruction.—The measure of damages when ornamental or fruit-bearing trees or growing timber is cut, is the difference in the value of the realty before and after the cutting. (p. 731.)

FIRES—Burning of Standing Timber—Evidence of Loss.—In an action for negligently burning over part of a tract of woodland, evidence of the condition of the unburned portion, which is of the same character as that which was burned, is admissible as showing what has been destroyed. (p. 732.)

Trespass to recover damages for the negligent burning over of woodland.

Thomas H. Murray, James P. O'Laughlin and Hazard Alex. Murray, for the appellants.

A. L. Cole, A. M. Liveright, Harry Byers and David L. Krebs, for the appellees.

286 STEWART, J. In admitting evidence as to the difference in market value of plaintiffs' land before and after the fire, there was no departure from the issue as defined in the pleadings. If the plaintiffs' claim had been for the loss of a **287** definite amount of marketable timber of a certain grade or quality, such evidence would not only have been irrelevant, but decidedly misleading; but such was not their claim. True, in the statement filed the property is described as a tract of land "largely woodland, on which there were standing and growing a large number of hemlock, chestnut, oak, pine and other valuable timber trees, a considerable part of which were suitable to the manufacture of merchantable lumber"; but the actual injury complained of in the statement was, that through the negligent act of the defendant company "one hundred and fifty acres of plaintiffs' woodland were burned over and destroyed." The evidence showed that the timber on this whole tract had some years before been cut and marketed, and at the time of the fire the entire acreage was covered by a new growth, none of it matured as timber, strictly speaking, yet much of it sufficient in size to be merchantable for certain purposes. It does not follow that what was not presently marketable because of immaturity was without value. This smaller growth was ripening into marketable material and consequently gave added value to the land it covered. This could be said of the entire growth, since none of it was fully matured. Two standards of measurement of loss could not be applied—one for the material that was marketable and another for that not marketable. The loss was an entire one, and the only standard applicable would be one covering every element of loss. Here the realty was affected apart from the loss sustained in the destruction of what was presently marketable. The rule governing such cases is thus stated in 3 Sedgwick on Damages, section 933; "The measure of damages when ornamental or fruit-bearing trees or growing timber are cut is the difference in the value of the realty before and after." The authorities cited in the note to this text show how widely this rule prevails. The

measure of damages applied here was the correct one, and assignments of error Nos. 1, 2, 3, 4 and 10 are overruled.

²⁸⁵ The chief value of plaintiffs' land was in prospective yield of timber. It was plaintiffs' contention that the fire had practically destroyed the reproductive capacity of the land in this regard, and that only as assisted by actual reforestation could it be made to produce. Evidence was admitted to show the cost of such reforestation. If this evidence was intended as a basis for estimating plaintiffs' damage, it was all wrong to admit it. The cost of restoring the property to its condition before the fire would not be the correct standard of measurement, but the difference in the market value of the real estate for any purpose to which a purchaser might devote it. We would regard the admission of this evidence as reversible error were we not convinced that it was without prejudice to the defendant. The cost of reforestation as stated by the witness is so far below the lowest estimate given by any witness of the depreciation of the market value of the land—the only true measure—that it is manifest that the evidence advantaged rather than prejudiced the defendant. The assignments 7, 8 and 9 are accordingly overruled.

The land burned over was part of a larger tract. Evidence was admitted without objection that the growth on the land burned over was of the same kind, character, thickness and density as that standing on the unburned portion. Following this, a witness was called to testify to conditions on the unburned portion, not as preliminary to any estimate of damages by the witness, but to inform the jury as to what had been destroyed. If this was not proper evidence, it could only be because it was not the best. We are by no means sure that it was not the best in view of the fact that the jury, at the instance of the defendant, were taken to the premises to examine for themselves, and that they were there permitted to see the whole tract including the part unaffected by the fire.

We find nothing substantial in any of the assignments of error and the judgment is affirmed.

Measure of Damage for Injury to Trees.—A land owner whose trees have been killed by fire is not necessarily limited in his recovery to their value for lumber or other such uses; hence evidence is not admissible to show that the trees not consumed were as valuable for the purposes of timber immediately after the fire as they were before: *Manitou & Pike's Peak Ry. Co. v. Harris*, 45 Colo. 185, 132 Am. St. Rep. 140. The true measure of damages, where standing timber is injured by fire, is the diminution in the value of the land caused by the injury: *Miller v. Neale*, 137 Wis. 426, 129 Am. St. Rep. 1077. The measure of damage for the injury to an orchard from fire is not the difference in value between the whole farm before and after the fire, but the reasonable value of the trees destroyed and the difference in value of those injured before and after the fire: *Louisville & Nashville*

R. R. Co. v. Beeler, 126 Ky. 328, 128 Am. St. Rep. 291, and see the cases cited in the cross-reference note thereto.

Negligence by a Land Owner in Stating or Managing Fires is discussed in the note to *Weitzmann v. Barber Asphalt Co.*, 123 Am. St. Rep. 576; and the liability of private persons for loss by fires is the subject of a note to *McNally v. Colwell*, 30 Am. St. Rep. 501,

RIGGS v. NEW CASTLE.

[229 Pa. 490, 78 Atl. 1037.]

DEEDS—Form and Sufficiency—Grant for Certain Purpose.—

An agreement under seal by which "The parties of the first part upon consideration of the premises hereinafter expressed, hereby agree that the said party of the second part, its lessees and assigns may and shall occupy forever for purposes of wharf all that strip of land . . . in consideration whereof said Borough [party of second part] hereby agrees that said party of the first part may and shall occupy from and after the date hereof without let, hindrance or interference from the said Borough to the sole use, benefit and behoof of said parties of the first part, their heirs and assigns forever and for whatever purpose the said parties of the first part may see proper," a certain piece of land, while not styled a deed or conveyance, is an agreement of bargain and sale, founded upon a valuable and sufficient consideration, and, when recorded, has the effect of a feoffment with livery of seisin or of a deed under the statute of uses. (p. 734.)

DEEDS—Formal Parts, Whether Essential.—It is not absolutely essential that a deed should contain all the ordinary formal parts. It is sufficient if the matter written is legally and orderly set forth by words which clearly specify the agreement and meaning of the parties and bind them. (p. 734.)

DEEDS.—The Word "Successors" is not Essential to pass a fee. (p. 734.)

DEEDS.—The Words "Bargain and Sale" are not Necessary to constitute a deed of bargain and sale, in order to pass a fee simple. (p. 734.)

DEEDS—Statement of Purpose of Grant.—The mere expression of a purpose will not of itself debase a fee; thus, the addition of the words "for the purpose of wharf" to words sufficient to pass a fee simple in a grant to a municipality, not preceded or followed by any words of condition or limitation, do not diminish the estate created, but should be taken as used for the purpose of showing the grant to be lawful on its face, that is, made for a purpose for which the municipality had power to acquire real estate. (p. 736.)

H. K. Gregory, S. P. Emery and T. W. Dickey, for the appellants.

James A. Gardner, for the appellee.

491 **MOSCHZISKER, J.** The proper construction of a written instrument is the essential point for determination in this case.

In 1856 the land in controversy was owned by certain ancestors of the present plaintiffs. On March 1st of that year they, as parties of the first part, entered into a written agreement under seal with the borough of New Castle, as party of the second part, which was duly acknowledged and filed of record. This writing provides: "The parties of the first part upon consideration of the premises hereinafter expressed, hereby agree that the said party of the second part, its lessees and assigns may and shall occupy forever for purposes of wharf all that strip of land lying on the west side of Neshannock creek [describing the ⁴⁹² land in controversy] in consideration whereof said Borough hereby agrees that said parties of the first part may and shall occupy from and after the date hereof without let, hindrance or interference from the said Borough to the sole use, benefit and behoof of said parties of the first part, their heirs and assigns forever and for whatever purpose the said parties of the first part may see proper" [here follows a description of a piece of land then owned by the borough].

The parties contend that this instrument only gave to the borough an easement in gross which has since been terminated by operation of law. The defendant contends that it created a fee absolute.

While the writing in question is not styled a deed or conveyance, it is clear that it is an agreement of bargain and sale founded upon a valuable and sufficient consideration, and having been recorded, it had the effect of a feoffment with livery of seisin or of a deed under the statute of uses: *Eckman v. Eckman*, 68 Pa. 460. "Although there are certain formal parts usual to deeds, yet it is not absolutely necessary that a deed should contain all of these parts, it being sufficient that the matter written should be legally and orderly set forth by words which clearly specify the agreement and meaning of the parties and bind them. Nor is any prescribed form essential to the validity of a deed; and a deed informally drawn will convey the fee": 13 Cyc. 537; *Auman v. Auman*, 21 Pa. 343. The word "successors" is not essential to pass a fee: *Wilkes-Barre v. Wyoming Historical etc. Society*, 134 Pa. 616, 19 Atl. 809; "so the words 'bargain and sale' are not necessary to constitute a deed of bargain and sale, in order to pass a fee simple": *Krider v. Lafferty*, 1 Whart. 303. "In the primary and most familiar sense of the word, 'occupy' is the equivalent of the word 'possess.' It implies the conception of permanent tenure for a period of greater or less duration": *Lacy v. Green*, 84 Pa. 514; *Lane v. Nelson*, 167 Pa. 602, 31 Atl. 864; and the word "forever" means "eternally": 19 Cyc. ⁴⁹³ 1353. "The word . . . 'forever' is . . . one appropriate to . . . the durability of land": *Landell v. Hamilton*, 175 Pa. 327, 34 Atl. 663, 34 L. R. A.

227; and "it is the natural adjunct of a fee simple": Lessee of Hall v. Vandegrift, 3 Binn. 374; Saxton v. Mitchell, 78 Pa. 479.

The writing stipulates that the borough of New Castle, its lessees and assigns, may and shall occupy forever certain land of the grantors, and that the grantors may and shall occupy forever certain land belonging to the borough. This was a mutual grant, and it seems plain that it must have been the intention of the parties that the words "may and shall occupy forever" should have the same meaning in both instances. This language was sufficient to pass a fee absolute, and the additional words "for the purposes of wharf" used in connection therewith should not be taken to diminish the estate so created. As noted by the court below, the words of the grant "are not preceded or followed by any words of condition or limitation. The instrument does not state that the grant is made upon condition or provided that a wharf be built or maintained, nor does it say that the grant is to continue 'so long as' or during such time as the premises are used for the purposes of a wharf, nor are there any other words of condition or limitation used."

In Slegel v. Lauer, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547, it is said: "The mere expression of a purpose will not of and by itself debase a fee. Thus, a grant in fee simple to county commissioners of land 'for the use of the inhabitants of Delaware county to accommodate the public service of the county' was held not to create a base-fee . . . ; as also a grant to county commissioners and their successors in office of a tract of land with a brick courthouse thereon erected 'in trust for the use of said county, in fee simple,' the statute under which the purchase was made authorizing the acquisition of the property for the purpose of a courthouse, jail and office for the safekeeping of the records. . . . Similarly a devise of land to a religious body in fee 'there to build a meeting-house upon' was held to ⁴⁹⁴ pass an unqualified estate . . . ; as also a grant to a congregation 'for the benefit, use and behoof of the poor of . . . the congregation . . . forever, and for a place to erect a house of religious worship, for the use and service of said congregation, and if occasion shall require a place to bury their dead.' . . ."

Most of the cases on the subject under discussion are reviewed in the opinion of Judge Endlich from which we have just quoted and which is reported and expressly approved by this court in the case last cited. It is there pointed out that this court has ruled more than once that a declaration in a grant to a corporation that land is conveyed for certain purposes does not necessarily import a

limitation of the fee. To again quote from that opinion: "Such a declaration can amount to no more than an explicit assertion of the intended legality of the grant. As was said in the case of *Griffitts v. Cope*, 17 Pa. 96: 'The use to which the granting clause declares that this land is to be applied is of the character which the law requires. . . . The presumption would therefore appear fair and obvious that by that declaration the deviser merely meant to make the grant lawful upon its face'; and in *Brendle v. German Reformed Congregation*, 33 Pa. 415: 'What, then, is the efficacy of the declaration that the congregation holds the land for the use of its poor, for a church, and for a burial ground? Nothing, except to show that they hold it for a purpose for which the law allows congregations to hold land. Not to limit their own title, but to recognize the uses allowed by law.'" In *First Methodist Church v. Old Columbia Public Ground Co.*, 103 Pa. 608, we stated: "The authorities show that the recital of the consideration and the statement of the purpose for which the land is to be used are wholly insufficient to create a conditional estate." The subject is also discussed in *Wilkes-Barre v. Wyoming Society*, 134 Pa. 616, 19 Atl. 809, and in *Sellers M. E Church's Petition*, 139 Pa. 61, 21 Atl. 145, 11 L. R. A. 282.

Under the act of April 3, 1851 (Pub. Laws, 320), the borough ⁴⁹⁵ had the right "to hold, purchase and convey such real and personal estate as the purposes of the borough shall require." It had no right to acquire real estate unless for a proper municipal purpose, nor to convey its real estate unless to serve such purpose. With this in mind, and considering that the writing makes no provision for a forfeiture or termination of the estate and uses no words which must be taken as a condition, we construe the phrase, "for the purposes of wharf," not as a limitation of the estate given to the borough, but rather as used for the purpose of showing the mutual grant "to be lawful upon its face."

As we agree with the court below that the borough took a fee, it becomes unnecessary to pass upon the question of the extinguishment of the alleged easement.

The assignments of error are all overruled and the judgment is affirmed.

Words Sufficient to Constitute a Conveyance are discussed in the note to *Harlowe v. Hudgins*, 31 Am. St. Rep. 26.

A Deed of Land to a Municipality, which in the habendum adds the words, "as and for a street to be kept as a public highway," does not create a condition subsequent: *Kilpatrick v. Baltimore*, 81 Md. 179, 48 Am. St. Rep. 509; and a prohibitive clause in the habendum clause of a deed of land to a city, that "no buildings for any other municipal purpose than that of a city hall shall ever be erected on the granted premises," does not, without words of re-entry or forfeiture,

create a condition subsequent: *Ecroyd v. Coggershall*, 21 R. I. 1, 79 Am. St. Rep. 741.

A Deed will not be Construed to Create a Conditional Estate unless the language used unequivocally indicates an intention upon the part of the grantor to that effect: *Huron v. Wilcox*, 17 S. D. 625, 106 Am. St. Rep. 788.

SNYDER v. ERWIN.

[229 Pa. 644, 79 Atl. 124.]

WILL—Undue Influence.—The Existence of Meretricious Relations between a testator and a married woman for some time before, at the time of, and continuing after the execution of the will, taken in connection with the fact she is the sole devisee to the exclusion of an only daughter against whom no other grievance existed than that she had declined to receive this woman into her home, is evidence of an undue influence affecting the dispositions of the will, and sufficient in itself to carry the case to the jury. (p. 738.)

WILL—Undue Influence—Meretricious Relations.—Evidence that the sole beneficiary under a will, a married woman, was persistent in following the testator, a man of seventy-five, to his different boarding places, and in accompanying him to public places, daytime and night; that she was most assiduous in showering her attentions upon him in various ways, unbecoming in the wife of another; that she carried on adulterous commerce with him; and that she addressed him in terms of dearest affection, to which he replied in equally ardent terms, is sufficient to establish undue influence. (p. 739.)

L. P. Monahan and John D. Brown, for the appellant.

R. T. M. McCready, for the appellee.

645 STEWART, J. This was an issue *devisavit vel non*, in which the jury found against the paper propounded as the last will of Charles S. Jenkins, on the ground that the same had been procured by undue influence. A general reference to the evidence from which the jury derived their conclusion will suffice. Charles S. Jenkins, at the time of the execution of the paper, was a man of about seventy-six years. He was then, and for years had been, a resident of Pittsburg. He was twice married, but had been a widower for some years before his death. His only children were by his first wife, two daughters. One of them died in his lifetime, married, but without issue; the other survives, is married, and is the contestant in this proceeding. Upon the death of his second wife Charles S. Jenkins discontinued his home life and thereafter boarded. He had retired from business about 1901. About 1906 he went to the home of his daughter in Sewickley and resided with her for a year. He then returned to Pittsburg and found a new boarding-

house. Here he remained the better part of a year, when becoming somewhat enfeebled he was taken by the proponent, Mrs. Amanda Snyder and her husband, to their home in Pittsburg, where he continued to reside until his death June 7, 1908. The estate left is of the value of about ten thousand dollars. By the will in issue he gives to his daughter, the contestant, the sum of five dollars, and the entire balance of his estate to Mrs. Amanda Snyder, the proponent. The first five assignments of error may be considered together, since they raise but the single question, whether there was sufficient evidence in the case to warrant a finding by the jury of undue influence in the procurement of the will. The verdict of the jury necessarily involves a finding that at the date of the execution of this paper the proponent was sustaining meretricious relations with Charles S. Jenkins. The issue with respect to this matter of fact was too squarely presented to be avoided; and as we read the evidence no different conclusion in regard to it was possible than that ⁶⁴⁶reached by the jury. The letters written by the proponent to Charles S. Jenkins and introduced in evidence are so many unequivocal and unmistakable acknowledgments of the relation. Such of the letters as are admitted to be genuine as well as those which without acknowledging she would not distinctly repudiate are equally incriminatory with those she disavowed. The evidence leaves the genuineness of none of them in doubt. It clearly appears that the unlawful relation thus established began several years before; that it existed at the making of the will, and that it continued thereafter. This fact, taken in connection with the further fact that the will gives the entire estate to the proponent, to the exclusion of an only daughter against whom no other grievance existed than that she had declined to receive into her home the woman she believed to be her father's paramour, was evidence of an undue influence exerted by the proponent affecting the dispositions of the will, and sufficient in itself to carry the case to the jury. For this we have express authority in *Dean v. Negley*, 41 Pa. 312, 80 Am. Dec. 620, a case more closely resembling this in its facts than any to be found in our books. It is a mistake to suppose that the rule in that case has ever been departed from. *Allshouse v. Kelly*, 219 Pa. 652, 69 Atl. 88, and *Chidester's Estate*, 227 Pa. 560, 76 Atl. 418, cited by appellant's counsel, are so wholly unlike the present case on the facts that they are wholly inapplicable here, and nothing can be found in either of them that in any way conflicts with the earlier case. *Dean v. Negley*, 41 Pa. 312, 80 Am. Dec. 620, announces no general rule applicable in all cases where a meretricious relation has been shown, but it does decide that when that meretricious relation has

been shown, and the will diverts the entire estate from the natural objects of the testator's bounty and gives it over to a married woman with whom adulterous commerce has been carried on, a presumption of fact arises, viz., that the will was procured by undue influence. And these were exactly the facts in this case. If there were nothing more in the evidence than what we have referred to, the ⁶⁴⁷ case would have been for the jury, and we would be without disposition to disturb their verdict. But there was far more. There was evidence from which the jury might have found that proponent was present at the execution of the will; it clearly appeared that she was persistent in following this old man to his different boarding places, and in accompanying him to public places daytime and night; and that she was most assiduous in showering her attentions upon him in various ways, all so unbecoming in one who was the wife of another as to suggest, now that the disposition of the estate is made known, a purpose that had relation to the framing of it. Then, too, in this connection, the letters offered in evidence are of like significance. When a woman, the wife of a second husband and a grandmother, writes to a man of seventy-five years without family, with ample property, with whom she is carrying on adulterous commerce, and addresses him in terms of dearest affection, protesting abiding love for him and him alone, it is no strained inference that the actuating motive in her case is some other than the passion so ardently expressed. When the party so addressed, in full assurance of the sincerity of the protestations, replies in equally ardent terms, it is some evidence at least that the process of mental decay in his case had not simply begun, but had so far progressed as to render him pliable in the hands of a designing woman to such extent that he could readily be persuaded to accept her will for his own. There is abundant evidence in the case from which the jury could derive the weakened condition of mind in the one and the mercenary purpose in the other; and the case abounds in circumstances all tending to show that advantage was taken of the opportunity thus afforded. These circumstances do not call for further or fuller recital. It is only necessary to add that the case was submitted to the jury in a most clear and impartial charge, in which both the law and the evidence were fully and correctly stated. We have already said that the letters of the proponent were properly in ⁶⁴⁸ evidence. The witness who testified as an expert to their genuineness had sufficient qualifications.

The assignments of error are overruled and the judgment is affirmed.

Undue Influence as Affecting a Will is considered in the notes to *In re Hess' Will*, 31 Am. St. Rep. 670; *Small v. Small*, 16 Am. Dec. 257.

The Presumption of Undue Influence in the execution of a will is the subject of a note to *Richmond's Appeal*, 21 Am. St. Rep. 94; and the presumption that undue influence was exerted by a concubine is considered in the note to *Shipman v. Furniss*, 44 Am. Rep. 537. It has been thought that there is no presumption of undue influence from the fact that a man, who is of sound mind, makes a will in favor of his mistress or of one with whom his relations have been meretricious: *Fulton v. Freeland*, 219 Mo. 494, 131 Am. St. Rep. 576. And see *Saxton v. Krumm*, 107 Md. 393, 126 Am. St. Rep. 393; *In re Shell's Estate*, 28 Colo. 167, 89 Am. St. Rep. 181.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

STEPHENS v. DUBOIS.
[31 B. I. 138, 76 Atl. 656.]

ATTORNEY—Purchase of Subject of Litigation.—An attorney will not be permitted to acquire an interest adverse to his client. When retained in litigation to enforce the claims of his client against a certain estate, he will not be permitted to purchase the residue of the estate to the prejudice of the client. (p. 745.)

ATTORNEY—Purchase of Subject of Litigation.—In an action by a client to have a purchase of the subject of litigation by his attorney held to be one in trust for him, it is not necessary to show any improper advantage was gained by the attorney. It is at the option of the client to repudiate or affirm the transaction irrespective of any fraud. (p. 745.)

ATTORNEY—Purchase by Attorney—Trustee for Client.—Where an attorney, retained in litigation to enforce claims of his client against an estate, purchases the residue thereof, he will be held to have done so in trust for the client and decreed to convey the same to the client upon reimbursement of his outlay. (pp. 748, 749.)

ATTORNEY—Action to Declare Trust—Laches.—A delay of sixteen months in the bringing of an action by a client to have a purchase by his attorney declared one in trust for him, where the case was heard on the bill and answer, is not such laches as to bar the action. (p. 748.)

LACHES—Prejudice or Disadvantage Essential.—Laches, in legal significance, is not mere delay, but delay that works a prejudice or disadvantage to another. (p. 748.)

LACHES—Knowledge and Freedom of Action.—A party who is entitled to set a transaction aside cannot be charged with delay, acquiescence or confirmation, unless there has been full knowledge of all the facts, and perfect freedom of action. (p. 749.)

Samuel H. Stephens, pro se ipso.

Irving Champlin, for the defendants.

139 **BLODGETT, J.** This is a bill in equity brought against former counsel of the complainant to establish a trust in a purchase of the residuum of an estate of which the complainant was then a creditor, and against which estate he then had an action pending for the collection of his claim in which the respondent Henry J. Dubois was his counsel,

who took a deed to the same in the name of his son, Russell C. C. Dubois, the other respondent.

After hearing on bill and answer, there being no replication, the following rescript was filed: "Tanner, P. J. This is a bill in equity and was heard upon bill and answer. We think it is clear that the respondents bought and hold the property involved as trustee to the complainant. We think, however, it is equally true that the complainant has slept upon his rights. He has waited for at least sixteen months before claiming his rights under the trust. The case being heard upon bill and answer, the bill must be viewed in the light of the respondents' denials. Thus viewed, the complainant alleges no excuse for his failure to act sooner, and a delay for at least sixteen months, in view of the complainant's refusal to purchase the estate when it was bought by the respondents, and in view of his statement that he would have nothing to do with it, must be considered an unreasonable length of time.

"We hold, therefore, that the complainant is estopped to assert his rights, and the bill is dismissed."

The material allegations of the bill are as follows: The complainant, having been given a large amount of personal property by one Mary T. Merriss just prior to her decease, ¹⁴⁰ engaged one of the respondents, Henry J. Dubois, to defend him in a suit brought by the administrator on the estate of said Mary T. Merriss against him for the purpose of recovering said personal estate and having said gift set aside. This complainant also had a claim against said estate for professional services rendered by him to said deceased, and also a claim on a promissory note made by said deceased to him for the sum of \$5,000.

Said Henry J. Dubois was also engaged to prosecute this claim for him against said estate. It is also alleged that, while said litigation was pending, this complainant, through his said attorney, entered into negotiations with the residuary legatees named in the will of said Mary T. Merriss with a view of purchasing said interests, it being considered for the benefit of the complainant to purchase the same in view of his litigation with said estate; that the said Henry J. Dubois then had money belonging to this complainant in his hands and was directed by the complainant to make such purchase for him, and that said Dubois afterward requested this complainant to assign to him all his claim against said estate, and said interests, to hold as collateral security therefor. That said Dubois did purchase said residuary interests and had them assigned to his son Russell C. C. Dubois, who now holds the same for his father, said Russell never having advanced any money in payment of the same. That in November 1908, in the trial of an action at law

brought by said Henry J. Dubois against the complainant for legal services, he learned that said transfer had been made to said Russell C. C. Dubois. That afterward this bill was filed by the complainant for the purpose of having said Russell declared to hold said residuary interests for the benefit of this complainant, he paying whatever sum said Henry J. Dubois may have advanced for the purposes of paying for the same.

So much only of the answer of the respondent Henry J. Dubois as is material to the purposes of this inquiry is here given: "2d. He admits the allegations in par. 2 of said bill to be true." Paragraph 2 of the bill thus admitted is ¹⁴¹ as follows: "2. That at the time this complainant consulted one Henry J. Dubois, an attorney and counselor at law of this court, in relation to the same, he then being and having been for a long time prior thereto his attorney in other suits then pending in this court, and he secured the services of said Dubois in relation to said gift and other matters incident thereto and connected therewith and also for the purpose of representing him and defending his interests in suit brought by said administrator to have said gift set aside."

In paragraphs 7, 8, and 9 of the answer, the respondent Henry J. Dubois states his contention relative to the matter here in issue:

"7th. He denies the truth of the allegations in par. 7 of said bill and avers that this defendant suggested to the complainant that he, said complainant, purchase the interests of the residuary legatees and devisees under said will; that the complainant said that he had no money with which to purchase the same; that this defendant was to procure the necessary money for such purchase, to loan to the said complainant and was to receive security from said complainant for such loan; that this defendant entered into negotiations with such residuary legatees and devisees for the purchase of said residuary estate for the complainant and for the conveyance to him of the same; that deeds and assignments of such residuary estates were drawn by this defendant conveying the same to this complainant; that after agreement with said residuary legatees and devisees had been made by this defendant and the price agreed upon for the conveyance of such residuary estate to this complainant, this defendant drew an assignment from said complainant to this defendant of a certain verdict for the sum of \$650, which said complainant had obtained against the estate of said Mary T. Merriss, and also of a certain promissory note for the sum of \$5,000, to be held by this defendant as security for the sum of \$650, to be loaned by this defendant to this complainant for the purchase of such residuary estates; that the said complainant refused to execute said assignment or to

give any security for the money so to be loaned as aforesaid by this ¹⁴² defendant, and absolutely refused to proceed with the purchase of said residuary estates and told this defendant that he would not purchase said residuary estates, that he would have nothing further to do with the matter.

"8th. He denies that he ever drew, or requested the complainant to execute such an assignment as is alleged in par. 7 of said bill. He admits that after the refusal of the complainant to purchase said residuary estates, this defendant entered into negotiations with such residuary legatees and devisees for the purchase of said residuary estates for his son Russell C. C. Dubois, one of the defendants, and did purchase the same for him for the sum of \$676, and the same were conveyed to said Russell C. C. Dubois by the said residuary legatees and devisees, and are now held by the said Russell C. C. Dubois. He denies that such purchase was completed immediately after the refusal of the said complainant to purchase the same and avers that such conveyance was made to the said Russell C. C. Dubois on September 6th, 1906. He admits that such conveyance was made without the knowledge or consent of this complainant and avers that said complainant was afterward notified of the same.

"9th. He denies the truth of the allegations in par. 9 of said bill except so far as the same are above admitted, and as follows:—He admits that he advanced the money for the said purchase of said residuary estates for the said Russell C. C. Dubois and that the said Russell C. C. Dubois is his son."

The respondent Russell C. C. Dubois makes these admissions in paragraphs 7 and 9 of his answer: "7. On information and belief he denies the allegations contained in par. 9 of said bill, except as follows:—That the transfer mentioned was made to this defendant; that said Henry J. Dubois used his own money for the purchase of said residuary estates; that he is the son of said Henry J. Dubois and that the said Henry J. Dubois negotiated the purchase of said residuary estate for this defendant. . . . 9. He admits that the complainant requested him to convey said residuary estate to him and that he refused so to do. He denies that said complainant offered ¹⁴³ to pay therefor the sum paid for the same with costs and expenses."

Both respondents deny any wrong or damage or injury to the complainant, and that they knew the value of the residuum so purchased.

1. The first question thus presented is as to the propriety of the purchase of the residuary share in an estate by an attorney whose client is then engaged in litigation to enforce his claims as creditor of that estate. Upon this point there

can be but one opinion. The attorney cannot thus be permitted to acquire an interest adverse to his client. By as much as the client succeeds in establishing his claim against the estate, by exactly that amount is the value of the residuary interest so purchased by his attorney diminished. He is in effect suing himself while acting as attorney for his client, and cannot thus occupy the inconsistent positions of defendant and attorney for the plaintiff, inasmuch as no man can thus serve two masters.

Thus in *Henry v. Raiman*, 25 Pa. 354, 64 Am. Dec. 703, it is said by Lewis, C. J.: "Where fidelity is required, the law prohibits everything which presents temptation to betray the trust. The orison which deprecates temptation is the offspring of infinite wisdom, and the rule of law in accordance with it rests upon the most substantial foundations. The purchase by an attorney of an interest in the thing in controversy, in opposition to the title of his client, is forbidden, because it places him under temptation to be unfaithful to his trust. Such a purchase, therefore, inures to the benefit of his client."

In *Case v. Carroll*, 35 N. Y. 385, the court of appeals of New York held: "It is a settled principle of equity that no person, who is placed in a situation of trust or confidence in reference to the subject of the sale, can be a purchaser of the property on his own account. And this principle is not confined to a particular class of persons, such as guardian, trustees or solicitors, but is a rule of universal application to all persons coming within its principle; which is, that no party can be permitted to purchase an interest where he has a duty to perform inconsistent with the character of a purchaser: *Torrey v. Bank of Orleans*, 9 Paige, 650, and cases there cited. In *Cumberland Coal Co. v. Sherman*, 30 Barb. 553, this principle was applied to the case of a mere agency. It is not necessary for a party seeking to avoid a contract on this ground to show that an improper advantage has been gained over him. It is at his option to repudiate or to affirm the contract, irrespective of any proof of actual fraud: *Denio, J., in New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85. So an agent who discovers a defect in the title of his principal to lands cannot misuse it to acquire a title for himself, but will be held a trustee for his principal: *Story on Agency*, sec. 211."

So in *Harper v. Perry*, 28 Iowa, 57, it is said (pages 60, 61): "2. The rules of law governing the transactions of an attorney with his client are most strict, and operate to protect the client from any advantage that may be possessed by the attorney on account of superior knowledge or confidence reposed in him by the client. What the law does not consider unfair dealing between other parties, where no

fiduciary relation exists, will frequently not be sustained as between attorney and client. While the relation exists, an attorney is not permitted to take advantage of the client's affairs, against his interest, to make money. The hardship of the doctrine, in its application to particular cases, is not so much regarded as the public mischief which would grow out of rules permitting the attorney to take advantage of his position and knowledge and the confidence of his client, in order to make advantageous transactions for himself. No rule, in its application, has a more beneficial effect upon the pecuniary interests, or more effectually promotes the dignity, of the legal profession. It is the source of the utmost confidence in the attorney, and secures to the client services meriting the most generous rewards. Its strict enforcement is necessary for the proper protection of the client. And courts will not refrain from its application because the wrong to the client may not be fully apparent in extent, nor the influence under which it was wrought entirely understood.

"The application of this rule forbids the attorney to purchase, against the interest of his client, property sold in the ¹⁴⁵ course of litigation, in which he is retained, and such sales will be held void, or the attorney will be held as the trustee of his client, and required to account as such"; citing cases.

In *Rogers v. R. E. Lee Min. Co.*, 3 McCrary, 76, 9 Fed. 721, it was held by McCrary, Circuit Judge: "It is not necessary to decide the question whether an attorney at law can, under any circumstances, purchase pendente lite from his client the subject matter of a litigation in which he is employed and acting.

"Equity will not uphold such a sale, even upon a showing of good faith, where it appears, as in this case, that the attorney, while negotiating for the purchase of the property, was at the same time, and as part of the negotiation, advising the client as to the probable outcome of the litigation concerning it. It is difficult to see how it is possible for an attorney, under such circumstances, to deal with his client at arm's-length; for the client's acceptance or rejection of any proposition for a purchase by the attorney must depend upon the nature of the advice he receives from him touching the pending litigation. In other words, the attorney must, as to an unimportant part of the negotiation, represent both sides; that is, his own private interest, and the opposing interest of his client—a thing which is manifestly contrary to law and abhorrent to equity. The client must in such a case act upon the attorney's advice and opinion as to the merits of the pending litigation about the property, and by the light of such advice he must fix the

price at which he will sell. Even if under some circumstances the property in controversy in a suit may, pending the suit, be sold by the client to the attorney, I am of the opinion that a court of equity ought to hold that such a sale is absolutely void, if the attorney, while negotiating as a purchaser, is called upon to advise the client, as an attorney, as to how far a pending litigation is likely to affect his title to the property, or the value of his interest therein."

So in *Rogers v. Marshall*, 3 McCrary, 87, 13 Fed. 59, it is said: "The questions of law presented by a litigation in which the attorney has been employed are matters within his peculiar ¹⁴⁶ knowledge; he deals with them as an expert; they are frequently questions of a technical, and always a professional, character. They are often questions which go to the very root and marrow of the inquiry which the seller must make in determining the price at which he will sell. This is well illustrated by the present case, since it appears that Marshall, the attorney, was defending for the complainant and others certain suits involving the validity of her title, and which, if decided adversely to her, would have destroyed every vestige of her property in the mine. It follows, therefore, that to decide the question whether these suits were well grounded, or whether there was danger of a decision therein adverse to complainant, was to decide upon the question of the value of complainant's interest. To allow Marshall to advise her or her agent upon this question was to enable him to influence materially the fixing of the value of the property while negotiating for its purchase. The law will not permit an attorney to deal with his client in this way. Such dealing is manifestly against the policy of the law—as much so as a purchase by a guardian from his ward, or that of a trustee from his cestui que trust. Such transactions are not held to be void upon the ground of intentional fraud, or proven bad faith, but because the relations of the parties are such that the one may make use of his position of power and influence over the other, or of his superior knowledge derived while in the employment of the other, to take an unfair advantage of him. The law, upon grounds of high public policy, seeks to destroy the temptation to abuse such opportunities, and therefore does not inquire whether the transaction was fraudulent or not. In such a case the attorney, by continuing to advise the client about the pending litigation, while at the same time negotiating for the purchase of the property in controversy in such litigation, confounds his position as attorney with that of purchaser, and however honest he may be, the purchase is not permitted in any case." And see *Gooch v. Peebles*, 105 N. C. 411, 11 S. E. 415.

At the time of the purchase of this residuary estate by the respondent, for \$676, it appears by the answer that the complainant then held a note for \$5,000, and had obtained a verdict ¹⁴⁷ for \$650 against the estate, and that the respondent was his counsel in that litigation. It is also undisputed that, upon a new trial being granted in the suit in which the verdict was obtained, in which second trial the respondent was still acting as attorney for the complainant, a verdict was rendered, in said second trial, against the complainant, which has now become a judgment, precluding the complainant from recovering from said estate on said note of \$5,000, or on the claim for services upon which, on the first trial, and at the time of the purchase by the respondent, the verdict for \$650 in his favor had been returned. It is indubitable that the value of the residuary estate so purchased by the respondent has now been increased thereby to the benefit of the respondents, and in proportion thereto, inasmuch as there is no claim that said estate was or is insolvent. Even if \$676 so paid by the respondent was a fair price for the residuary interest, with the litigation as it stood at the close of the first trial and at the time of his purchase, we are asked by the respondent to hold that, in view of the result of the litigation, he may thus profit at the expense of the client whose cause had been committed to his care. In *Hall v. Hallet*, 1 Cox Cas. 134, the rule was thus expressed by Lord Chancellor Thurlow, that "no attorney can be permitted to buy in things in a course of litigation, of which litigation he has the management. This the policy of justice will not endure." In this case the purchase appears to have been by the attorney in 1758, and the bill was filed in 1766.

In the opinion of the superior court, the complainant was held to be guilty of laches by reason of his delay to institute proceedings for sixteen months. It will be observed that in paragraph 8 of the respondent's answer, *supra*, his statement does not specify the time when the complainant knew of said purchase, the language being as follows: "He admits that such conveyance was made without the knowledge or consent of this complainant and avers that said complainant was afterward notified of the same." Even if we consider the defense of laches available when not pleaded, or when facts are not pleaded which show laches, and even if it be admitted that the ¹⁴⁸ delay on the part of the complainant was as long as the trial justice, hearing the case only on bill and answer and without proofs, has found it to be, we are nevertheless of the opinion that it was error to dismiss the bill.

It does not appear that the delay has in any way prejudiced the respondents, and this court has said, in *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804: "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another.

So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities and other causes, but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief. . . . Second, that mere lapse of time within the statutory limits does not constitute laches. To this we agree, as we have already stated."

And there is a further consideration set forth in *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413, 21 L. R. A. 366: "But the party, who is entitled to set the transaction aside cannot be charged with delay, or with acquiescence, or confirmation, unless there has been full knowledge of all the facts, and perfect freedom of action. Acts, which might appear to be acts of acquiescence, will not be held to be such if the client or cestui que trust is ignorant of the circumstances, or under the control of the original influence, or otherwise so situated as not to be free to enforce his rights," citing cases.

In *Atkins v. Delmage*, 12 Irish Eq. 1, the syllabus is as follows: "The solicitor for X., who was plaintiff in a suit to raise a charge on certain lands, purchased, in the name of a trustee, the lands, at a sale under the decree, which was conducted ¹⁴⁹ by him in a manner that showed either great negligence or a design to depreciate the property, and the proceeds of which were insufficient to discharge his demand for costs, without paying anything to X. The sale was declared void in a bill filed by X. sixteen years afterward, without any proof of its being at an undervalue." And the lord chancellor observed (page 15): "In some of the cases where no actual deception or concealment was proved, many years, ten or eleven, elapsed. In this the time has been but sixteen years, which is less than that in *Gregory v. Gregory*, Coop. 201 (eighteen years), or *Champion v. Rigby*, 1 Russ. & M. 539 (eighteen years); and in these cases no evidence of fraud, misrepresentation or circumvention appeared, but the question turned on the effect of length of time on a purchase only impeachable on an equity arising out of the transaction itself. Here, therefore, where I have evidence, and strong evidence, of that character, at least of misconduct and misrepresentation as between Mr. Delmege and the court, I cannot think that he is entitled to reply on the lapse of time which has occurred. I do not absolutely assent to, though I am far

from saying that I dissent from, the proposition put by Mr. Christian, that in truth in such a case as this, where a disability amounting almost to incapacity to purchase exists, the party cannot be protected within a shorter limit than that of twenty years fixed by the statute of limitations. I am not inclined to fix any bounds to the power of the court to do justice to the parties who have reason to complain of a sale such as this, and I will not on this occasion either say that the court is to be bound by a shorter period than twenty years, nor that similar cases may not occur which would call for its interposition at a much longer interval. I will say nothing that could be quoted as my opinion that, under any circumstances or after any length of time, a sale such as complained of in the present case could be supported."

We are of the opinion that the complainant is entitled to a decree that the property in question is held in trust for him, and that he is entitled to a conveyance of the same upon payment ¹⁵⁰ of the purchase price thereof, and interest thereon, within sixty days after entry of such decree.

A decree may be presented for entry accordingly.

Contracts Between Attorneys and Clients, including purchases by attorneys from, and of the property of, their clients, is the subject of an extended note to Shirk v. Neible, 83 Am. St. Rep. 159, and see the subsequent cases of Bucher v. Hohl, 199 Mo. 320, 116 Am. St. Rep. 492; Cassen v. Henstes, 201 Ill. 208, 94 Am. St. Rep. 160.

Purchases by Attorneys at Judicial and Other Compulsory Sales are considered in the note to Credle v. Baugham, 136 Am. St. Rep. 813; and see Rogers v. Whitam, 56 Wash. 190, 134 Am. St. Rep. 1105.

Constructive Trusts Between Attorney and Client are considered in the note to Insurance Company of Tennessee v. Waller, 115 Am. St. Rep. 795.

EARLY v. PROVIDENCE AND WASHINGTON INSURANCE COMPANY.

[31 R. I. 225, 76 Atl. 753.]

FIRE INSURANCE—Condition for Arbitration—Pleading.—A provision in a policy of fire insurance that, in the event of loss and disagreement as to its amount, the same shall be determined by appraisers and umpire, constitutes a contract and makes it obligatory upon the plaintiff, in an action on the policy, to aver, in the absence of a reasonable excuse for failure so to do, that such an award has been made. (p. 754.)

FIRE INSURANCE—Arbitration—Impeachment of Award.—The award of appraisers and umpire appointed under a provision of a fire insurance policy cannot be impeached in an action at law on the policy because of alleged misconduct of the appraisers or of their incompetency. (pp. 755, 756.)

FIRE INSURANCE—Arbitration—Second Appraisement.—The fact that a first appraisement under an arbitration clause of a fire

insurance policy failed because of misconduct of the appraisers, or the appointment of incompetent and interested appraisers, does not excuse the assured from requesting a second appraisal, where it is not shown that the disqualification was known to the insurer at the time it appointed the disqualified appraiser, or that it was in any way responsible for the alleged misconduct. (p. 756.)

E. C. Pierce, for the plaintiff.

Frank H. Swan, Edwards & Angell and Francis B. Keeney, for the defendant.

226 JOHNSON, J. This case is before the court on exception to the decision of the superior court sustaining the defendant's demurrer to plaintiff's amended declaration. The action was upon a policy of fire insurance which contained the following provisions: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described. . . .

*"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each **227** selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss.

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by

any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

"No suit or action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The plaintiff avers that the goods and chattels mentioned in said policy and insured thereby were lost, damaged and destroyed by fire on, to wit, the — day of November, 1904, to the value of five thousand dollars, and at the time of the loss to the plaintiff thereby said policy and contract of insurance was subsisting and was in full force.

"And the plaintiff avers that after said fire there was a disagreement between the plaintiff and defendant as to the amount of loss, and two appraisers were selected to ascertain the amount of such loss, the plaintiff and defendant each selecting one of said appraisers and the two so chosen selected an umpire, and the appraisers together then estimated and appraised the loss as provided in said policy as respects a portion of the insured property damaged by said fire, and failing to agree as to whether certain property damaged and destroyed by said fire was included in the property insured by said policy submitted their differences to said umpire, and that said umpire wrongfully and erroneously decided that said disputed property ²²⁸ was not covered and insured by said policy, that said decision of the umpire was procured and induced by the positive assurance of the appraiser selected by the defendant that the disputed property was not covered by the policy, and was not insured thereby, that said assurance of the appraiser selected by the defendant and the concurring decision therewith of the umpire was finally and wrongfully and erroneously accepted by the appraiser selected by the plaintiff and an award was made in writing by the appraisers and umpire determining the amount of the loss, that said amount was wrong and erroneous in this, that it excluded from appraisal and ascertainment all loss on the said certain property as to said dispute and disagreement arose as to whether it was covered and insured by the said policy.

"And the plaintiff avers that the said property so wrongfully excluded consisted of the following, [setting them out] all of great value at the time of said fire, to wit, of the value of three thousand dollars.

“That said excluded goods and chattels were all destroyed by said fire;

“That all said goods and chattels were covered and insured by said policy.

“And the plaintiff avers that although he accepted the damages awarded in and by said award as the amount of his loss on the property appraised by said appraisers and included in said award, he is entitled to damages for the value of the said property insured by said policy and damaged and destroyed by said fire and wrongfully excluded from said appraisal and award, and he claims for the same under said policy.

“And the plaintiff avers that the appraiser selected by the defendant as aforesaid and the said umpire were not competent and disinterested.

“And the plaintiff avers that said appraisers and umpire exceeded their authority in the aforesaid arbitration in that they undertook to decide as to whether the defendant was liable at all under said policy for the damage or destruction of certain property aforesaid (meaning the property in said list) damaged and destroyed by said fire.

²²⁹ “And the plaintiff avers that this action was not commenced until after full compliance by the plaintiff with all the requirements of said policy and that it was commenced within twelve months next after said fire.”

The defendant demurred on the following grounds:

“1. It appears therefrom that an award was made under the provisions of the policy sued upon and said award was accepted and retained by the plaintiff.

“2. It does not appear therefrom that the award made under the provisions of the policy sued upon was on its face other than a proper and just award.

“3. From all that appears from said declaration the said award showed on its face that the appraisal covered all of the goods destroyed.

“4. It does not appear that the alleged wrongfulness and erroneousness of the award in failing to include certain alleged items of damage was due to any fraud, partiality or misconduct on the part of the arbitrators and umpire, as distinct from an erroneous judgment upon a full and clear consideration of all the facts.

“5. It does not allege that the alleged wrongfulness and erroneousness of the award in failing to include certain items of damage was due to any assumption of fact as distinct from a deliberate opinion after a consideration of all the facts.

“6. From all that appears from said declaration no mistake of law appears on the face of the award.

“7. From all that appears from said declaration no mistake of fact appears on the face of the award.

"8. It does not appear therefrom that an award has become impossible because of any fraud or fault on the part of the defendant.

"9. It does not allege that the award made was due to the fraud, misconduct or partiality of either appraiser, umpire or defendant.

"10. From all that appears from said declaration a full and conclusive award has been made under the terms of the policy and accepted by the plaintiff."

²³⁰ The provisions of the policy quoted, *supra*, constitute a contract binding upon the parties, by which it was agreed that, in the event of loss under the policy, and disagreement as to its amount, the same should be determined by the appraisers and umpire, and they make it obligatory on the plaintiff to aver in his declaration, in the absence of a reasonable excuse for failure so to do, that such an award has been made: *Grady v. Home Fire & Marine Ins. Co.*, 27 R. I. 435, 63 Atl. 173; *Graham v. German-American Ins. Co.*, 75 Ohio St. 374, 79 N. E. 930, 15 L. R. A., N. S., 1055, 9 Ann. Cas. 79; *Vernon Ins. etc. Co. v. Maitlen*, 158 Ind. 393, 63 N. E. 755. This the plaintiff has done by alleging in general terms that he has fully performed all of the conditions of the policy, of which such an award determining the entire liability of the defendant is one, and by averring in particular terms, following the words of the policy, that "an award was made in writing by the appraisers and umpire determining the amount of loss." He does not charge, therefore, that the award on its face is other than responsive to the requirements of the policy, or other than a determination of the complete loss under the policy, but he seeks to impeach the award by showing (1) that the value of certain goods, and the plaintiff's loss thereon, were not considered in ascertaining the amount of the award because of an erroneous decision by the appraisers that certain goods were not covered by the policy, and (2) by showing that the umpire and the appraiser chosen by the defendant were not competent and disinterested.

The general rule is that this cannot be done in an action at law in jurisdictions where the distinction between law and equity is still maintained: *Georgia Home Ins. Co. v. Kline & Co.*, 114 Ala. 366, 21 South. 958; *Kaplan v. Niagara Fire Ins. Co.*, 73 N. J. L. 780, 65 Atl. 188; *Robertson v. Scottish Union & Nat. Ins. Co.*, 68 Fed. 173; *Levin v. Northwestern Nat. Ins. Co.*, 146 Fed. 76.

Thus in *Georgia Home Ins. Co. v. Kline & Co.*, 114 Ala. 366, 21 South. 958, the plaintiff brought an action under a fire insurance policy containing the same arbitration agreement, with a few minor verbal changes, found in the Rhode Island standard form. The defendant pleaded an award, to which

the plaintiff replied that the arbitrators wrongfully refused to consider a large ²³¹ amount of goods covered by the policy. And it was held, in sustaining the defendant's demurrer to the reply, that the award could not be contradicted in a court of law, because (page 372) "the submission, on its face, submitted and carried before the arbitrators, the matter of the entire loss, and the award shows they passed upon, and adjudicated the entire loss."

In *Kaplan v. Niagara Fire Ins. Co.*, 73 N. J. L. 780, 65 Atl. 188, where it appeared, in an action on a fire policy containing an arbitration agreement identical in all ways with the clauses in the Rhode Island form, that an award had been made, it was held that evidence introduced for the purpose of showing that the appraisers omitted to take into account certain articles alleged to have been covered by the policy and destroyed, was properly excluded, because (page 789): "Their award cannot be impeached at law for erroneous judgment upon facts, nor can it be for the omission of items of account which are within the terms of the submission."

Robertson v. Scottish Union & Nat. Ins. Co., 68 Fed. 173, was an action on a fire policy containing the arbitration clauses quoted above, in which an award had been made. And it was held that the plaintiff could not prove that the loss sustained was greater than the amount found by the appraisers, nor that the appraiser selected by the insurer and the umpire were not competent and not disinterested, because, where the distinction between law and equity still prevails, an award cannot be attacked in an action at law for misconduct of the appraisers, and that, therefore (page 175), "in this forum (law side of the court) the award is binding on the parties, and no recovery can be had in this action beyond the amount therein ascertained."

So, also, in *Levin v. Northwestern Nat. Ins. Co.*, 146 Fed. 76, it was held that the defendant's motion to strike out the plaintiff's reply, setting up fraud on the part of the appraisers appointed under an arbitration clause identical with the Rhode Island form, should be granted, because, where the distinction between law and equity is still preserved, the award cannot be impeached in a court of law for misconduct of the arbitrators.

²³² 1. These cases seem conclusive of the case at bar. In this case, as in them, the plaintiff avers that an award has been made which on its face determines the entire liability of the defendant under the policy; and in this case, as in them, the plaintiff seeks to recover, in an action at law, a sum greater than that awarded, and to impeach the award because of an alleged misconduct on the part of the appraisers in excluding certain items while estimating the loss, and because of in-

competency. This, as the above authorities show, he cannot do in this form of action.

And if plaintiff could show that the award is invalid, that would not benefit him. In *Grady v. Home Fire & Marine Ins. Co.*, 27 R. I. 435, 63 Atl. 173, this court, in construing the arbitration clauses of the standard fire policy, said: "An award by arbitration having been made by the policy a condition precedent to the right of action, it was incumbent on the plaintiff to allege and prove such award; or, if the award was invalid, then to allege and prove either that the amount of loss had been determined by other arbitrators selected according to the provisions of the policy, or that for some valid reason such determination had become unnecessary or impossible."

The plaintiff does not aver that any such second award has taken place, or that he ever made any request for a second appraisal. And the fact, assuming it to be a fact, that the first arbitration failed because of misconduct on the part of any or all of the appraisers, or because of the appointment of incompetent and interested appraisers, did not excuse the plaintiff from requesting a second appraisal because it is not shown that the disqualification was known to the defendant at the time of the appointment by it of an appraiser, or that the defendant was in any way responsible for the alleged misconduct of the referees: *Graham v. German-American Ins. Co.*, 75 Ohio St. 374, 79 N. E. 930, 15 L. R. A., N. S., 1055, 9 Ann. Cas. 79; *Westenhaver v. German-American Ins. Co.*, 113 Iowa, 726, 84 N. W. 717; *Baumgarth v. Firemen's Fund Ins. Co.*, 152 Mich. 479, 116 N. W. 449; *Fisher v. Merchants' Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282; *Davenport v. Long Island Ins. Co.*, 10 Daly. 535; *Silver v. Western Assur. Co.*, 164 N. Y. 381, 58 N. E. 284.

In *Graham v. German-American Ins. Co.*, 75 Ohio St. 374, 79 N. E. 930, 15 L. R. A., N. S., 1055, 9 Ann. Cas. 79, the plaintiff brought an action on a fire policy drawn after the Rhode Island form, and proved that neither party had asked for an appraisal. And it was held that the burden was on the plaintiff to show that (page 376) "she has either performed the conditions or has a legal excuse for the nonperformance of such conditions, such as a refusal to submit to an arbitration by the other party, or a refusal to select an appraiser."

In *Westenhaver v. German-American Ins. Co.*, 113 Iowa, 726, 84 N. W. 717, it was held that a failure of arbitration due to the inability of the two appraisers appointed by the parties to agree on an umpire did not authorize an action on the policy, because the defendant was in no way responsible for the misconduct of the appraiser appointed by him.

The same conclusion was reached in *Baumgarth v. Firemen's Fund Ins. Co.*, 152 Mich. 479, 116 N. W. 449, where the court said (page 484); "If it were the fact that both arbitra-

tors acted unreasonably and had concluded that they could not agree, there being no bad faith on the part of the defendant, the plaintiffs had not fully performed their legal duty under their contract. It was their duty to continue further negotiations to secure an appraisal."

Plaintiff's counsel argues that the scope of the appraisal and award is never anything more than an ascertainment of the amount of damage done by fire to property which has only been partly destroyed by fire, and that the amount of the loss in case of a total destruction of property is not a question for the appraisal. He cites no authorities in support of this contention. We think the provisions of the policy clearly contemplate an ascertainment by the appraisers of the whole loss. In the case at bar there is nothing to show that the first award failed to contain the sound value of all of the property covered by the policy, and the loss thereon, through any fault of the defendant. The amended declaration does not show that the defendant knew that the umpire and the arbitrator appointed ²³⁴ by it were not competent and disinterested. It does not show that the defendant was in any way responsible for the decision excluding the value and damage on certain goods alleged to have been insured. It does not show that an appraisal of the sound value, etc., of said goods alleged to have been excluded has ever been made, or that the plaintiff has ever requested such an appraisal, or that the defendant has waived this condition in the policy. It follows, therefore, that, assuming that the first arbitration failed because of the reasons alleged in the plaintiff's declaration, nevertheless he cannot maintain this action on the policy because he has not performed all of the conditions precedent to a right of action on the policy.

The plaintiff's exception to the decision of the superior court sustaining the defendant's demurrer is overruled, and the case is remitted to the superior court for further proceedings.

Covenants in Fire Insurance Policies for Appraisal by Arbitrators of the amount of the loss are valid and binding upon the parties; and when the policies further provide that the sum for which the insurer is liable shall not become payable until sixty days after an award by such arbitrators has been received by the insurer, when an appraisal has been required, or that no suit upon the policy shall be sustained until after full compliance by the insured with all of such requirements, then such arbitration and award are conditions precedent to the right of the insured to an action upon such policy, where the insurer has demanded such arbitration and award: *Southern Home Ins. Co. v. Faulkner*, 57 Fla. 194, 131 Am. St. Rep. 1098, and see note thereto for cases upon various aspects of "arbitration clauses." A condition in a fire insurance policy requiring a submission to arbitration is valid: *Shawnee Fire Ins. Co. v. Poutfield*, 110 Md. 353, 132 Am. St. Rep. 449. Where a policy requires all differences regarding a loss to be submitted to arbitration, no action can be maintained thereon

in the absence of an attempt in good faith to ascertain the amount of the loss as provided in the policy. And where the failure to do so is the fault of the assured, he cannot maintain any action thereon; but if the absence of the award is due to the insurer or his appraiser, the action is maintainable without the award: *Shawnee Fire Ins. Co. v. Poutfield*, 110 Md. 352, 132 Am. St. Rep. 449.

Agreements to Submit Disputes Respecting Insurance to Arbitration are considered in the note to *Commercial Union Assur. Co. v. Hocking*, 2 Am. St. Rep. 565.

BOWLIN v. RHODE ISLAND HOSPITAL TRUST COMPANY.

[31 R. I. 289, 76 Atl. 348.]

WILLS—*Joint Tenancy not Created.*—A Devise of a piece of real estate and one-half the testator's personal property to one daughter, and of another piece of real estate and the remaining one-half of his personalty to another daughter, providing that the property shall not absolutely vest in them but be held in trust and the income paid to them for life, and in the event of the decease of one her share to go to the survivor, with a devise over to a third person in case she survive the daughters, does not create a joint tenancy but makes specific devises in severalty, with the right to the entire beneficial use in the survivor. (p. 760.)

A MERGER is the Annihilation by Act of Law of the less in the greater of two vested estates meeting, without any intervening estate, in the same person and in the same right. (p. 760.)

WILLS.—*A Possibility of Issue is Always supposed to exist in law, and there is no age beyond which, as matter of law, the having of issue is impossible.* (p. 761.)

WILLS—*Joint Tenancy—Merger of Estates.*—A devise of one piece of real estate and one-half the testator's personal property to one daughter, and of another piece of real estate and the remaining half of the personal property to another daughter, providing the property shall not absolutely vest in them but be held in trust, the income being paid to them for life, and the whole thereof to the survivor, and providing further that such property and income shall be free from the control and debts of the husbands of the daughters, with a devise over to a third person should she survive the daughters, shows a dominant purpose to create an equitable joint tenancy, and is a positive prohibition against the vesting of the estate in the daughters, and the equitable or trust estate is not merged in the legal estate upon the death of the person to whom the devise over was made, the two daughters being the sole heirs of their father, so as to vest the title in them absolutely. (p. 762.)

MERGER—*Legal and Equitable Estates.*—Equity will not establish an equitable merger by analogy to law, where the effect would be to defeat its own rules and practices in the protection of married women from marital control. (p. 762.)

TRUSTS—*Distribution, When Determined.*—The Persons to Whom trust property shall be distributed will not be determined in advance of the termination of the trust. (p. 763.)

James Harris, Irving Champlin and Washington R. Prescott, for the complainants.

James Tillinghast, for the respondent.

²⁸⁹ BLODGETT, J. The complainants, alleging that they are not only the cestuis que trustent under the trusts created by the will of William H. Williams, late of Providence, deceased, but are also now his sole heirs at law, seek a termination of the ²⁹⁰ trusts created by said will, of which the following portions are material to this inquiry:

"II. In the event of the decease of my said wife before my daughter, Sarah Elizabeth Peck, wife of Charles Watson Peck, my estate situate at No. 100 Dexter st. in said Providence, and one half of my personal property, and to my daughter Adeline Lawton Brown, wife of Levi B. Brown, my estate situate on School st. in the town of East Providence, Rhode Island, and the remaining half of my personal property.

"III. But I hereby direct that the shares of my said daughters shall not absolutely vest in said daughters, but their shares shall be retained by my trustees for the time being whether appointed by me, or by the proper tribunal of the state, and put at interest, or upon rent, and only the income thereof paid to my said daughters during their natural lives, and in the event of the decease of one of my said daughters, the whole share of such daughter to go to the survivor. And I hereby expressly direct that no part of the share of either of my said daughters, or of the income thereof, shall be in any manner subject to the control of any husband of either of my said daughters, or liable under any mortgage, pledge, or other contract of such husbands, or in any manner liable for any debt of such husband. But my trustee shall retain the entire property of the share of my said daughters, whether it be of real or personal estate, during the life of said daughters and pay over the use and income thereof quarterly, or oftener, as may be convenient for them, into the hands of my said daughters, or of the survivor of them, upon their own sole receipt therefor.

"IV. To Martha Jane Blake, wife of William Luther Blake, all my real estate wheresoever situate, and all my personal property of whatever kind, provided that she survive my said wife and daughters and the children of said daughters."

Both the wife of the testator and Martha Jane Blake are now deceased, and the complainants claim that they are now the sole heirs at law of their said father, and hence that the trusts should be terminated and the property be conveyed to them free of the trust.

²⁹¹ 1. We are of the opinion that this should not be done.

Conceding all that is contended for by the complainants, it is clear that clause 2, *supra*, does not create a joint tenancy, but makes specific devises in severalty, while the right of the survivor to the entire beneficial use of the trust estate is clearly provided for in clause 3. In *Johnson v. Johnson*, 7 Allen, 196, 83 Am. Dec. 676, it was said by Bigelow, C. J., in considering the right to partition: "The petitioner and his wife became seised of a life estate during their joint lives and the life of the survivor, and their children became seised of a vested remainder in fee. . . . Subsequently, the remainder in fee of five-sixths of the premises became vested in the petitioner. But this did not merge his life estate so as to vest in him an absolute fee in five-sixths of the premises. The life estate of his wife in the entire premises was still outstanding. This intervening estate prevented a merger; the elementary definition of which is, the annihilation by act of law of the less in the greater of two vested estates meeting, without any intervening estate, in the same person and in the same right." And in *Philips v. Brydges*, 3 Ves. Jr. 120, it was observed by Sir Richard Pepper Arden, Master of the Rolls, as follows: "Another position was maintained in a latitude that would create infinite confusion; that where there is in the same person a legal and equitable interest, the former absorbs the latter. I admit that where he has the same interest in both, he ceases to have the equitable estate, and has the legal estate; upon which this court will not act, but leaves it to the rules of law. But it must be understood always with this restriction, that it holds only where the legal and equitable estates are co-extensive and commensurate; but I do not by any means admit that where he has the whole legal estate and a partial equitable estate, the latter sinks into the former; for it would be a disadvantage to him. All this depends upon the misuse of words." And it is stated by Mr. Preston in his work on Merger, *page 88: "For the purpose of merger, each person who is tenant by entireties has the entirety of the lands as one individual. Therefore, merger may be in the same manner, and to the same extent, as if there were a sole seisin; ²⁹² but joint tenants have, for the purposes of merger, only aliquot parts, although for the purposes of surrender or release to one of them, and for many other purposes of tenure, they are seised per my et per tout; and tenants in common have only particular undivided shares, which as between themselves may be equal or unequal in their extent, and each share is considered as a distinct tenement, and gives a separate and distinct freehold. Therefore, as to joint tenants and tenants in common the merger will not operate beyond the extent of the part in which the owner has two several estates." And in *Donalds v. Plumb*,

8 Conn. 447, it is said that in order to create a merger "the legal and equitable estates must be coextensive and commensurate, or there must be the same estate in law as in equity." And to the same effect is the observation of Shaw, C. J., in *Hunt v. Hunt*, 14 Pick. 374, 25 Am. Dec. 400: "In order to effect a merger at law, the right previously existing in an individual, and the right subsequently acquired, in order to coalesce and merge, must be precisely coextensive, must be acquired and held in the same right, and there must be no right outstanding in a third person, to intervene between the right held and the right acquired. If any of these requisites are wanting, the two rights do not merge, but both may well stand together." And see *Merest v. James*, 6 Madd. 118; *Hildreth v. Eliot*, 8 Pick. 293. Again, it appears by the bill that the two daughters complainants are now fifty-six and sixty-three years of age, respectively, are both married and have had no children, and it is urged, as a ground for the termination of the trust, that there is no longer a possibility of issue, and that the complainants are accordingly the only persons who are entitled to the residue aforesaid. But the rule is otherwise in this respect. In *List v. Rodney*, 83 Pa. 483, it was said as follows by *Mercur, J.*, of a woman then more than seventy-five years old: "If other children should be born and survive their mother, they will be entitled to share in the estate. This cannot be denied. It is contended, however, that the advanced age of Mrs. Sarah Rodney precludes such an event. We may concede that she has passed the age to which the ability to bear children usually ²⁹³ continues; yet the law appears to have settled that there is no age beyond which it is impossible. 'A possibility of issue is always supposed to exist in law . . . even though the donees be each of them an hundred years old': 2 Blackstone's Commentaries, *125. 'For that the law seeth no impossibility of having children': Coke on Littleton, 28a. Whether the rule rests upon the indelicacy of the acts to which such an inquiry might lead, or to the great uncertainty of arriving at an accurate conclusion, we know not; but certain it is, the rule has stood the test of time, and received the sanction of ages. No case has been cited showing that it has ever before been questioned in Pennsylvania. Nature has fixed no certain age, by years, at which a child-bearing capacity shall begin or end. Any conjecture based on age is too doubtful and uncertain to result in any reliable conclusion. It was well said in *Jee v. Audley*, 1 Cox., 324, 'if this can be done in one case it may in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture.'

"It is contended that this doctrine of possibility of issue is only applicable to cases of estate tail after possibility of issue is extinct; that it is simply a presumption governing the devolution and quality of estates, and that it should not be presumed when the facts show it to be impossible. This argument is fallacious. The very question before us is whether the possibility of issue is extinct. It affects the transmission of the estate. It diminishes the interests which the children now living may take. The presumption of law is in favor of issue, notwithstanding advanced age. It is a presumption of law on the very fact which we are requested to say destroys the presumption. The argument makes a conjectural conclusion rest on a fact, when the law declares no such conclusion shall be deduced from that fact." And see 1 Greenleaf's *Cruise on Real Property*, *p. 135; Williams on *Real Property*, *p. 55; 2 Witthaus & Becker on *Medical Jurisprudence*, p. 405; Draper on *Legal Medicine*, p. 112.

²⁹⁴ Moreover, the dominant purpose apparent in the third clause of the will is "that the shares of my said daughters shall not absolutely vest in said daughters," and is to create an equitable joint tenancy, and that his daughters should enjoy and control only the income of the trust property, the corpus of which should be free from the control of "any husband of either of my said daughters," both of whom are now married. This is a positive prohibition of the vesting of the estates in the daughters, and is not to be disregarded so that the trust is as valid to-day as on the day of the death of the testator, and must remain in force until the death of the survivor of his two daughters. We see no reason for thus defeating the will and his purpose. Whatever may have been his motive for doing so, the testator had a right to ingraft this purpose in his will, and he has thereby created a trust which is still an active trust for such purpose, and is sufficient, without more, to prevent its termination. In 4 Kent's *Commentaries*, *page 102, the general rule is thus stated by Chancellor Kent: "Merger is not favored in equity, and is never allowed unless for special reasons and to promote the intention of the party."

In *Whittle v. Henning*, 2 Phil. 731, Lord Chancellor Cottonham refused to decree a merger upon a case which is thus stated in the syllabus: "A fund in court was subject to a trust for a husband for life, remainder to his wife for life, remainder to their son absolutely. The husband and son, by deed, surrendered and released their respective interests to the wife for the express purpose of giving her a present absolute interest in the fund, and thereby enabling her to assign it at once to the son. But a petition by the three for payment of the fund to the son was refused, on the ground that this court will not establish an equitable merger by analogy to law, where the effect would be to de-

feat its own rules and practice in the protection of married women from the marital control." And see Bomar v. Mullins, 4 Rich. Eq. 80; Wehrhane v. Safe Deposit Co., 89 Md. 179, 42 Atl. 930.

2. The trustee respondent has never been appointed trustee of the real estate, and as to the personalty, it is sufficient to say, in the language of Mr. Justice Peckham, in the recent case ²⁹⁵ of Fitchie v. Brown, 211 U. S. 321, 29 Sup. Ct. Rep. 106, 53 L. ed. 202: "Holding the trust to be valid, it is not now necessary to determine to whom the distribution is to be made when the time for distribution shall arrive." And see Searls v. Charitable Baptist Society, 30 R. I. 478, 76 Atl. 160.

The cause will be remanded to the superior court, with direction to enter a decree dismissing the bill without prejudice.

The Merger of Estates is the subject of a monographic note to Forthman v. Deters, 99 Am. St. Rep. 152, the merger of trust estates being considered at page 157. When a lesser and higher estate meet and coincide in the same person, they will be kept separate when equity and justice require it, unless there is an expressed intention to the contrary: Katz v. Obenchain, 48 Or. 352, 120 Am. St. Rep. 821.

CASES

IN THE

SUPREME COURT

OF

SOUTH DAKOTA.

STATE v. HEFFERNAN.

[24 S. D. 1, 123 N. W. 87.]

CRIMINAL TRIAL—Testimony at Former Hearing.—One of the exceptions to the general rule excluding hearsay testimony is, that the testimony of a witness given in a former action, or at a former stage of the same action, is competent in a subsequent action or a subsequent proceeding of the same action, where it is shown that such witness is dead, insane, disqualified or beyond the jurisdiction of the court, cannot conveniently be found, or has been kept away by the opposite party, and also that such former giving of testimony was under oath, and that the opposing party cross-examined or was given an opportunity to cross-examine such witness. This rule applies in criminal causes. (p. 765.)

CONSTITUTIONAL LAW—Right to be Confronted With Witnesses.—Article 6 of the amendments to the federal constitution and section 7 of article 6 of the state constitution, providing that the accused shall be confronted with the witnesses against him, and that he shall have the right to meet the witnesses against him face to face, are satisfied where the defendant has once, at some proper stage of the proceeding, been confronted with and met such witness face to face and has cross-examined him, or been given the privilege so to do. (p. 766.)

CRIMINAL TRIAL—Testimony Before Committing Magistrate. The testimony of a witness taken before a committing magistrate upon the preliminary hearing of a charge, where the accused had the right of cross-examination, is competent upon the trial of the charge, upon a showing that the witness is dead, insane, or beyond the jurisdiction of the court, and its admission does not violate the constitutional or statutory right of the accused to be confronted with the witnesses against him. (p. 774.)

Don A. Crawford and George G. Yeaman, for the appellants.

S. W. Clark, attorney general, William H. Warren and Charles P. Warren, for the respondent.

¹ McCOY, J. The former opinion in this case, reversing the judgment of the trial court, is reported in 22 S. D. 513, 118 N. W. 1027. Petition for rehearing having been granted, the cause is again before this court for all purposes upon re-

argument of the entire record. There is but one debatable question in the record. The defendants were convicted of the crime of adultery. On the trial in the circuit court certain witnesses, children of the defendant Taylor, were absent from this state and beyond the jurisdiction of the trial court, having but a short ² time prior to the trial left the state of South Dakota and gone to the state of Iowa. These witnesses testified on behalf of the state on the preliminary examination held before the county judge of Kingsbury county, acting as committing magistrate, in the presence of defendants, and were cross-examined by defendants' counsel, and the testimony thus given was taken in shorthand by a stenographer. On the trial in the circuit court, after showing the absence of these witnesses from the jurisdiction of the court, the state called Mr. Scott, the stenographer who took the testimony on the preliminary hearing, as a witness, and by him, using his transcript of the evidence of said witnesses to refresh his memory, gave the testimony of each of said absent witnesses before the jury. The defendants made proper objections to the offer and admission of this testimony, which objections were overruled, and proper exceptions taken thereto. Defendants now, as on the former hearing, urge that the admission of such evidence was reversible error.

It is contended on the part of defendants that the admission of this testimony was in violation of section 7, Code of Criminal Procedure, which, among other things provides that: "In a criminal action defendant is entitled to be confronted with witnesses against him in the presence of the court." It is evident the learned trial court overruled the objections to the testimony in question on the theory that it was admissible under a well-known exception to the "hearsay rule." The reason for excluding hearsay evidence is that it was not given under the sanction of an oath, and that there was no opportunity for cross-examination. It has long been a settled rule of evidence, as one of the exceptions to the general rule excluding hearsay, that the testimony of a witness given in a former action, or at a former stage of the same action, is competent in a subsequent action, or in a subsequent proceeding of the same action, where it is shown that such witness is dead, has become insane or disqualified, is beyond the jurisdiction of the court (that is, out of the state), cannot conveniently be found, or has been kept away by the opposite party, where it is also shown that the former giving of such testimony was under oath, and that opposing party cross-examined or was afforded an opportunity to cross-examine such ³ witness. This rule has been generally applied in criminal causes, and has been held not to be in conflict with article 6 of the United States

constitution amendments, providing that "in all criminal prosecutions the accused shall enjoy the right to be confronted with witnesses against him," nor in conflict with the state constitution, such as ours (article 6, section 7), which provides that "in all criminal prosecutions the accused shall have the right to meet the witnesses against him face to face"; it being held that, where the defendant has once at some proper stage of the proceeding been confronted with and met such witness face to face, has cross-examined him, or been given the privilege to do so, the provisions of these constitutions have been satisfied, and that such evidence is not objectionable on that account: Elliott on Evidence, sec. 503; Jones on Evidence, sec. 339; Wigmore on Evidence, secs. 1365-1395; 12 Cyc. 543; 16 Cyc. 1091; *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. Rep. 337, 39 L. ed. 409; *Bishop on Criminal Procedure*, 1194; *State v. Mannion*, 19 Utah, 505, 75 Am. St. Rep. 753, 57 Pac. 542, 45 L. R. A. 638. This rule seems to have come into existence of necessity by reason of the fact that to hold otherwise would often result in a failure or miscarriage of justice. The defendant in the case at bar contends that because the legislators of this state who framed this section 7, Code of Criminal Procedure, added thereto the clause "in the presence of the court," it confers upon a defendant in a criminal action some greater or broader or additional right than is conferred by the provisions of the state and federal constitutions, and that the adding of this clause, "in the presence of the court," has the effect to limit the former testimony that may be given under the above-mentioned exception to the "hearsay rule" to only such testimony as might be given "in the presence of the court wherein the action is being tried"; or, in other words, that the confrontation mentioned in this section of the code can only take place in the presence of the court wherein the action is being tried. Upon further and more careful consideration, we are of the opinion that this position is unsound and untenable, and not sustained by authority.

Formerly, according to the history of these provisions of the state and federal constitutions and like statutes, defendants in criminal actions were prosecuted and convicted upon *ex parte* ⁴ depositions and affidavits, taken in the absence of the defendant and his counsel, and to remedy this evil such constitutional provisions and statutes were brought into existence, the intended effect of which was to secure to the defendant the right or privilege of cross-examination of the witnesses against him, that he might propound or have propounded to such witnesses personally questions which they were required to answer on oath in his presence. It seems to be held everywhere and by all courts of last resort

that "to be confronted with the witnesses against him" and to "meet the witness face to face" mean one and the same thing; that is, the accused shall have the right or privilege to cross-examine the witness against him. To confront a witness means that you shall have the right or privilege or opportunity to meet such witness personally face to face for the purpose of cross-examination: Elliott on Evidence, 503; Wigmore on Evidence, 1365-1395; 12 Cyc. 543; Mattox v. United States, 156 U. S. 237, 15 Sup. Ct. Rep. 337, 39 L. ed. 409; Bishop on Criminal Procedure, 1194, 1197, 1294; State v. Mannion, 19 Utah, 505, 75 Am. St. Rep. 753, 57 Pac. 542, 45 L. R. A. 638. It would be an absurdity, and statement of a physical impossibility, to say that the "confrontation" or meeting a witness "face to face" which resulted in cross-examination in the presence of the defendant could take place without the witness being personally present at the place of the "confrontation" or place of such meeting "face to face." It is plainly apparent that the framers of the state and federal constitutions contemplated and had in mind and impliedly intended that this "confrontation" and "meeting face to face" should take place somewhere. It is also plainly apparent that they did not intend that such confrontation and meeting face to face should take place out on the railroad track or in some dimly lighted back alley, but it is evident they intended it should take place in the presence of the court or tribunal where the cross-examination or opportunity to cross-examine might properly and lawfully take place: Elliott on Evidence, secs. 503-507; Wigmore on Evidence, 1373, 1375, 1395. In general, the principle is clearly accepted that testimony taken before any tribunal employing cross-examination as a part of its procedure is admissible: Wigmore on Evidence, 1373. These constitutional provisions mean that the "confrontation" or "meeting face to face" must take place in the presence of the court having jurisdiction to permit the privilege of cross-examination. They could by no possibility mean otherwise. Hence there was nothing added to the legal effect of section 7, Code of Criminal Procedure, by the incorporation therein of the clause "in the presence of the court," as used in this section of the statute. This clause does not specify any particular court. It does not specifically point out the court "wherein the action is being tried" as the one and only court before which such confrontation can be made, any more than it specifies the justice court, or county court, before which the preliminary hearing may be held. But considering this section of the statute in the light of the purpose sought to be obtained, and in the light of the reasons which brought it about, viz., to remedy the evil of ex parte depositions and affidavits by

securing to the defendant the right to cross-examine the witness against him, it is plainly apparent that the legislative mind by the use of the clause "in the presence of the court" had in view the court wherein this right or privilege of cross-examination might be legally exercised, whether it was justice court, county court, or circuit court; the object being to shut out all possibility of the use of *ex parte* depositions not taken in the presence of the accused. It was simply re-enactment of the constitutional right then already existing. This is, in effect, the view taken by the United States supreme court in *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. Rep. 337, 39 L. ed. 409: "The primary object of the constitutional provision in question was to prevent *ex parte* depositions and affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only of testing the recollection and of sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of these safeguards even by the death of the witness, and that if notes of his testimony ⁶ are permitted to be read, he is deprived of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a witness, should go scot-free simply because death has closed the mouth of that witness, would be carrying the constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused. We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties for the rights of the citizens, but as securing to every individual such as he already possessed as a British subject such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a bill of rights are subject to exceptions recognized long before the adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried further

than is necessary to the just protection of the accused, and further than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused. They are made without any opportunity for examination or cross-examination, nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted, not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. As was said by the chief justice, when this case was here upon the first writ of error (146 U. S. 140, 13 Sup. Ct. Rep. 50, 36 ⁷ L. ed. 917), the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict adherence to the truth as would the obligation of an oath. If such declarations are admitted, because made by a person then dead, under circumstances which give his statements the same weight under oath, there is equal, if not greater, reason for admitting testimony of his statements which were made under oath. The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of cross-examination. This, the law says, he shall under no circumstances be deprived of. It is quite clear from this exposition of the constitutional provision that "the accused shall have the right to be confronted with the witnesses against him" necessarily implies that the confrontation should take place in the presence of the court. Yet this case holds that this necessarily implied requirement of the constitution might be dispensed with in cases of necessity, and aptly illustrates by use of another exception to the hearsay rule, viz., dying declarations.

This seems to be the view taken by the courts of last resort of other states having similar statutes. Section 8, Code of Criminal Procedure of New York, provides that the defendant shall be confronted with the witnesses against him in the presence of the court, except that when the charge has been preliminarily examined before a magistrate and reduced to writing in the presence of the defendant, who has had an opportunity to cross-examine the witness, it may be read in evidence on the trial, where it is shown that the witness is dead or insane, or could not be found in the state. In effect, the same as section 686, 5 Kerr's Cyc. Code Cal.

In the recent case of *People v. Elliott*, 172 N. Y. 146, 64 N. E. 837, 60 L. R. A. 318, it is held that this section 8, Code of Criminal Procedure of New York, with this exception incorporated, and containing, "in the presence of the court," is merely re-enactment of section 14 of the New York Bill of Rights, which provides that "the accused shall be confronted with the witnesses against him," the exact language of article 6, Const. U. S. Amend, and the exact legal effect of article 6, section 7, Const. S. D. It is also held in this case that this ^s section 8 of the New York code, containing this clause, "in the presence of the court," does not require that the accused shall in all cases be confronted with the witnesses against him upon a pending trial of the indictment (which is the exact point at issue in the case at bar), but that the statute is satisfied in cases of necessity if the accused has once been confronted with the witnesses against him in any stage of the proceeding upon the same accusation, and has had an opportunity of a cross-examination by himself or counsel in his behalf. The case of *People v. Fish*, 125 N. Y. 136, 26 N. E. 319, holds that neither this same section 8, Code of Criminal Procedure of New York, containing this clause, "in the presence of the court," nor section 14 of the New York Bill of Rights (1 Rev. Stats., pt. 1, c. 4), nor the federal constitution, were ever intended to secure the accused the right to be confronted with the witnesses against him upon his final trial, but to protect him against *ex parte* affidavits and depositions taken in his absence. If section 8 of the New York code with this clause, "in the presence of the court," and the exception annexed thereto, was merely re-enactment of section 14 of the New York Bill of Rights, then the reason is so much stronger why this section 7 of the Code of Criminal Procedure of this state with only the clause "in the presence of the court" therein was merely re-enactment of the constitutional right secured to an accused to be confronted with the witnesses against him, already then existing, and the said section of the code therefore added nothing whatever by way of legal effect to the state constitution.

Mr. Wigmore, in his valuable work on Evidence, reaches the same conclusion. He has gone into the history and purpose of this question so thoroughly and to such length that it is impracticable to fully quote the whole of his argument: Vol. 2, secs. 1365-1418, inclusive. In the period when the hearsay rule is being established and *ex parte* depositions are still used against an accused person, we find him frequently protesting that the witnesses should be "brought face to face" or that he should be "confronted" with the witnesses against him. The final establishment of the hearsay rule meant that this protest was sanctioned as a just one; in

other words, that confrontation was required. What was, in principle, the meaning and purpose of this confrontation? So far as there is a rule of confrontation, what is the process that satisfies this rule. It is generally agreed that the process of confrontation has two purposes—the main and essential one, and a secondary one. The main and essential purpose of confrontation is to secure the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon a witness or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers. That this is the true and essential significance of confrontation is demonstrated by counsel and judges from the beginning of the hearsay rule to the present day. There is, however, a secondary advantage to be obtained from the personal appearance of the witness. The judge and jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness. This secondary advantage, however, does not arise from the confrontation of the opponent and the witness. It is not the consequence of those two being brought face to face. It is the witness' presence before the tribunal that secures this secondary advantage, which might equally be obtained whether the opponent was or was not allowed to cross-examine. In other words, this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination. The witness' presence before the tribunal may be dispensed with if not obtainable. The question, then, whether there is a right to be confronted with opposing witnesses, is essentially a question where there is a right of cross-examination, if there has been a cross-examination there has been a confrontation. The satisfaction of the right of cross-examination disposes of any objection based on the so-called right of confrontation. Nevertheless, the secondary advantage incidentally obtained for the tribunal by the witness' presence before it—the demeanor evidence—is an advantage to be insisted upon whenever it can be had. No one has doubted that it is highly desirable if ¹⁰ only it is available. But it is merely desirable. Where it cannot be obtained, it need not be required. It is no essential part of the motion of confrontation. It stands on no better footing than other evidence to which special value is attached, and just as the original of a document or a preferred witness may be dispensed with in case of unavailability, so demeanor evidence may be dispensed with in a similar necessity. Accordingly, supposing that the indispensable requirement of cross-examination has been satisfied, the only remaining in-

quiry is whether the demeanor evidence, to be obtained by the witness' production before the tribunal, is available.

This inquiry, the conditions of unavailability of demeanor evidence by reason of death, illness, and the like, remains now to be made. But first the effect must be considered of the constitutional sanction in the United States of the principle of confrontation; for this has often erroneously affected the judicial attitude toward demeanor evidence. In the United States most of the constitutions have given a permanent sanction to the principle of confrontation by provisions requiring that in criminal cases the accused shall "be confronted with the witnesses against him" or "brought face to face" with them. The question thus arises whether these constitutional provisions affect the common-law requirement of confrontation otherwise than by putting it beyond the possibility of abolition by an ordinary legislative body. The only opening for argument lies in the circumstances that these brief provisions are unconditional and absolute in form; i. e., they do not say, that the accused shall be "confronted" except when the witness is deceased, ill, out of the jurisdiction, or otherwise unavailable, but imperatively prescribe that he "shall be confronted." Upon this feature the argument has many times been founded that, although the accused has had the fullest benefit of cross-examining a witness now deceased or otherwise unavailable, nevertheless, the witness' presence before the tribunal being constitutionally indispensable, his decease or the like is no excuse for dispensing with his presence. That this argument is unfounded is doubtless; and the answer to it may be put in several forms: 1. There never was at common law any recognized right ¹¹ to an indispensable thing called confrontation as distinguished from cross-examination. There was a right to cross-examine as indispensable, and that right was involved in and secured by confrontation. It was the same right under different names. This much is clear enough from the history of the hearsay rule, and from the continuous understanding and exposition of the idea of confrontation. It follows that, if the accused has had the right of cross-examination, he has had the very privilege secured to him by the constitution. 2. Moreover, this right of cross-examination thus secured was not a right devoid of exceptions. The right to subject opposing testimony to cross-examination is the right to have the hearsay rule enforced, for the hearsay rule is the rule requiring cross-examination. Now, the hearsay rule is not a rule without exceptions. There never was a time when it was without exceptions. There were a number of well-established ones at the time of the earliest constitutions, and others might be expected to develop in the future. The rule had always involved the idea of exceptions, and the constitution makers indorsed the general

principle merely as such. They did not care to enumerate exceptions. They merely named and described the principle sufficiently to indicate what was intended. The rule sanctioned by the constitution is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein. 3. The net result, then, under the constitutional rule, is that, so far as testimony is required under the hearsay rule to be taken *infra* judicially (that is, within the presence of the court), it shall be taken in a certain way, namely, subject to cross-examination, not secretly or *ex parte* away from the accused: 2 Wigmore on Evidence, secs. 1365, 1395-1397. For decisions sustaining the view that these provisions of the constitutions were passed in view of the hearsay rule, and in view of the exceptions thereto, and did not have the effect of destroying such exceptions, see *Jackson v. State*, 81 Wis. 127, 51 N. W. 89; *Summons v. State*, 5 Ohio St. 325; *State v. McO'Brien*, 24 Mo. 402, 69 Am. Dec. 435; *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. Rep. 337, 39 L. ed. 409; *State v. Mannion*, 19 Utah, 505, 75 Am. St. Rep. 753, 57 Pac. 542, 45 L. R. A. 638.

¹² It seems to be an elementary proposition that things necessarily or plainly implied in a constitution or a statute are as substantial a part of the enactment thereof as those actually expressed: *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819, 22 N. E. 188, 5 L. R. A. 340, and exhaustive note, 1 L. R. A. 613; *Thurber v. Miller*, 32 U. S. App. 209, 67 Fed. 371, 14 C. C. A. 432. If the "confrontation" or meeting "face to face" contemplated in the federal and state constitutions must take place "in the presence of the court" by plain implication, then it logically follows that section 7, Code of Criminal Procedure, by containing the clause "in presence of the court," in express terms added nothing to the legal effect of the constitutional provision, and which should receive the same application. If the personal presence of the witness before the trial court, where cross-examination might be made, could be dispensed with in satisfying the provisions of a constitution, which is the highest and most sacred law of the land, the same requirement contained in an ordinary statute could certainly be dispensed with when the proper necessity arose. And, again, the statute in question is general, and contains no exceptions, any more than does the federal or state constitutions, and, if it is to receive a literal construction without exception, then it logically and necessarily follows that dying declarations and the former testimony of deceased witnesses must hereafter be rejected in this state, as those exceptions are in the same category and stand upon the same basis as the former testimony of a witness who is beyond the seas or out of the jurisdiction of the court, but if it was the intention that this section of our statute was passed in view of

the hearsay rule, with all the exceptions thereto, which we are constrained to believe, then all the recognized exceptions to that rule are available just the same as under the provisions of the federal and state constitutions.

The former testimony given before any tribunal which can enforce the attendance of witnesses, and administer oaths, and employs cross-examination as a part of its procedure, is admissible: Jones on Evidence, 342; Wigmore, 1373. It seems to be generally held that the confrontation and meeting face to face is sufficient, and satisfies the constitutions where the cross-examination or opportunity ¹³ to cross-examine was before a committing magistrate: Wigmore on Evidence, 1375; Elliott on Evidence, 507; Bishop on Criminal Procedure, 1197; Cooley's Constitutional Limitations, 389; Jones on Evidence, 342. "Authority in favor of the admissibility of such testimony where the defendant was present, either at the examination of the deceased witness for a committing magistrate, or upon a former trial, is overwhelming": *Mattox v. United States*, 156 U. S. 237, 13 Sup. Ct. Rep. 337, 39 L. ed. 409; *Summons v. State*, 5 Ohio St. 325; *Brown v. Commonwealth*, 73 Pa. 321, 13 Am. Rep. 740; *State v. Houser*, 26 Mo. 431; *Commonwealth v. Richards*, 18 Pick. (Mass.) 434, 29 Am. Rep. 608. That the testimony given at any former stage of the same action on the same accusation is admissible: *People v. Elliott*, 172 N. Y. 146, 64 N. E. 837, 60 L. R. A. 318; Jones on Evidence, 339. Preliminary examination on the same accusation is an indispensable stage of every criminal action under the law of this state: Code of Criminal Procedure, sec. 211. The former testimony of a witness who is absent from the state—that is, beyond the jurisdiction of the court—is one of the well-recognized necessities within the exceptions of the hearsay rule. A party desiring to offer the testimony of a witness who is out of the jurisdiction and beyond the reach of a subpoena or other compulsory process of the trial court is helpless. This branch of the rule stands upon the same reasoning and basis as the former testimony of a deceased witness: Wigmore on Evidence, 1404; Jones on Evidence, 345; 1 Greenleaf on Evidence, 163; 1 Elliott on Evidence, 500.

Some objection was made to this evidence in question on the ground that complaint before the committing magistrate alleged the offense to have been committed January 2, 1907, while the information on which defendants were convicted alleged the offense to have been committed June 2, 1907, but we are of the opinion that the precise time was immaterial in a charge of this character; and, besides, the record shows clearly that the offense in relation to which the said witnesses testified on the preliminary examination was the same identical offense of which defendants were convicted under the

information: *State v. Fordham*, 13 N. D. 494, 101 N. W. 888; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477.

¹⁴ Finding no error in the record, the judgment of the circuit court is affirmed.

Haney, P. J., dissents. Whiting, J., took no part in this decision.

The Constitutional Right of an Accused to be Confronted by the Witnesses and what is an invasion of that right are discussed in the note to *Wray v. State*, 129 Am. St. Rep. 23. Such right imports the privilege of cross-examination: *Wray v. State*, 154 Ala. 36, 129 Am. St. Rep. 18.

The Admissibility of Evidence Given on a Former Trial or Preliminary Examination is discussed in the notes to *Atchison etc. R. R. Co. v. Osborn*, 91 Am. St. Rep. 192; *Cline v. State*, 61 Am. St. Rep. 873. The testimony of a witness given at a preliminary hearing, with opportunity for cross-examination, is not admissible upon the subsequent trial merely upon proof of the absence of the witness from the state. To make such testimony admissible it must be shown that the witness is either a nonresident or permanently absent from the state, or that he is absent for such a length of time as to make his return contingent and uncertain: *Sims v. State*, 139 Ala. 74, 101 Am. St. Rep. 7. The absence or inaccessibility of a witness, who is not shown to be dead or without the state, does not render admissible the evidence he gave on a former trial: *Wyatt v. State*, 58 Tex. Cr. 115, 137 Am. St. Rep. 926.

Stenographer's Notes as Evidence and the right to read them to the jury is the subject of a note to *Padgitt v. Moll*, 81 Am. St. Rep. 358.

GOLDBERG v. SISSETON LOAN AND TITLE COMPANY.

[24 S. D. 49, 123 N. W. 266.]

JUDGMENTS—Parties Concluded by.—Under the rule that judgments and decrees are conclusive only as between the parties and privies to the litigation, the term "parties" includes all who are directly interested in the subject matter and who have a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment; and where a person not a party to an action will be liable to one of the parties if the latter's claim or defense shall fail, and he has notice and an opportunity to participate in the action, in defense or maintenance of his position, he will be bound by the result the same as if he were a party to the action. (pp. 778, 779.)

ABSTRACTER OF TITLE—When Bound by Judgment Against Client.—An abstractor of title, in an action against him for damages for omitting a lien from an abstract, is bound by the judgment in a suit brought by the clients at his request to test the validity of the lien, where he had an opportunity to and did participate in such action. (p. 780.)

ABSTRACTER OF TITLE—Liability to Purchaser.—Under section 3197 of the Political Code, an abstractor of titles is liable for an

error in the abstract to a purchaser of property who relied upon the abstract, without regard to whether he or the vendor ordered the abstract or paid for it. (p. 780.)

APPEAL—Review on Judgment-roll—Questions Considered.—

On an appeal from a judgment, the questions of the sufficiency of the complaint, the sufficiency of the findings or general or special verdict to sustain the judgment, or of a defect in the judgment, may be presented upon a proper assignment of error, notwithstanding the question of their sufficiency has not been raised in the court below. (pp. 783, 784.)

ABSTRACTER OF TITLE.—The Sureties upon the Bond of an Abstracter of titles cannot be held liable for an error or omission of their principal occurring prior to the execution of the bond. (p. 785.)

APPEAL—Modification of Judgment.—Where it appears that no new trial is necessary, the supreme court may direct the lower court to modify the judgment in accordance with its opinion. (p. 785.)

APPEAL.—A Question not Presented by an Assignment of error in accordance with the rules of the court will not be reviewed. This applies to all cases, whether they involve questions that have been passed upon by the trial court, or new questions that may be raised for the first time on appeal. (p. 785.)

TRIAL—Objections to Evidence—Statement of Grounds.—The grounds of an objection to the reception of evidence, or the competency of a witness, must be specifically stated at the time the objection is made. It is not sufficient to object generally that the evidence is illegal or the witness incompetent. (p. 786.)

Howard Babcock and Bouck McCarthy, for the appellants.

Frank McNulty, for the respondents.

52 CORSON, J. This case comes before us on an appeal by the defendants from a judgment in favor of the plaintiffs, and from the order denying a new trial. The pleadings, findings and specifications of errors are very voluminous, and the material points involved in the case will sufficiently appear from a summary of the facts.

It is disclosed by the record that the defendant the Sisseton Loan and Title Company is a corporation, and the other three defendants were officers of the corporation and sureties on a bond executed by the corporation, as required by law. The plaintiffs, in July, 1904, were negotiating for the purchase of a quarter section of land in Roberts county, from Carl Lackness and Bardinas Lackness, and applied to the defendant corporation for an abstract of title to the said land. The abstract was furnished and delivered to the plaintiffs, and the plaintiffs, relying thereon, concluded their negotiations and closed the deal for the land, making full payment therefor. It is further disclosed by the record: That, prior to the application of the plaintiffs for said abstract of title, one Theo. Starks had commenced an action against Carl and Bardinas Lackness to recover an indebtedness claimed to be due him from them; that a warrant of attachment was issued and the said land attached under said warrant; that on the twenty-seventh day of

February, 1905, a judgment was duly rendered in favor of the plaintiff Starks, execution issued upon the same, and the real estate was advertised to be sold under and by virtue of said judgment; that on July 13, 1904, when said warrant of attachment was issued, the said Stark by his attorney duly filed a notice of his *lis pendens* in the office of the register of deeds in and for said county, reciting that a warrant of attachment was issued against the property of the said Carl and Bardinas Lackness; that under said attachment ⁵³ a levy had been made upon the said real estate belonging to Bardinas Lackness; that plaintiffs had no notice or knowledge that said notice of *lis pendens* upon the above-described land had been filed, and relied upon said abstract of title in which the notice of *lis pendens* was omitted by the said defendant corporation; that the plaintiffs had been compelled, in order to protect their said property, to pay the amount of said judgment and costs, being four hundred and ninety-one dollars and twenty-one cents. It is further disclosed by the record that, prior to the payment of said judgment by the plaintiffs, they notified the defendant corporation and two of the sureties upon its bond, the defendants herein, of the existence of said judgment, and were advised by the defendants, except Rickert, to institute a suit to vacate and cancel said notice of *lis pendens*, and enjoin the plaintiff Starks from enforcing his said judgment against the property so purchased by the plaintiffs; that a trial was held in said action resulting in a judgment in favor of the said Starks; that upon the request of the said defendants these plaintiffs moved for a new trial in that action, which was denied by the court, and thereupon these plaintiffs offered to appeal the same to the supreme court if the defendants deemed it advisable so to do, but that defendants, except Rickert, declined to advise such an appeal, and therefore no appeal is taken. It is further disclosed by the record that the plaintiffs in the prosecution of said action, incurred an expense of two hundred and fifty dollars, including costs and attorney's fees, and the plaintiffs pray for judgment in this action for the sum of seven hundred and forty-one dollars and twenty-one cents, with the costs of suit.

The court in its eleventh finding of fact finds as follows: "That the defendant Sisseton Loan and Title Company carelessly and negligently failed to include in said abstract of title a description of said notice of *lis pendens*, or any part thereof, or any reference to said notice or *lis pendens* or action or warrant of attachment levied upon, or about to be levied upon, the above-described premises." The court in its fifteenth finding finds as follows: "That thereupon plaintiffs did notify and tell said defendant Sisseton Loan and Title Company that said Starks and Minder had seized the above-described premises, and were threatening to and were about to

the court, after discussing a number of cases holding the rule as stated in the headnote, says: "The above rules have been applied to cases where persons are responsible over to another either by express contract or operation of law."

The rule as thus stated is calculated to prevent unnecessary litigation by practically a retrial of the action, in which persons, though not nominally parties to the action, are interested in the result and have an opportunity in the one action to protect themselves, and to bring before the court in the one action all defenses that might be made in the second action, and thus prevent unnecessary litigation. In such cases the definition of the word "parties," as given by the supreme court of the United States in *Robbins v. City of Chicago*, 4 Wall. 657, 18 L. ed. 427, holding that it includes not only persons actually named as parties, but persons interested in the action and who have notice of the same, is properly applicable. In the case at bar the defendants were not only notified of the claim of the plaintiffs as to their liability, but the plaintiffs instituted the injunction action at the request of the defendants, and the defendants were given every opportunity to defend, and in fact were requested to take charge of the litigation, and did to some extent take part in the trial of the action; one of the defendants being an attorney, sitting with and advising the plaintiffs' ⁵⁷ attorney in that action, and the other defendants, including the corporation, through its officers aided and assisted in the prosecution of that action. The case at bar, therefore, clearly comes within the rule applicable to the conclusiveness of judgments, and the judgment-roll in the case of the plaintiffs against Starks was properly admitted and held by the court as *res adjudicata* in this action as to the fact the *lis pendens* was legally binding upon the plaintiffs, and under which decision, in order to protect their property, the plaintiffs were compelled to pay the amount of the Starks judgment against Lackness, in order to prevent a sale of the property purchased by them, to satisfy the judgment in that case.

It is further contended by the appellants that the omission of the notice of *lis pendens* upon the abstract did not render them liable, for the reason that the Lacknesses did not have a legal title to the property of record at the time the abstract was made, and therefore it was not the duty of the abstract company to note the fact of the existence of the *lis pendens* in the abstract; but this contention was determined adversely to the defendants in the injunction suit, which we hold, under the findings in this case and the evidence, was *res adjudicata* and conclusive upon the defendants.

It is further contended by the appellants that the abstract was ordered, not by the plaintiffs in this action, but by Morris, one of the defendants, or by Ben Lackness, and that therefore they are not liable in this action. While it is true that Morris or Lackness ordered the abstract, it is clear that he did so as the agent of the plaintiffs. The plaintiffs were the parties purchasing the property, and, Morris being connected with the bank, a portion, if not all, of the money for the property was to be paid to the bank on account of the Lacknesses; but it is quite clear from the evidence that Morris or Lackness, in requesting the abstract to be made, did so in the interest, and as the agent, of the plaintiffs. It appears from the evidence of the plaintiff Goldberg that: "The transaction was made at the First National Bank in Sisseton, with Mr. Morris and Ben Lackness. At that time (he says) I received an abstract of title, I asked for such abstract of title. Exhibit 'B' ⁵⁸ is the abstract I received at that time. I relied upon this abstract as to the condition of the title to this land. I had a conversation with Mr. Morris in regard to the title to this land. I told him to go in and make an abstract to show a clear title to that land. Mr. Morris promised to get an abstract." On cross-examination he testified: "I asked both Mr. Morris and Ben Lackness to get the abstract for me. They were there together, and I wanted them to get me an abstract, and Ben Lackness went over to the courthouse and got it." It clearly appears from the evidence that Mr. Morris was a director and managing officer of the defendant corporation, and had charge of its affairs, and that, when requested to furnish the abstract of title, it was furnished for the benefit of the plaintiffs. It is not material, in our view, which one of the parties furnished the abstract, or which one paid for the same; the plaintiffs, being the purchasers of the property, were the parties directly interested in the correctness of the abstract furnished by the abstract company, as, if the property was encumbered, or there were liens thereon which were not shown by the abstract, they were the parties to suffer damage by reason of the omission, and that they did suffer damage is clearly shown by the evidence that they were compelled to pay the Starks judgment in order to protect themselves from a sale of the property under that judgment, and thereby prevent a loss of the property purchased by them.

It will be noticed by the provisions of section 3197, Political Code, that the abstracters are liable for any and all damages that may occur to any party or parties by reason of any error or deficiency or mistake in any abstract or certificate of title made and issued by such person, firm, or corporation. The liability, therefore, of the abstracters is to the person injured, without regard to who pays for the

abstract or by whom it had been ordered, and such seems to be the view of the supreme court of Nebraska, which state has an abstract law practically identical with our own, and that court held in the case of *Gates City Ab. Co. v. Post*, 55 Neb. 742, 76 N. W. 471, that "One who purchases real estate on the faith of a certificate of title furnished to his vendor by a bonded abstractor may maintain an action for damages grounded on the ⁵⁹ failure of the abstractor to make the proper search and true certificate." And in the course of its opinion the court says: "That being the case, it seems highly probable that in adopting the act in question the legislative design comprehended protection to those who in dealing with land titles rely on the correctness of the abstractor's certificate. They stood most in need of legislation of this character, and, being fairly within the description of persons for whose benefit the law was enacted, we feel warranted in holding that they are within its terms." The defense to that action was that the liability of an abstractor is contractual, and that the principal defendants never had any contract relations with the plaintiff; but, notwithstanding this defense, the abstractor was held liable. A similar view was taken by the courts in the following cases: *Western L. & S. Co. v. Silver Bow Ab. Co.*, 31 Mont. 448, 107 Am. St. Rep. 435, 78 Pac. 774; *Economy Bldg. & Loan Assn. v. West Jersey T. & G. Co.*, 64 N. J. L. 27, 44 Atl. 854; *Dickle v. Nashville Ab. Co.*, 89 Tenn. 431, 24 Am. St. Rep. 616, 14 S. W. 896; *Denton v. Nashville Title Co.*, 112 Tenn. 320, 79 S. W. 799; 1 Am. & Eng. Ency. of Law, 221. In the case of *Dickle v. Nashville Ab. Co.*, 89 Tenn. 431, 24 Am. St. Rep. 616, 14 S. W. 896, the court held that: "Where A refused to purchase a tract of land from B unless furnished with an abstract of title, and B thereupon procured an abstract from an abstract company, . . . the company is liable to A, who, relying on the abstract and guaranty, has purchased the property and sustained loss through the omission of a conveyance therein." It was evidently the intention of the legislature of this state, in adopting the sections of the Political Code applicable to the liability of abstractors, to include within its protection any person that might suffer damage by reason of the neglect or omission of the abstractor in making his abstract, and we think it was clearly the intention of the legislature of this state to include a case like the one at bar.

The contention of the appellants that the findings are not supported by the evidence is clearly untenable. The findings of the circuit court are presumptively correct, and, while there was some conflict in the evidence, we are unable to say that there was a preponderance of the evidence against the findings of the court.

⁶⁰ It is further contended by the appellants that the findings of the court do not support the judgment. It is alleged in the second paragraph of the assignment of errors that the findings of fact are not sufficient to support or justify, and do not support or justify, the judgment against the defendants, in this, that the action is brought upon a bond of the defendant Sisseton Loan and Title Company, which said bond was dated and executed August 30, 1904, filed September 5, 1904, and approved by the board of county commissioners of Roberts county October 6, 1904, as shown by the complaint and findings of fact herein, while the judgment is rendered upon a pretended cause of action that accrued July 14, 1904, long before the execution of the bond.

It is contended by the respondent that neither during the trial nor on the motion for a new trial was the attention of the court called to the date of the bond, or any objection made which was based on that alleged defect, and that question was not presented to the court below, either by motion, objection to the testimony, or on the motion for a new trial, and therefore the sufficiency of the findings to support the judgment cannot be considered by this court. This contention, as applied to the case at bar, is not tenable. The findings constitute a part of the judgment-roll, and an appeal may be taken from the judgment without any bill of exceptions or motion made for a new trial, and, when the alleged defect appears in the judgment-roll presented to this court on the appeal from the judgment, the questions as to the sufficiency of the complaint, the sufficiency of the findings or general or special verdict to support the judgment, or a defect in the judgment, may be presented to this court upon a proper assignment of error, and the court, in case the complaint fails to state a cause of action, or the verdict or findings are not sufficient to sustain the judgment, or the judgment is fatally defective, will reverse the judgment, notwithstanding the question of their sufficiency has not been raised in the court below. This logically follows from the fact that on appeal from the judgment no bill of exceptions or statement or motion for a new trial is required. The statement in the opinion of this court in the case of *McCabe v. Desnoyers*, 20 S. D. 581, 108 N. W. 341, that "the rule is well settled ⁶¹ that no question not presented to the court below, in some form at the trial, and a ruling had thereupon, can be raised in this court," must be read in connection with the facts in that case from which it appears that the objections were such as must necessarily have been contained in a bill of exceptions and presented to the trial court on a motion for a new trial. And the same may be said of the other cases cited by the learned counsel

for the respondent in support of his proposition above contended for.

It will be observed in the case at bar that the appeal is taken from both the judgment and order denying a new trial. An appeal from the judgment only brings up the judgment-roll, and in a proper case, and upon proper assignments of error, this court will examine the sufficiency of the complaint, or the sufficiency of the findings, general or special verdict to support the judgment, without regard, for that purpose, to the bill of exceptions or statement. In *Hentsch v. Porter*, 10 Cal. 555, it was held that an objection to the sufficiency of the complaint could be raised for the first time in the appellate court, and this seems to have been the uniform rule in California, the Practice Act of which state is quite similar to our own: *Buckman v. Hatch*, 139 Cal. 53, 72 Pac. 445; *Bell v. Thompson*, 147 Cal. 689, 82 Pac. 327. And the same view is taken by this court in *Porter v. Booth*, 1 S. D. 558, 47 N. W. 960. In *Hutton v. Reed*, 25 Cal. 478, the supreme court of California held, in a case where the appeal was taken from the judgment and also from the order denying a new trial, and the statement was insufficient to bring before the court the order denying a new trial, that the judgment-roll would be examined for the purpose of determining the sufficiency of the verdict to sustain the judgment, and that it was not necessary in such case that there should be in the transcript or on file any statement of the ground upon which the party relies; but when the court came to examine the case it would require a brief or statement of points and authorities to be furnished on the part of the appellant, and, in the absence of such brief or statement, the judgment would be affirmed: *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828. In 11 Ency. of Pl. & Pr. 905, it is said: "There is no principle of ⁶² law more firmly established than that the judgment must follow and conform to the verdict or findings, and, where a special verdict is rendered, a judgment, to be entered thereon, must be the logical legal conclusion upon the facts found by the jury and upon those facts alone." And the learned author cites a large number of cases in support of the proposition. And in Cyc. 428, it is said: "Where the judgment below does not follow the verdict which is itself proper, the appellate court will amend it so as to make it conform to the verdict. And so a judgment or decree in a case tried by the court without a jury may be modified on appeal to correspond with the findings." The proposition above stated, therefore, that the court will examine the judgment-roll for the purpose of ascertaining the sufficiency of the complaint, or of the findings or verdict to support the judgment, and that the question may be

raised for the first time in the appellate court upon a proper assignment of errors, is well settled. Upon an examination of the findings in the case at bar, we are of the opinion that the findings are clearly sufficient to support the judgment as against the defendant corporation. All the facts necessary to sustain its liability for the loss sustained by the plaintiffs are fully found by the court.

The judgment, however, as against Morris, Babcock and Rickert is not sustained by the findings. The only claim made against them is that they are liable as sureties upon their bond. The court in its second finding as to the bond finds: "That a true and correct copy of said bond, together with the indorsements thereon, is attached to the complaint herein and marked Exhibit A, and made a part of these findings." Upon an examination of Exhibit A, we find that the bond referred to was executed on the thirtieth day of August, 1904, filed for record September 5th, and approved October 6th, as alleged in the assignment of error. The legal and logical conclusion therefore from this finding is that Morris, Babcock and Rickert were not liable for errors in the abstract made long prior to their becoming sureties on the bond of the corporation. It is clear, therefore, that the three defendants named could not be held liable on the bond executed by them in this action for an alleged cause of action that accrued on July ⁶³ 14th—forty-five days before they executed the bond. The judgment, therefore, as against them is wholly unsupported by the findings. It clearly appearing from the findings that no facts are found showing their liability for the act of the corporation long prior to the time they executed the bond, no judgment against them could be properly entered, and the judgment must therefore be reversed as to them; but no new trial is necessary, as this court may properly direct that the circuit court shall modify its judgment by striking therefrom the names of Morris, Babcock and Rickert, and correcting its conclusion of law by limiting the same to the defendant Sisseton Loan and Title Company: *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56, 28 L. ed. 636; *Roehl v. Roehl*, 20 Neb. 55, 29 N. W. 257; *Fischer v. Blank*, 138 N. Y. 669, 34 N. E. 397.

It is further contended by the appellants that the complaint does not state facts sufficient to constitute a cause of action as against any of the defendants; but as there is no assignment of error in the record presenting this question to the court, it cannot be considered by us on this appeal. This court has recently held, in case of *Williams Bros. Lumber Co. v. Kelly*, 23 S. D. 582, 122 N. W. 646, that this court will not consider any question not properly presented to it by an assignment of error, and this ruling, we think, should apply to all cases, as it would be manifestly unfair

to opposing counsel and the court to present a question for the first time in this court for its decision, which has not been called to the attention of counsel or the court by an assignment of error. The object of an assignment of errors is to call to the attention of the opposing counsel and court the points that will be presented on the appeal, in order that such counsel may have an opportunity to make the necessary preparations on the hearing of the same, and also to inform the court as to the points it will be called upon to decide. Our rules require such assignment of errors, and we discover no reason why the rule should not be applicable to all cases appealed to this court, whether they involve questions that have been passed upon by the trial court, or involve new questions that may be raised for the first time on appeal to this court. There being no assignment of error, therefore, as to the alleged ⁶⁴ defect that the complaint does not state facts sufficient to constitute a cause of action, we must decline to consider or discuss it on this appeal.

Objections were interposed on the trial of the case to the admission of the judgment-rolls, and notice of lis pendens, etc.; but as the objections were made on behalf of all the defendants, including the corporation, and the ground of the objection stated in the assignment of error in this court not being called to the attention of the court, it properly overruled the same: *Greenleaf on Evidence*, sec. 421; *Elwood v. Deifendorf*, 5 Barb. 398; *Pitts Agricultural Works v. Young*, 6 S. D. 557, 62 N. W. 432; *Caledonia Gold Min. Co. v. Noonan*, 3 Dak. 189, 14 N. W. 426. Mr. Greenleaf, in the above section, says: "It is also to be noted as a rule applicable to all objections to the reception of evidence that the ground of objection must be distinctly stated at the time, or it will be held vague and nugatory." And in *Elwood v. Deifendorf*, 5 Barb. 398, it was held by the supreme court of New York that: "A party who objects to evidence, or to the competency of witnesses, should state specifically the grounds of his objection. It is not sufficient to object, generally, that the evidence is illegal, or the witness is incompetent; but the party objecting must put his finger on the very point, to apprise the court and his adversary of the precise objection he intends to make." At the close of all the evidence the defendants moved for a direction of a verdict in their favor; but the grounds referred to in the assignment of error not being specified as a ground of the motion, and the motion being made in behalf of all the defendants jointly, and the attention of the court not being called to the specific ground now assigned as error in this court, the motion was properly denied: *Tanderup v. Hansen*, 8 S. D. 375, 66 N. W. 1073; *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747.

We have carefully examined the other errors assigned and presented by appellants in their brief, and are of the opinion that there are none possessing sufficient merit to require a separate discussion.

Our conclusion is that the order denying a new trial should be affirmed, and that the said judgment, so far as it affects Morris, ⁶⁵ Babcock and Rickert, should be reversed, and the judgment modified by striking their names therefrom, and as so modified the same should be affirmed as to the Sisseton Loan and Title Company.

As the judgment is reversed in part and affirmed in part, and the defendants all appeared by a joint answer, and have taken a joint appeal, no costs will be allowed to either party in this case.

McCoy, J., took no part in this decision.

Who are Parties Within the Doctrine of Res Judicata is the subject of a note to Hill v. Bain, 2 Am. St. Rep. 76; and who are concluded by judgments is considered in the notes to Gould v. Sternberg, 15 Am. St. Rep. 142, and Rossequio v. Byers, 38 Am. Rep. 778. The term "parties" includes those who are directly interested in the subject matter of the suit, knew of its pendency, and had the right to control and direct or defend it: Courtney v. William Knabe & Co. Mfg. Co., 97 Md. 499, 99 Am. St. Rep. 456. A person, though not technically a party to a prior judgment, may nevertheless have been so connected with it by his interest in the result of the litigation, and his active participation therein, as to be bound by such judgment: Pew v. Johnson, 35 Mont. 173, 119 Am. St. Rep. 852. A judgment quieting title to real property binds the holders of unrecorded conveyances and encumbrances, though not parties to the action: Leslie v. Gibson, 80 Kan. 504, 133 Am. St. Rep. 219; Doyle v. Hays Land & Investment Co., 80 Kan. 209, 133 Am. St. Rep. 199.

The Liabilities of Abstracters, including the question of to whom they are liable, are discussed in the notes to Worden v. Witt, 95 Am. St. Rep. 87; Brown v. Sims, 72 Am. St. Rep. 315. There must be some contract or privity of contract to create liability on the part of an abstractor: Western Loan etc. Co. v. Silver Bow Abstract Co., 31 Mont. 448, 107 Am. St. Rep. 435. If an abstract company has an arrangement with a loan association whereby abstracts are furnished at the expense of borrowers for the use of the association, the abstract company is liable to the loan association where it delivers a defective abstract to the association which is relied upon by the association to its injury: Western Loan etc. Co. v. Silver Bow Abstract Co., 31 Mont. 448, 107 Am. St. Rep. 435.

As to When the Statute of Limitations Commences to Run upon a cause of action for negligence in not discovering defects in title or giving a wrong certificate of title, see the note to In re Estate of Hanlin, 126 Am. St. Rep. 949.

An Abstractor of Titles must Furnish to an Intending Purchaser by means of the abstract everything pertaining to the names and the property in question, so far as appears from the record, that reasonably may affect the title, and thus put the purchaser on inquiry, in order that he may himself make such investigation as to outside facts affecting the title which are indicated there. An abstractor who leaves off from a search of the real estate title of Edward J. B. the

record of a judgment against Ed. J. B. will be liable to one having a right to rely on his abstract, who is injured by such omission, if the judgment proves to have been against the one whose title he was searching: *Stephenson v. Cone*, 24 S. D. 460, 124 N. W. 439, 26 L. R. A., N. S., 1207.

MILISON v. MUTUAL CASH GUARANTY FIRE INSURANCE COMPANY.

[24 S. D. 285, 123 N. W. 839.]

FIRE INSURANCE—Insurable Interest—Ownership of Property.—A building situated upon a patented mining claim constitutes a part of the real estate. Hence it is the property of the owner of the mining claim, and in the absence of a lease or contract permitting one claiming to be the owner of the building to retain possession or remove the same, it is not the property of or owned by such claimant within the terms of an insurance policy prohibiting and rendering void insurance upon property not owned by the insured. (pp. 790, 791.)

FIRE INSURANCE—Ownership of Property—Waiver of Condition.—Where an insurance company accepts and retains the premium and issues its policy without requiring a written application, or without making inquiry into the condition of the title to the land on which the insured property stands, and where the insured is guilty of no fraud or concealment, it is conclusively presumed that the company waived that condition of the policy providing for a forfeiture if the building insured stands on land not owned by the insured in fee simple. (p. 791.)

FIRE INSURANCE—Ownership of Property—False Representations.—Where, in answer to inquiries of an insurance agent, an applicant for insurance upon a building stated that he owned the property, when in fact he did not own the land upon which the building was situated, such statement was a misrepresentation sufficient to work a forfeiture of the insurance. (pp. 791, 792.)

Martin & Mason, for the appellant.

Kellar & Stanley, for the respondent.

285 CORSON, J. This is an action upon an insurance policy to recover nine hundred dollars loss upon household furniture and a dwelling-house, five hundred dollars on the furniture, and four hundred dollars on the dwelling-house. Verdict and judgment being in favor of the plaintiff, the defendant has appealed. The complaint is in the usual form, and the defendant pleads breach of certain warranties contained in the policy as constituting a forfeiture of the plaintiff's claim to recover upon his policy. In the fifth paragraph of the answer it is alleged, in substance, that the said policy of insurance issued by the defendant to the plaintiff contained a provision that the entire policy should be void if the insured had concealed or misrepresented in writing

or otherwise any material fact or circumstance ²⁸⁶ concerning the insurance or the subject thereof; or if the interest of the insured in the property be not truly stated in said policy, or in case of any fraud by the insured touching any material fact relating to said insurance, or the subject thereof, whether before or after a loss, and that, for the purpose of obtaining said policy from the defendant, the said plaintiff willfully and fraudulently stated and represented to the defendant that the building described in said policy was the absolute property of the plaintiff, whereas, in truth and in fact, the said plaintiff was not the absolute and unconditional owner of said property, and that the plaintiff further represented to the defendant, for the purpose of obtaining his said policy, that the said building was used exclusively as a dwelling-house, whereas, in truth and in fact, the said building was by the said plaintiff at the time of the issuance of the said policy and afterward used as a hotel and boarding-house. At the close of all the evidence, the defendant made the following motion for a verdict: "The defendant then moved that a verdict be directed in its favor: First, for the reason that no proof of loss was furnished defendant as required by the policy; second, because the undisputed evidence shows that the insured building was on ground not owned by the plaintiff in fee simple; third, because the evidence shows that there was a misstatement as to the character and use of the property insured; that, instead of being used as a dwelling, it was used as a boarding-house. The motion was denied, and the defendant excepted. The defendant then moved that a verdict be directed in its favor as to the four hundred dollars insurance upon the building described in the policy for the same reasons as stated in the last preceding motion. This motion was also denied and the defendant excepted." And thereupon a judgment was entered in favor of the plaintiff for the sum of nine hundred thirty-five dollars and twenty-five cents. A motion for a new trial was made and denied.

It is contended by the appellant that the undisputed evidence shows that the plaintiff was not the owner of the dwelling-house, for the reason that the same was situated upon a patented mining claim belonging to a third party, and that plaintiff had neither a lease nor a contract with such party by which he was authorized ²⁸⁷ to either retain possession of said property or remove the said building from the said mining claim. Appellant further contends that the plaintiff, when interrogated by the agent of the defendant as to his ownership of the property, represented to the said agent that he was the owner of the same, and that, in view of said representation, it affirmatively appearing from the undisputed evidence that the plaintiff was not the owner of

the said building, the court should have granted the motion made by the defendant for the direction of a verdict in favor of the defendant for the amount of insurance upon the building, the same being shown not to be the property of the plaintiff. We are inclined to take the view that the appellant is right in this contention. It is disclosed by the evidence that the defendant's agent visited the home of the plaintiff, and while there examined the premises, and on his cross-examination he was asked the following question: "He [the plaintiff] did not then inform you that the ground upon which the building stood was owned by someone else? A. He did not. Q. And you did not so understand or learn from any source at the time you issued the policy or before that time? A. I did not." He further stated: "As near as I can recollect, I asked Milison if he owned the property. He said he did. There was no question asked about real estate or about the lot the house was standing on. I never inquired into that at any time." As before stated, it is undisputed that this building was upon a mining claim owned by one John Sawyer, who had received a patent therefor in 1901. It is clear, therefore, that the representations made by the plaintiff that he was the owner of the property was untrue so far as the same related to the dwelling-house. The dwelling-house, being upon the patented mining claim, constituted a part of the real estate, and hence was the property of the owner of the mining claim. Section 188 of the Civil Code provides: "A thing is deemed to be affixed to the land . . . or permanently resting upon it as in the case of buildings." John Rova, a witness for the defendant, testified: "I know the house that Mr. Milison used to own and that was burned up. I used to own it, and I sold it to William Rule, and he sold it to Mr. Milison. When I sold ²⁸⁸ it to Rule, I did not own or claim to own the land on which the house stood. Some fellow what was called John Sawyer claimed it belonged to him. He applied for patent. I did not sell the lot, but the house." It was then shown by the defendant by Frank Peck, a surveyor, that the house in controversy was situated upon the New Hampshire No. 2 lode, which is part of the official mineral survey No. 1307. It is clear, therefore, from the evidence that the dwelling-house insured was not the property of the plaintiff, and in the absence of evidence showing a lease or contract on the part of the owner of the mining claim permitting the plaintiff to retain possession of the dwelling-house, or the right to remove the same from the land, and in the absence of any acts or declarations on the part of the owner of the mining claim by which he would be equitably estopped from asserting his rights to the building, he had the legal title to, and the right to possession of,

the same, and could at any time have enforced that right as against the plaintiff: *Klatt v. Highland Park Hose Co.*, 22 S. D. 109, 115 N. W. 1074. We may reasonably presume, therefore, that, had the agent been correctly informed as to the state of the plaintiff's title to the dwelling-house, he would have refused to issue any policy of insurance thereon, as in contemplation of law the plaintiff had no insurable interest in the same, and the question of the ownership of the property was therefore a very material one as affecting the insurance in this case.

It is contended by the respondent that: "Where an insurance company accepts and retains the premium and issues its policy of insurance without requiring a written application, or without making inquiry into the condition of the title to the land on which the insured property stands, and where the insured is guilty of no fraud or concealment, it is conclusively presumed that the company waived that condition of the policy providing for a forfeiture if the building insured stands on land not owned by the insured in fee simple." And it is insisted by the respondent that this court held in the case of *Peet v. Dakota Ins. Co.*, 1 S. D. 462, 47 N. W. 532, and the case of *Harding v. Norwich etc. Ins. Co.*, 10 S. D. 64, 71 S. W. 755, the law to be as above stated. This is undoubtedly true, and the position taken by the court in those cases following ²⁸⁹ the decisions of the supreme court of Massachusetts is undoubtedly the law in this jurisdiction, and is supported by the decisions in numerous cases decided since the decision in the *Peet* and *Harding* cases: *Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A., N. S., 708; *German Ins. & S. Inst. v. Kline*, 44 Neb. 395, 62 N. W. 857; *Johnson v. Scottish Union & N. Ins. Co.*, 93 Wis. 223, 67 N. W. 416; *Dooly v. Hanover Ins. Co.*, 16 Wash. 155, 58 Am. St. Rep. 26, 47 Pac. 507; *Farmers' & M. Ins. Co. v. Mickel*, 72 Neb. 122, 100 N. W. 130, 9 Ann. Cas. 992; *German Ins. Co. v. Davis*, 6 Kan. App. 268, 51 Pac. 60; *Philadelphia Tool Co. v. British America Assur. Co.*, 132 Pa. 236, 19 Am. St. Rep. 596, 19 Atl. 77. In the case at bar, however, it is disclosed by the record that inquiries were made by the agent, and having been made it was the duty of the plaintiff to make true answer to the same. But in stating that he was the owner of the property it was necessarily a representation that he not only owned the dwelling-house, but that he owned the land upon which the same was situated. It is true that the agent states that he did not inquire of the plaintiff about the real estate or the lot upon which the house was standing, but this, in view of the plaintiff's answer to his question, was clearly unnecessary, as the question necessarily included the title

to the land on which the building was situated. We are of the opinion, therefore, that the court's ruling that the defendant was not entitled to a direction or a verdict as to the four hundred dollars insurance upon the building was erroneous under the facts as they appear in the present record. There being no question as to the plaintiff's ownership of the personal property included in the dwelling-house, and the agent being fully informed, both by the plaintiff and from his own examination of the premises, as to the plaintiff's occupancy of the said dwelling-house, the verdict as to the personal property in the dwelling-house would seem to be correct. But, as upon another trial a different state of facts may be shown as to the dwelling-house and such ownership of the same shown as to entitle the plaintiff to recover the insurance claimed to be due thereon, we have deemed it proper to grant a new trial. In the view we have ²⁹⁰ taken of the case, we have not deemed it necessary to review the many authorities cited by the counsel for the plaintiff, as the law in this jurisdiction is settled by the cases in this court referred to, and, as we have seen, are supported by the later decisions of the highest courts of other states.

The judgment and order of the circuit court are therefore reversed.

A Provision in an Insurance Policy That It shall be Void if the Assured is not the Sole and Unconditional Owner of the property insured is material, valid and binding on the parties: Insurance Co. of North America v. Erickson, 50 Fla. 419, 111 Am. St. Rep. 121. A vendee in possession under an executory contract of sale whereby he has unqualifiedly agreed to buy the property is the "sole and unconditional owner" thereof within the true meaning of the ordinary clause of insurance policies upon that subject: Phenix Ins. Co. v. Hilliard, 59 Fla. 590, 138 Am. St. Rep. 171; Lancaster v. Southern Ins. Co., 153 N. C. 285, 138 Am. St. Rep. 665; Evans v. Crawford County etc. Ins. Co., 130 Wis. 189, 118 Am. St. Rep. 1009; and a vendee in possession under a deed is such "sole and unconditional owner" although the property be subject to a vendor's lien: Insurance Co. v. Pitts, 88 Miss. 587, 117 Am. St. Rep. 756. One may be such "sole and unconditional owner" although he has made an executory contract to sell, which remains unperformed: National Fire Ins. Co. v. Three States Lumber Co., 217 Ill. 115, 108 Am. St. Rep. 239. But one who has unqualifiedly agreed to sell to another, who has unqualifiedly agreed to buy, is not such "sole and unconditional owner": Insurance Company of North America v. Erickson, 50 Fla. 419, 111 Am. St. Rep. 121. A man who marries a widow having dower in lands, although at his own expense he makes repairs or builds a house thereon, is not "an unconditional or sole owner": McIntosh v. North State Fire Ins. Co., 152 N. C. 50, 136 Am. St. Rep. 818; and see Tyrees v. Virginia Ins. Co., 55 W. Va. 63, 104 Am. St. Rep. 983.

If the Insured has an Insurable Interest in the property, and in good faith applies for insurance thereon, and makes no actual misrepresentation or concealment of his interest therein, and the insurance company refrains from making inquiry concerning his interest and issues a policy to him, accepts and retains his premium, it must be presumed

to have knowledge of the condition of his title, and to insure the property with such knowledge: *National Fire Ins. Co. v. Three States Lumber Co.*, 217 Ill. 115, 108 Am. St. Rep. 239, and see cases cited in the cross-reference note thereto. If a policy contains a provision stating that it is void if the subject of insurance is a building on ground not owned by the assured in fee simple, no recovery can be had thereon for the loss of a building on leased premises, it has been thought, where the application for insurance was oral and no representation was made and no question asked respecting the title, and the insurer had no notice thereof, though the policy issued was not read by the assured prior to the fire, and he had no knowledge of the condition: *Wyandotte Brewing Co. v. Hartford Fire Ins. Co.*, 144 Mich. 440, 115 Am. St. Rep. 458; and see *Dooley v. Hanover Fire Ins. Co.*, 16 Wash. 155, 58 Am. St. Rep. 26. And it has been held that a fire insurance company, by issuing a policy without inquiry, does not waive a condition against encumbrances unless it or its agent has notice of their existence: *Virginia Fire etc. Ins. Co. v. J. L. Case Threshing Machine Co.*, 107 Va. 588, 122 Am. St. Rep. 875.

CUNNINGHAM v. ROYAL NEIGHBORS OF AMERICA.

[24 S. D. 489, 124 N. W. 434.]

LIFE INSURANCE—Issuance and Delivery of Policy.—The “issuing” of a policy of life insurance, within the meaning of a statute providing that an insurance company shall be estopped, in the absence of fraud, by the certificate of its medical examiner from setting up that the insured was not in the condition of health required by the policy at the time it was issued, includes a delivery of the policy to the assured. Until such delivery is made there is no “issuing” of the policy. (pp. 794, 795.)

Nelson, Duffy & Dennison and Seward & McFarland, for the appellant.

M. J. Russell and Hanten & Hanten, for the respondent.

490 **WHITING, P. J.** This action was brought to recover on a benefit certificate issued by the defendant corporation, by which certificate it undertook to insure the life of one Valina Cunningham in favor of her husband, the plaintiff herein. Trial was had resulting in a verdict for plaintiff, and, a motion for a new trial having been denied, the defendant company has appealed to this court from the judgment of the trial court and the order denying a new trial.

No dispute is made but what said Valina Cunningham made her application for such benefit certificate, and that in due course of time her application was approved and a certificate executed by the proper officers of the company; that said certificate was forwarded to the proper officers of the local lodge, a branch of such defendant company, and by such officers mailed to the insured and received by her

on the twenty-ninth day of May, 1906; that on or about June 3, 1906, the assessment due upon issuance of such policy was paid on behalf of the insured; and that upon July 6, 1906, the insured died. Numerous errors are assigned by the appellant company, several of which were abandoned in its brief, and, in the view we take of the case, there is only one question needing consideration.

The defendant alleged, and it stood established beyond question by the proof, that the certificate was issued and received by the insured subject to all the by-laws of said defendant company. Among such by-laws are found provisions under which no policy shall come into force, as against the defendant company, until the same shall be delivered to the insured, while such insured person is in good health. Among other defects set up by the appellant was the alleged fact that at the time this policy was received by the insured she was not in sound health, and the appellant alleged that for said reason such certificate never went into effect, there being no valid delivery of the same. Upon the trial the appellant called witnesses for the purpose of proving, and sought to prove, the alleged bad health of the insured at the time of the receipt by her of said certificate. Evidence ⁴⁹¹ along this line was objected to by respondent, and his objection sustained, and it is the rulings of the court sustaining these objections of which the appellant now complains, and which alleged error is the material question for consideration at this time.

Respondent contends that the rulings of the court are correct under section 731 of the Civil Code of this state, which reads as follows: "In any case where the medical examiner, or physician acting as such, of any life insurance company doing business in this state, shall issue a certificate of health or declare the applicant a fit subject for insurance under the rules and regulations of such company, the company shall be thereby estopped from setting up, in defense of suit on such policy, that the assured was not in the condition of health required by the policy at the time of issuing of such policy, except where the same is procured by or through the fraud or deceit of the assured." Appellant contends that said section has no application to the question involved here, for the reason that said section relates only to the time of issuing a policy, and that the "issuing of a policy" and the "delivery of the policy" are two separate and distinct matters; that "issuing" relates to the signing and executing of the policy, and nothing more. No contention is made but what, if the word "issuing," as used in said section, includes the delivering of the policy, that then the ruling of the trial court was correct, unless, as we shall hereafter more fully

consider, the answer was sufficient to admit of proof to establish fraud or deceit under said section 731.

We are clearly of the opinion that the learned trial court was correct in the construction which it placed on said section 731. It needs but a moment's reflection to satisfy any person that to construe the word "issuing" as referring only to the executing of the certificate by defendant company makes such section of practically no effect, inasmuch as the act of executing the policy or certificate is a thing done entirely unknown to the insured, and therefore the insured could never know whether some sudden illness suffered by him during the time between date of the ⁴⁹² application and the receipt by applicant of the policy occurred at a time when, if known to the company, it might have caused the company to refuse to execute the policy or certificate. But, regardless of the fact that appellant's construction of this section would destroy its usefulness, we think that, under the authorities, there can be no question but what as used in this section the word "issuing" includes the idea of delivery. Webster defines issue as follows: "To send out; to put into circulation." We think it must be conceded that as long as the certificate is in the hands of the defendant company or its agents, the officers of the local company, that such certificate has never been "sent out" from the defendant corporation. Appellant has cited us to the case of *Logsdon v. Supreme Lodge of F. U. of A.*, 34 Wash. 666, 76 Pac. 292. In that case, in construing the word "issue," the court said: "A certificate cannot be said to be issued when it is merely dated and signed by appellant's officers. It is not issued until it becomes vitalized as the evidence of a binding and mutual obligation. It does not become such until it has been delivered to and accepted by the member. In that particular it is analogous to deed which does not become a deed until it is delivered, even though that may be long after its date." In the case of *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565, 45 N. E. 804, the question arose as to the construction of a certain phrase used by plaintiff in the complaint, and the court says: "It is further urged that the allegation 'that the plaintiff procured to be issued to her a policy of insurance' is not equivalent to an allegation of delivery to and acceptance of such policy by the plaintiff. Conceding the learning of counsel, we think they are in error in this interpretation. A standard dictionary defines the word 'procured' 'to acquire for one's self,' 'to cause'; and the word 'issue' 'to deliver for use.' " In the case of *Folks v. Yost*, 54 Mo. App. 55, the court says: "Counsel for defendants at the oral argument seemed to place much emphasis on the clause directing the engineer to 'deliver such bills to the party in whose favor issued,' etc., arguing, as we gathered

his meaning, that this necessarily meant that the bills had already been issued before delivery. We regard such interpretation of the word ⁴⁹³ 'issued' as too narrow, and not in keeping with the general context of the act." And again, this court called attention to the fact that "the ordinary and commonly accepted meaning of 'to issue' is to send forth, to put into circulation, to emit, as to issue bank notes, bonds," etc. In the case of *State v. Pierce*, 52 Kan. 521, 35 Pac. 19, the court says: "To issue county warrants or orders means 'to send out; to deliver; to put forth; to put into circulation; to emit, as to issue bank notes, bonds, scrip,' etc." In *Magget v. Roberts*, 112 N. C. 71, 16 S. E. 919, the court held that a marriage license was not "issued" when filled out and said: "When filled out . . . and handed to the party who was to use it, it was then 'issued.'"

The appellant has sought to show that its answer was sufficient to admit of proof under section 731, in that it is claimed the allegations therein were such as to show fraud on the part of the insured. It is true, as held by this court in *Bryne & Hammer Dry Goods Co. v. Willis-Dunn Co.*, 23 S. D. 221, 121 N. W. 620, 29 L. R. A., N. S., 589, that it is not always necessary to expressly allege the fraudulent intent on the part of the party accused of fraud, when, from the facts pleaded, there can be no other deduction except that of fraud on the part of the person against whom such facts are pleaded; yet the answer in this case falls far short of coming under that class of pleadings. This answer was prepared apparently, so far as the parts material to this question were concerned, upon the theory that there had been no valid delivery owing to the fact that insured was not in sound health. If it had not been for said section 731 of our code, *supra*, such plea was sufficient, and this regardless of any allegation of scienter on the part of the insured, and the pleader in drawing the answer, following such idea, has wholly omitted any allegation to the effect that the insured was aware of the fact that her health was not sound at the time she received such certificate.

The judgment of the trial court and the order denying a new trial are affirmed.

The Delivery and Acceptance of Policies of Insurance is the subject of an extended note to *Stephenson v. Allison*, 138 Am. St. Rep. 29.

As to When a Contract of Insurance is Complete and when the insurance takes effect, see the note to *New York Life Ins. Co. v. Babcock*, 69 Am. St. Rep. 143.

BLAIR v. MAYER.

[24 S. D. 563, 124 N. W. 721.]

FEDERAL HOMESTEAD.—The Matter of the Exemption from debts of lands acquired under the federal homestead laws, prior to the patent thereof, is beyond the control of the state legislature. A federal homestead is in no event liable for a debt contracted prior to the issuance of a patent therefor, although the equitable title may have passed to the entryman. And this exemption is a condition running with the land, so that it remains exempt from such debts when title has passed to other parties, or its homestead character has been abandoned after final proof. (p. 798.)

FEDERAL HOMESTEAD—Transfer Before Patent.—The Exemption of a federal homestead from any debt contracted prior to the issuance of patent is not affected by a transfer from an entryman to his wife prior to patent. Such transfer does not have the effect of rendering a judgment against the husband and wife for a debt contracted prior to the issuance of the patent a lien upon the land. (p. 800.)

Gaffy & Stephens, for the appellant.

Goodner & Goodner, for the respondents.

⁵⁶³ WHITING, P. J. This action was brought to quiet the title to a certain tract of land in Hughes county. It appears that the plaintiffs were, at the time this action was brought, and had been at all times hereinafter mentioned, husband and wife. The husband in 1890 filed a homestead claim upon the land in question, under the general homestead laws of the United States. He made final proof in March, 1895, receiving the final receiver's receipt, which showed that the land was taken as a homestead. Patent issued to him in 1902. In October, 1895, the husband, by warranty deed, conveyed his title to this land to his wife. Over defendant's objection it was shown that this deed was without consideration, was executed without the wife's knowledge, and that it was given solely to protect the wife in case of the husband's death. In 1892 the plaintiffs executed a note secured by a mortgage on another piece of real estate. This mortgage was foreclosed in 1895, and on special execution the land mortgaged was sold, and deficiency reported by sheriff. In 1897 the judgment creditor caused general execution to issue, and same was levied on the land in suit as the property of plaintiffs, nothing connected with the levy or return thereon showing that the property was levied on as the separate property of either plaintiff. This land was sold under such execution, and afterward sheriff's deed issued, and through a chain of conveyances ⁵⁶⁴ any rights that were acquired under such sheriff's deed passed to the appellant herein. Upon the trial findings and decree entered for plaintiffs; and a motion for

new trial having been denied, the defendant Sarah A. Mayer appealed. It stands admitted that she is the sole party in interest as defendant.

The respondents claim that no title passed by the purported sheriff's sale, for the reason that the land could not be sold for the debt contracted before the patent issued. Further, they claim that the evidence sustains the court's findings to the effect that this land, at time of such sale, was the homestead of respondents under the state law, and, further, they claim that, for certain reasons alleged, the execution was invalid, and the proceedings thereunder irregular, thus rendering the sale void. The learned trial court held with respondents on the above propositions; and, if its holding was correct on the first proposition, it is conclusive of the rights of the parties herein, and renders it unnecessary to consider any assignments based on evidence or ruling pertaining to any other feature of the case.

Stated briefly, the proposition before us is this: Where a homestead entryman, after final proof, but before patent issues, conveys the homestead land to his wife, does such land become subject to lien of judgment against her, where such judgment was rendered upon a joint indebtedness of husband and wife, contracted long prior to final proof? It will be noticed that the above query leaves out all reference to the transfer being merely colorable, and is founded on facts undisputed herein. So far as we have been able to discover, this exact proposition has never been before the courts; but it would nevertheless seem to us that certain other matters have been fully settled by adjudications of this and other courts that must determine the above question in favor of respondents. It must be remembered that as the basis of this discussion we have the United States homestead laws and the reasons for their enactment. It has been held by a long line of decisions that the matters of disposing of the public lands, as to when, for how long, and for what debts they shall pass exempt to the government's grantee, are matters entirely beyond the power of state legislation to control.

⁵⁶⁵ In *Wallowa Nat. Bank v. Riley*, 29 Or. 289, 54 Am. St. Rep. 794, 45 Pac. 766, it was well said: "In pursuance of this power, and with a view to encourage the settlement of the public domain, Congress has invited heads of families to settle upon small parcels thereof, and make for themselves homes, with the assurance that in no event shall the land become liable to the satisfaction of any debt contracted prior to the issuing of the patent, although in the meantime the settler may become the owner of the equitable title." Under the above theory it is held that the federal statute means just as it reads, that even though the equitable title

is in the claimant through final proof made, yet the land is exempt from debts contracted up to date of issuance of patent, and, further, that this is more than a right of exemption personal to claimant, but is a condition running with the land, so that the land remains exempt from debts of entrymen when the title has passed to other parties. It has even been held that this condition follows the title back to the claimant should he ever become repossessed of the title to the land: *Brandhoefer v. Bain*, 45 Neb. 781, 64 N. W. 213. In the case of *Gould v. Tucker*, 20 S. D. 226, 105 N. W. 624, it was held, in line with many authorities, that upon death of claimant after final proof, but before patent issued, the title to homestead lands would not vest by succession or devise, but by grant from the government, and that this grant attached to it, in favor of the grantee, all the conditions in favor of such grantee as would have attached if the original claimant had been grantee.

It is also well established under the authorities that the conditions above referred to follow the land, even if the claimant wholly abandons it as a homestead, after final proof. These federal statutes thus established much more than an exemption law in favor of the land merely as a homestead. But, considering the homestead feature of the federal laws, we must recognize that these laws are for the benefit of the home, of the family taken as a whole, and should be as liberally construed as a state homestead law, so that the evident purpose of the laws may be effected that the family may all be protected thereby. That this law, taken as a whole, is intended for the benefit and protection ⁵⁶⁶ of the family has been held where the husband had entered into agreement, before entry on land, whereby he was to convey land to wife after patent issued. It was held that such agreement did not conflict with provisions against agreements to sell: *Barlow v. Barlow*, 47 Kan. 676, 28 Pac. 607. That this law must be intended to protect the wife is evidenced by the fact that, if the husband dies, all his rights pass to the wife. Why? Because the law looks not to the individuals, but, through the individuals, to the home and family. Thus in this case, if the husband had died before executing the deed to his wife, but after final proof, and this land had not been conveyed to anyone, the patent would have issued to the wife, vesting the absolute title to the land in her exempt from any debt of hers then in existence, including the debt upon which the judgment was entered. Supposing the husband had died after executing the deed to his wife, but before patent issued, the legal title would pass to her from the government by patent, and this legal title would be absolutely exempt from any prior indebtedness. Could it be held for a moment that by the receipts of this deed from her husband her rights

would be less if he then died than they would have been if he had died without executing a deed, and that, as a result, while the legal title was in her free from her debts, yet she held such legal title on behalf of certain parties who might have judgments of record against her, which were liens against an equitable title received from her husband? It must be remembered that, if judgment creditors acquired any rights whatever, they did so immediately upon the transfer under the deed to the wife, the judgment becoming a lien then, if at all. Can it be held that, if the wife had reconveyed this land to her husband before patent issued, it would have come to the husband subject to the lien of the judgment entered upon a debt, the debt of the wife as well as of the husband, but a debt from which the homestead of this family would have been exempt if the equitable title had not passed to a party for whose benefit, equal to that of the husband's, the homestead laws were passed? Certainly this cannot be true; it would be absolutely repugnant to the objects and purposes of the law. And by holding as we do the judgment creditor is ⁵⁶⁷ not wronged. It has been held repeatedly that, under the homestead laws, it is intended that creditors shall never get any benefit, except by the voluntary act of claimant, by which act he or she intentionally subjects the land to a lien. This is evidenced by the fact that unpatented homestead lands never, under any circumstances, become a part of the estate of a deceased entryman, and subject to administration as such; but, on the other hand, they revert to the government when there exists no person so related to the deceased entryman as to entitle him or her to become the grantee from the government under the federal law. The government intends to give to the homesteader and his family a new start in life, with a property acquired by their joint efforts, which property can never be taken for old claims. It certainly would not be in accord with the spirit of this law to hold that the entryman had defeated this beneficent purpose of the law by a transfer before patent to one who was, as well as himself, an intended beneficiary under the law. If appellant is right in her contention, then an entryman, in anticipation of pending death, could destroy the value of his wife's right as his widow to become the grantee of the government, by merely conveying to her his equitable interest under the final receipt. This would be absolutely repugnant to the well-established rules for construction of exemption laws, which should always be construed liberally to carry out the spirit of such laws.

Appellant contends that she was an innocent purchaser without notice. There is no possible foundation for such claim, as the records advised her of every fact upon which

we have based our discussion. It was also contended that respondents were guilty of laches, but the facts shown show no inexcusable delay whatever.

The judgment of the trial court and the order denying a new trial are affirmed.

As to the Selling, Leasing or Encumbering of a Homestead acquired under the land laws of the United States, see notes to Wilcox v. John, 52 Am. St. Rep. 249, and Nichols v. Council, 14 Am. St. Rep. 22; and the subsequent cases of Milliken v. Carmichael, 134 Ala. 623, 92 Am. St. Rep., and cases cited in the cross-reference note thereto.

A Homestead Acquired by Entry on Government Land is Forever Exempt from liability for debts of the grantee, contracted prior to the acquisition of the homestead, and there can be no such abandonment of the homestead as will destroy such exemption, although the patentee conveys the land and afterward reacquires the title: McCorkell v. Herron, 128 Iowa, 324, 111 Am. St. Rep. 201. See, also, Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936. But if one holding a homestead acquired under the laws of the United States sells it and the money goes into the hands of a third person, it becomes subject to garnishment, though the debtor intended to use such money in the acquisition of a new homestead to be owned and occupied under the laws of the state. The federal exemption ceases as soon as the land is voluntarily disposed of by the homesteader: Ritzville Hardware Co. v. Bennington, 50 Wash. 111, 126 Am. St. Rep. 894.

STATE v. ETTER.

[24 S. D. 636, 124 N. W. 957.]

BASTARDY PROCEEDING — Venue of Action — Residence of Complainant.—Under section 307 of the Code of Civil Procedure, it is not necessary that the complainant or her bastard child be residents of this state in order to maintain bastardy proceedings against a putative father, where the proceeding is instituted in the county of his residence. (p. 802.)

N. P. Bromley, for the appellant.

S. W. Clark, attorney general, Cloyd D. Sterling, assistant attorney general, and Wm. Issenhuth, state's attorney, for the state.

⁶³⁷ MCCOY, J. This is a bastardy proceeding against defendant, Frank E. Etter. He was found guilty by verdict of the jury, judgment entered against him, motion for new trial denied, and he has brought the cause to this court on appeal.

The appellant contends that because the complaining witness, Lillian Anderson, and her bastard child were both residents of the state of Minnesota at the time this proceeding was commenced, the same cannot be maintained in the

courts of this state against the defendant, who is a resident of Spink county. We are of the opinion that this contention is not tenable. It appears from the record that the child was begotten during the month of September, 1907, in Hughes county, this state, where the complaining witness was then residing and employed as a domestic, and that afterward she went to reside with her parents in the state of Minnesota, where she and the child have since remained. It also appears that the defendant at the time this proceeding was commenced was a resident of Redfield, Spink county. Section 307, Code of Civil Procedure, provides that when an unmarried woman shall be delivered of a child, which by law would be deemed a bastard, and shall make complaint to a justice of the peace of the county where she may be delivered, or the person accused may be found, and shall accuse under oath a person of being the father of such child, it shall be the duty of the justice to issue a warrant, etc. There is nothing in this section of the statute requiring the mother or the child to be a resident of this state as a condition precedent to maintaining the action, while this section of the statute expressly provides that the suit may be maintained in the county where the accused may be found. This court has held in *State v. Patterson*, 18 S. D. 251, 100 N. W. 162, that the obligation of the father to support a bastard child grows out of the parental relation existing between him and the child, and that it is immaterial, so far as the obligation is concerned, whether the child was born out of the state or not. It is the father's duty to support his children, legitimate or illegitimate; and, because he is liable to neglect that duty in the latter case, the law enforces the obligation by proceedings under the bastardy acts. The case of *Hodge v. Sawyer*, 85 Me. 285, 27 Atl. 153, in principle, on this question of residence is identical with the case at bar, and in that case the court said: "The defendant is a resident of this state. It would be unreasonable to hold that he was not amenable to our laws because from distress the complainant sought shelter in her father's home in another state—the only place for her to go, outside the almshouse." In *Moore v. State*, 47 Kan. 772, 28 Pac. 1072, 17 L. R. A. 714, it is held: "If the putative father is a resident of the state where the prosecution is commenced, the mother may make the complaint of bastardy against him, even if she and the child are residents of another state." The proceeding being statutory, reference must be had to the statute of the particular state to determine jurisdictional questions. Generally, a bastardy proceeding is a transitory action, unless there is some statute making it otherwise. As a general rule, it is not necessary that the mother be a resident of the state in order to institute

bastardy proceedings: 5 Cyc. 645-652; 3 Ency. of Pl. & Pr. 270. Under a statute similar to ours it is not necessary that the complainant or her bastard child be residents of this state in order to institute and maintain bastardy proceedings against a putative father, where the proceeding is instituted in the county of his residence. If the rule were otherwise, there might be no remedy where the accused took proper care to cross state lines at the proper time, or where the complainant and her child were, by force of circumstances compelled to reside outside the state.

Examination of the record disclosing no reversible error, the judgment and order denying a new trial are affirmed.

Whiting, P. J., took no part in this decision.

The Resident Father of a Bastard Child, begotten and born out of the state of a woman not then nor now a resident of the state, is subject to her suit in the county of his residence to compel him to contribute to the support of the child: Roy v. Poulin, 105 Me. 411, 134 Am. St. Rep. 573.

CASES
IN THE
SUPREME COURT
OF
UTAH.

BRISTOL v. BRENT.

[36 Utah, 108, 103 Pac. 1076.]

APPEAL—Harmless Error.—Where the Court Failed to Acquire Jurisdiction, whatever errors it may have committed in the proceedings leading up to its judgment are neither material nor prejudicial to the appellant. (pp. 806, 812.)

GARNISHMENT—Return Only Evidence of Service.—The officer's return to the writ constitutes the evidence, and is the only proper evidence, of the service of a garnishment. (p. 807.)

GARNISHMENT—Service—Compliance With Statute.—The service of a garnishment, in order to invest the court with jurisdiction of the garnishee or the debt, must comply with the statute. (p. 807.)

GARNISHMENT—Modes and Effect of Service.—Debts or credits may be attached in two ways: By leaving with the person owing the debt a copy of the writ of attachment with a notice that the debt has been attached, by which nothing is accomplished except to prevent the person who owes the debt or is in possession of property from disposing of it or surrendering possession thereof; or by having, in connection with the writ of attachment, a writ of garnishment issued and served upon the debtor of the defendant, and in that way not only attach the debt but place it in the custody of the law. (p. 807.)

GARNISHMENT—Personal Service—Return must Show.—In order to confer jurisdiction upon the court to proceed against a garnishee, the writ of garnishment must be served by delivering a copy thereof to him, and the return to the writ must show such service. (p. 808.)

GARNISHMENT—Service not Shown by Return.—Where the officer's return shows that a writ of attachment was not served, and it does not appear that a copy of a writ of garnishment was delivered to the garnishee, there is no such disclosure of "due service" as to give the court jurisdiction. (p. 808.)

GARNISHMENT—Appearance—Effect of as Waiver of Service. A garnishee may, by appearance, waive such defects in process and service only as affect him personally, and cannot, by any act of his, either waive the rights of the defendant or confer jurisdiction over the res. (p. 808.)

ATTACHMENT—Nonresident.—In attachment proceedings against a nonresident, where personal service is lacking, the court

must obtain jurisdiction of the property of the defendant by its seizure and taking into the custody of the law. If no property is found or seized, the court does not acquire jurisdiction to proceed to judgment. (p. 809.)

GARNISHMENT—Nonresident.—In Order for the Court to Obtain Jurisdiction to render judgment against a nonresident, where personal service is lacking, by the attachment of a debt by garnishment, two things are essential: (1) Jurisdiction of the person of the garnishee; and (2) jurisdiction of the debt owing by the garnishee to the defendant, which constitutes the res. (p. 809.)

GARNISHMENT—Nonresident.—A Proceeding by Which Jurisdiction is sought by attaching property, whether tangible or intangible, such as a debt, is essentially a proceeding in rem; a proceeding against a thing which is brought into the custody of the law and hence within the jurisdiction of the court. To place it into the custody of the law and bring it within the jurisdiction of the court, the things which the law requires must be done. (p. 809.)

GARNISHMENT.—Whether or not the Court has Jurisdiction over the res in case of a garnishment does not depend on whether the garnishee objects, but it depends entirely upon whether the statute by virtue of which alone the court is authorized to act has been complied with. (p. 810.)

GARNISHMENT—Jurisdiction—Waiver.—A garnishee cannot waive jurisdictional defects, and a failure to comply with the statute in making service on the garnishee is jurisdictional. It is the mandate of the law, when complied with, and not the act of the garnishee, that confers jurisdiction upon the court over the res. (p. 810.)

GARNISHMENT—Objection to Jurisdiction.—By a General Appearance a garnishee is precluded from objecting to a defect in service in so far as it relates to the jurisdiction over him, but in so far as it relates to the jurisdiction over the debt, he can object at any time before the money is paid and applied to the discharge of any judgment obtained in the action. (p. 813.)

GARNISHMENT—Objection to Jurisdiction After Payment.—After judgment and an application of the money, a garnishee will be held estopped from reclaiming it on the ground that the court had not acquired jurisdiction of the debt, the payment being tantamount to a voluntary payment, and the defendant may sue the garnishee and recover the amount so paid. (p. 813.)

APPEAL—Decision on New Grounds—New Trial.—Where a reversal is ordered upon grounds not called to the attention of the trial court, and for defects which the opposing party was given no opportunity to remedy, a new trial will be directed. (p. 813.)

GARNISHMENT—Amendment of Return.—Where proper service of a writ of attachment or garnishment was in fact made, but the return fails to show it, the court may allow an amended return to conform to the facts. (p. 814.)

E. A. Walton, for the appellant.

Goodwin & Van Pelt, for the respondent garnishee.

¹¹⁰ FRICK, J. This case was before us on a motion to dismiss the appeal: *Bristol v. Brent*, 35 Utah, 213, 99 Pac. 1000. The motion to dismiss was denied, and the parties at the last term of this court submitted the questions arising on the appeal. The appeal is from an order or judgment

discharging the garnishee, and the facts upon which the order was based are sufficiently stated by Mr. Chief Justice Straup in his opinion on the motion to dismiss the appeal, to which reference is made.

The garnishee alone appears in the action. Counsel for garnishee, stating their contention in their own language, insist "that the want of jurisdiction both of the person of the garnishee and of the property attempted to be held appears upon the face of this record cannot be questioned." If this be so, the district court was without authority to proceed further with the case, and ¹¹¹ hence whatever errors it committed in the proceedings leading up to the discharge of the garnishee are neither material nor prejudicial to appellant. Did the district court acquire jurisdiction of either the person of the garnishee or of the debt owing by it to the principal defendant, Noah Brent? As appears from the former opinion, appellant obtained a writ of attachment against Brent upon the sole ground that Brent was a nonresident of this state. The writ of attachment, as appears from the return of the officer, was never served; nor was there any tangible property attached. In connection with the writ of attachment, appellant also obtained a writ of garnishment, which it is claimed, was properly served on the garnishee, and by virtue of this service it is contended the debt owing by the garnishee to Brent was attached, and the court thus acquired jurisdiction of the res. The whole question hinges upon whether the court thus acquired jurisdiction of the res.

The return of the officer showing service of the writ of garnishment, and this is the only service the officer made, is as follows: "State of Utah, County of Salt Lake—ss. I hereby certify and return that I received the within and hereunto annexed writ of attachment on the 20th day of October, A. D. 1907, and by virtue of the same on the 20th day of October, A. D. 1907, I served a garnishment on the Atchison, Topeka and Santa Fe Railway Company, per C. F. Warren, Gen'l Agt., in the county and city of Salt Lake, state of Utah. At the same time I paid the garnishee fee of \$2.00 and took receipt therefor which receipt is hereto attached and made a part of this return. Life of said writ having expired I now return same without further service by me. Dated Oct. 18, 1907. [Duly signed by sheriff.]"

Was this return of service of the writ of garnishment sufficient to invest the court with jurisdiction of the res so as to authorize it to proceed with the case? Rood on Garnishment, section 277, states the rule which is almost universally applied by the courts in the following language: ¹¹² "All that has been said of the service of the writ applies with equal force to the return, for the return is the

officer's report of his doings under the writ. It should be indorsed upon the writ, or made upon a paper annexed thereto; for the writ and return constitute essentially one record, and must go together. Whatever the statute requires to be done in the service of the writ the return must show to have been done; and, unless it shows that due service has been made, the court has before it no proper evidence upon which to base any further proceedings. Its absence cannot be cured by the garnishee's signed admission of due service."

This return constitutes the evidence, and is the only proper evidence of service. The service, in order to invest the court with jurisdiction, must comply with the statute. Under our statutes debts or credits may be attached in two ways. By subdivision 6, section 3073, Compiled Laws of 1907, it may be done by leaving with the person owing the debt a copy of the writ of attachment with a notice to such person that the debt has been attached. By following this method, however, the plaintiff in the action accomplishes nothing except to prevent the person who owes the debt or is in possession of property from disposing of it, or from surrendering possession thereof. This is made clear by sections 3074 and 3075. If the plaintiff desires to make the person owing the debt a party to the proceedings—that is, if it is desired to bring him into court so as to compel him to disclose by a proper answer—then the plaintiff may, in connection with the writ of attachment, under section 3090, proceed to have a writ of garnishment issued and served upon the debtor of the defendant, and in that way not only attach the debt, but may also require such debtor to answer as garnishee, and thus place the debt into the custody of law. By section 3093 it is provided that a writ of garnishment must be served "in the same manner as a summons in the action." Section 2948 provides "the summons must be served by delivering a copy thereof," etc. Section 3094, among other things, provides that: "The return of the latter writ [garnishment] showing due service on the person therein named as garnishee shall give the court jurisdiction ¹¹³ to proceed against such garnishee as hereinafter provided." The writ of garnishment, therefore, must be served by delivering a copy thereof to the garnishee. The return of the officer who made the service of the writ of garnishment in this case does, therefore, not show a compliance with the statute. As we have seen from the quotation from Rood on Garnishment, *supra*, the statutory requirements with regard to service must be complied with in order to make a valid service. There is no "presumption that the officer has done his duty": Rood on Garnishment, sec 279. Upon the face of the officer's return, therefore, it affirmatively appears

that the writ of attachment was not served at all, while in disclosing the manner of service it does not appear that a copy of the writ of garnishment was delivered to the garnishee as required by our statute, and hence it affirmatively appears upon the face of the return that the writ was not served as provided by statute. The return, therefore, did not disclose "due service," which, it is provided by section 3094, *supra*, "shall give the court jurisdiction."

It is contended by counsel for appellant that the objections to the service and jurisdiction came too late, since they were not interposed until after the garnishee had appeared and answered to the writ of garnishment, and had by its answer admitted that it was indebted to the defendant; that by its appearance and answer the garnishee waived all defects, if any, in the service of the writ of garnishment, and thus conferred jurisdiction, not only over its person, but of the *res* as well. Upon this question the authorities are apparently in hopeless conflict. We have already held that the garnishee may not waive jurisdictional defects by a general appearance; that is, he cannot confer jurisdiction over the *res* by a voluntary appearance: *Cole v. Utah Sugar Co.*, 35 Utah, 148, 99 Pac. 681. Respecting the effect of a general appearance by the garnishee the rule is stated in 20 Cyc. 1057, in the following language: "In the majority of jurisdictions the rule is laid ¹¹⁴ down that a voluntary general appearance on the part of the garnishee waives all irregularities in garnishment proceedings, such as defects in the writ or summons, or in its service, *at least in so far as the rights of the garnishee are thereby affected.*" (*Italics ours.*) In support of this text cases from twenty-two states are cited. We have carefully examined cases from every one of the jurisdictions and have also examined others not referred to in Cyc. Many of the cases support the text not italicized as given in Cyc. in full, while a few of those cited support only that portion of the text which has been italicized. It is not practical to enter upon a review of all of the cases cited. We remark, however, that from a very careful examination of them we have become convinced that nearly all courts that have taken the pains to examine into the subject thoroughly refuse to enforce the doctrine of waiver except to the extent that the garnishee can waive such defects in process and service only as affect him personally, and cannot by any act of his either waive the rights of the defendant or confer jurisdiction over the *res*. The decided cases also disclose that the courts which extend the doctrine of waiver beyond this almost without an exception do so upon the general principle, namely, that a party by a general appearance waives defects in process and in the service thereof. If nothing were involved in attachment by garnishment ex-

cept to obtain jurisdiction over the person of the garnishee, the doctrine announced by those courts would no doubt be sound. In attachment proceedings against a nonresident defendant where personal service on him is lacking it is elementary that the court must obtain jurisdiction of the property of the defendant. This in an ordinary attachment is obtained by a seizure of it by the officer, and this seizure places the property in the custody of the law to be so held until the court determines whether or not the plaintiff in the action is entitled to judgment in the main case. When this is determined and judgment is entered, then, and then only, can the property that has been seized be applied to the payment of the judgment. If the officer's ¹¹⁵ return, therefore, should disclose that he had not found nor seized any property of the defendant, and the record further disclosed that the defendant had not been served with process or that he had not appeared in the action, the court could proceed no further for want of jurisdiction. In case of an attachment of a debt by garnishment, the writ of garnishment performs the functions of a writ of attachment, and a debt owing by the garnishee to the defendant may be attached by due service of such writ upon the garnishee. In such a proceeding, in order to confer jurisdiction upon the court, two things are essential: (1) Jurisdiction of the person of the garnishee; and (2) jurisdiction of the debt owing by the garnishee to the defendant, which constitutes the *res*. A proceeding by which jurisdiction is sought by attaching property, whether tangible or intangible, such as a debt, is essentially a proceeding in *rem*; that is, a proceeding against a thing which is brought into the custody of the law and hence within the jurisdiction of the court. To place it into the custody of the law and bring it within the jurisdiction of the court, the things which the law requires to be done must be done. If the law, therefore, requires personal service upon the garnishee by a delivery of a copy of the writ to him, this must be done in order to authorize the court to proceed against him. The regularity of this service, in so far as it is personal to the garnishee, may be waived by him, and he may appear before the court either in person or by answer if the law authorizes one to be made and filed, and thereby confer jurisdiction over his person. But when the garnishee has thus conferred jurisdiction upon the court over his person, only one of the essential elements to its complete jurisdiction to proceed in the case is present. The other, jurisdiction over the *res*, is still lacking. While the defendant no doubt may insist that unless the court have jurisdiction over the person of the garnishee, the debt owing from the garnishee to the defendant cannot be seized, yet the defendant cannot pre-

vent the garnishee from waiving any defects in the service in so far as it affects merely the ¹¹⁶ jurisdiction of the court over the person of the garnishee. But when it affects the res, the very thing to be taken from the defendant, he may insist upon a full compliance with the law, and, without such compliance, the court can acquire no jurisdiction over it without the consent of the defendant. Whether the court has jurisdiction over the res or not, therefore, does not depend on whether the garnishee objects, but it depends entirely on whether the statute by virtue of which alone the court is authorized to act has been complied with. If the return of the officer discloses an essential defect in this regard, the court is without power to proceed, and hence should arrest the proceedings on its own motion.

After a very careful examination of all the authorities that we could find relating to the subject, and after mature consideration, we have come to the conclusion that the doctrine of waiver by the garnishee does not extend to jurisdictional defects, and that a failure to comply with the statute in making service upon the garnishee is jurisdictional, for the reason that it is only by a strict compliance with the statute in respect to service that the court acquires jurisdiction of the debt owing by the garnishee to the defendant, and this debt constitutes the res which the garnishee may not voluntarily surrender or place in the custody of the law. It is the mandate of the law when complied with, and not the act of the garnishee, that confers jurisdiction upon the court over the res. While the garnishee may surrender his own person to the jurisdiction of the court, he may not voluntarily surrender the property of the defendant, although it be merely an intangible thing, such as a debt owing by the garnishee. Rood, in his excellent work on Garnishment, states the law upon this subject as follows:

"Sec. 268. The other proceedings being valid, due service of summons upon the garnishee is the commencement of a suit in the name of the plaintiff against him, and operates as an attachment, in his hands, of the property or debt alleged in the affidavit, and in respect of which he is summoned, placing it, substantially, in custodia legis.

"Sec. 269. It is also essential to the validity of the service that it be made in the manner prescribed by the statute under which ¹¹⁷ it issues, usually by reading or showing the original to the garnishee, and giving him a marked or certified copy, together with the statutory fee for his answer.

"Sec. 270. The garnishee may make many admissions and waivers without endangering his protection. He may waive payment of the fee allowed him by law, and his appearance and answer without objection will cure all defects

in the process which do not go to the jurisdiction of the subject matter.

"Sec. 271. Such waivers by the garnishee cure all defects in the service or process as a personal summons, but not as an attachment upon the property. Appearance and submission under void service depend upon a personal right to waive service, which the garnishee, as such, does not possess. He can waive his own rights, but he cannot waive the defendant's rights. He cannot voluntarily appear and substitute his creditor's creditor for his own, because that goes to jurisdiction of the subject matter, not to jurisdiction of the person. Fatal defects in the service of process cannot be cured by any act of the garnishee."

"Sec. 275. But, the remedy being extraordinary, and so liable to abuse and injustice, unless properly regulated, the courts enforce a rigorous compliance with all the provisions of the statute; and a failure in any will be fatal to the proceedings, and deprive the court of jurisdiction if previously acquired. All rights acquired under the proceedings depend upon compliance with the requirements of the statute."

In 20 Cyc. 1047, the rule is stated as follows: "The service of a writ or summons in garnishment is regulated entirely by statute, which must be strictly followed in order to confer jurisdiction upon the court, and in the majority of jurisdictions actual service upon the garnishee is required, and failure to comply with the statute in respect to service is not waived by the voluntary appearance of the garnishee so as to confer jurisdiction upon the court. However, the garnishee's appearance and answer without objection will cure all defects in the service of the writ or summons which are not jurisdictional in their nature."

In 2 Shinn on Attachments, section 610, the author says: "Garnishment is a compulsory novation which the law can alone initiate by the intervention of its own substantial appointments. The court does not obtain jurisdiction over the debt sought to be seized without sufficient service upon the garnishee, for acceptance of service by the garnishee is not an attachment. The garnishee by appearing and answering cannot waive objections to the jurisdiction."

¹¹⁸ Is it not pertinent to ask, if the garnishee cannot confer jurisdiction of the debt by a voluntary appearance, how can he do so by waiving defects in the service? The answer, to us at least, seems inevitable, namely, because the act of the garnishee is no substitute for what the statute requires in order to make a valid attachment of a debt, and unless and until the statute is complied with there is no attachment, and without an attachment there can be no

jurisdiction of the res. The following cases will be found to support the doctrine as laid down by both Mr. Rood and Mr. Shinn: *Masterson v. Missouri Pac. Ry.*, 20 Mo. App. 653; *Fletcher v. Wear*, 81 Mo. 524; *Hackett v. Gihl*, 63 Mo. App. 447; *Altona v. Dabney*, 37 Or. 334, 62 Pac. 521; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *McDonald v. Moore*, 65 Iowa, 171, 21 N. W. 504; *Raymond v. Rockland Co.*, 40 Conn. 401; *Dunn v. Missouri Pac. Ry.*, 45 Mo. App. 29; *Phoenix Bridge Co. v. Street*, 9 Okl. 422, 60 Pac. 221; *McKenzie v. Ransom*, 22 Vt. 324. The last case cited is frequently classed among those which hold to the doctrine that the garnishee's general appearance waives all defects in process and service, and confers jurisdiction upon the court of the res. A mere cursory reading of the able opinion written by Mr. Justice Carpenter will disclose that the defect in that case was one merely personal to the garnishee, and that the reasoning of the case is clearly in harmony with the rule we have adopted in this case. The case of *Phoenix Bridge Co. v. Street*, 9 Okl. 422, 60 Pac. 221, went off upon the proposition that the writ of garnishment was void, but in the opinion the doctrine we contend for is clearly supported. We mention these two cases because the question of waiver is discussed in them, but passed upon only indirectly. In all of the other cases cited the question of waiver is discussed, and it is held that whatever the statute requires to be done in order to effectuate an attachment by garnishment, whether it be in the service or otherwise, must be complied with; and further, that the garnishee can waive defects in service or otherwise only in so far as it may affect him personally,¹¹⁹ and that any waiver by him does not confer jurisdiction over the res, the debt.

From what we have said it follows that all the other assignments are of no importance. We have considered nothing except the proceedings up to and including the return of the officer. Since this return discloses that the court was without jurisdiction of the res, the errors complained of by appellant are wholly immaterial, and, if we attempted to discuss or pass upon them, anything we might say would be merely dicta. This is also true of the matters urged by the garnishee respecting the insufficiency of the service upon it. The garnishee could and did waive any defect in the service so far as it affected it by its general appearance. In view that the garnishee appeared generally, it is of no consequence whether the person served as "Gen'l Agt." was the proper person on whom service could legally be made or not. The objection urged by the appellant that the garnishee's objections to the

jurisdiction come too late because made after a general appearance is not tenable. While the garnishee was precluded from objecting to the defect in service in so far as it related to the jurisdiction over it, yet, in so far as it related to the jurisdiction over the debt, it could, as we view it, object at any time before the money was paid by it and applied to the discharge of any judgment obtained in the action. After such judgment and application of the money, the garnishee would be estopped from reclaiming it, not because the court had acquired jurisdiction over the money, but because the payment by the garnishee would be tantamount to a voluntary payment which it could not recover back, and the defendant could then sue the garnishee and recover the amount so paid in an action against the garnishee: *Cole v. Utah Sugar Co.*, 35 Utah, 148, 99 Pac. 681; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400. Therefore, when by an inspection of the return it appeared to the district court that service had not been made of the writ of garnishment as required by statute, the only proper thing for it to do was to discharge the garnishee and refuse to proceed further in the action until jurisdiction ¹²⁰ over the res, or over the person of the defendant, was acquired according to law. In view, however, that the return of the officer was not attacked upon the ground upon which the decision is based, and the attention of the trial court not having been directed to the defect in the return of service, and thus no opportunity having been given to the appellant to cure the defect in the service, an opportunity to do this should be given. If the service was in fact made in accordance with the provisions of the statute, then the court was deprived of the power to act, not because there was no valid service, but upon the sole ground that there was no evidence of that fact before the court authorizing it to proceed. Under the authorities such a defect is curable by proper amendment if application therefor is made to the trial court. As appears from the authorities, the application, to some extent at least, rests in the sound discretion of the trial court which should be exercised with some caution, and if, under the facts and circumstances, the court is satisfied that no intervening or other rights are affected by permitting an amendment, it should ordinarily be allowed. This doctrine is, we think, clearly sustained and fully illustrated in the following cases: *Fee v. Kansas City etc. Ry.*, 58 Mo. App. 90; *Gregor Grocer Co. v. Carlson*, 67 Mo. App. 179; *Tennent-Stribbling S. Co. v. Hagardine etc. Co.*, 58 Ill. App. 368; *Ware v. Bucksport etc. Ry.*, 69 Me. 97; *O'Connell v. Ackerman*, 62 Md. 337; *Brown v. Ellsworth*, 72 N. H. 186, 55 Atl. 356; *Bushnell*

v. Allen, 48 Wis. 460, 4 N. W. 599; O'Conner v. Wilson, 57 Ill. 226.

For the foregoing reasons, and upon the authorities cited, we are of the opinion that the order or judgment discharging the garnishee should not be unconditionally affirmed. It is therefore ordered that the case be remanded to the district court, with directions to set aside the order discharging the garnishee and to permit the appellant to amend the return of the officer showing the manner of service upon the garnishee, and, if the court is satisfied that the service was in fact made as required by statute, then the court shall proceed ¹²¹ with the garnishment proceeding as if a proper service had been shown in the original return and pass upon the garnishee's objections in other respects, as none of these have been or could be decided by us. If the appellant shall fail or be unable to so amend the return as to show a statutory service as defined in this opinion, then the court is directed to finally discharge the garnishee and dismiss the garnishment proceeding, the respondent to recover costs.

Straup, C. J., and McCarty, J., concur.

A Proceeding by Garnishment is in the Nature of a Proceeding to Rem: Katz v. Obenchain, 48 Or. 352, 120 Am. St. Rep. 821. In an attachment proceeding the res must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction: National Broadway Bank v. Sampson, 179 N. Y. 213, 103 Am. St. Rep. 851. If a court seeks to obtain jurisdiction of a nonresident by virtue of an attachment of his property in the state, the jurisdiction and the validity of the attachment depend upon the defendant's actually having property within the state, and if this fact does not appear, it is fatal: Greenwood etc. Co. v. Canadian etc. Co., 72 S. C. 450, 110 Am. St. Rep. 627. It is the duty of the sheriff levying an attachment by his return to show full compliance with the provisions of the statute defining his duties concerning the levy of the writ: Green v. Coit, 81 Ohio St. 280, 135 Am. St. Rep. 784. As to the sufficiency of the return in attachment, see note to Hall v. Stevenson, 20 Am. St. Rep. 808.

Garnishment is an Attachment by means of which money or property of the debtor in the hands of third persons, which cannot be levied upon, may be subjected to the payment of the creditor's claim. To subject money or property to attachment it must be within the jurisdiction of the court: American Cent. Ins. Co. v. Hettler, 37 Neb. 849, 40 Am. St. Rep. 522. The courts of a state may, by process of attachment, acquire jurisdiction over a nonresident defendant for the purpose of subjecting a debt due him from a citizen of that state to the payment of plaintiff's demand: Serviss v. Washtenaw Circuit Judge, 116 Mich. 101, 72 Am. St. Rep. 507. A person served with garnishment process has a right to raise all questions as to the jurisdiction of the court to proceed against him: McKinney v. Mills, 80 Me. 478, 81 Am. St. Rep. 278.

**WALL RICE MILLING COMPANY v. CONTINENTAL
SUPPLY COMPANY.**

[36 Utah, 121, 103 Pac. 242.]

SALE BY SAMPLE—Right of Inspection.—In a sale by sample, where the seller selects the goods and there is no express warranty, a right of inspection exists as a condition precedent to the passing of title. (p. 816.)

SALE BY SAMPLE—Buyer Bound by Inspection and Acceptance.—Where the buyer of goods, sold by sample, inspects and accepts the bulk, he is bound to pay the purchase price without right to recoup damages for any defect in quality thereafter discovered. (p. 817.)

SALE BY SAMPLE—Opportunity of Inspection.—The buyer in a sale of goods by sample is entitled to a reasonable opportunity to make an inspection of the bulk and a reasonable time within which to make it. (p. 817.)

SALE BY SAMPLE—Acceptance—Removal for Inspection.—A removal of the bulk of goods sold by sample from the railroad car in which they were shipped to the warehouse of the buyer, for the sole purpose of inspection, does not constitute an acceptance. (p. 817.)

SALE BY SAMPLE—Inspection and Acceptance—Questions of Fact.—In the case of a sale by sample the questions whether the receipt of the goods by the buyer was for the purpose of inspection only, whether the inspection was made within a reasonable time and in the proper manner, and whether what was actually done amounted to an acceptance, are all questions of fact. (p. 817.)

TRIAL—Immaterial Issues.—It is not Error to refuse to submit an immaterial issue to the jury. (pp. 817, 818.)

INSTRUCTIONS.—It is not Error to Refuse to give a requested instruction, the subject matter of which is substantially covered by the court's general charge. (p. 818.)

Valentine Gideon, for the appellant.

C. R. Hollingsworth, for the respondent.

123 FRICK, J. This is an action to recover the purchase price of a carload of rice, which, it is alleged, respondent purchased from appellant. While respondent interposed a number of defenses and also set up a counterclaim, the only defense which was submitted to the jury by the trial court and upon which the verdict in favor of respondent is based is the one that the rice was not of the quality represented by appellant, and that, upon inspection of the rice by respondent, it refused to accept the same or any part thereof.

The material facts in brief are: That at the times alleged appellant was engaged in the business of preparing rice and selling it in wholesale quantities, its place of business being at Lake Charles, Louisiana, while respondent was engaged in business at Ogden, Utah. Mr. Geoghegan represented appellant as its agent at Salt Lake City. In

March, 1908, respondent placed a verbal order with Mr. Geoghegan as claimed by it for three hundred sacks of unmilled rice containing one hundred pounds each, at the agreed price of four dollars and thirty-seven and one-half cents per hundredweight, free on board cars at Lake Charles, Louisiana, and that the quality of the rice was to be in accordance with the specified sample agreed upon by the parties. The only difference between the claim made by respondent and Mr. Geoghegan is that, while respondent claims the order was for three hundred, Geoghegan claims it was for four hundred ¹²⁴ sacks. This difference, as will appear hereafter, however, is not material. The order was duly forwarded by Mr. Geoghegan to appellant, and on the sixth day of April, 1908, appellant, at Lake Charles, Louisiana, loaded in a certain car five hundred and twelve sacks of one hundred pounds each of what it claimed to be unmilled rice of the quality ordered by respondent. The car was consigned in the name of appellant to Ogden, Utah, and respondent was duly notified that the car had been loaded as aforesaid and was being forwarded. A draft for the amount of the purchase price was attached to the bill of lading, and was forwarded by mail to one of the banks at Ogden, Utah. The bill of lading contained a stipulation that respondent was entitled to inspect the rice before acceptance. Upon the arrival of the car at Ogden respondent obtained permission to open the car for the purpose of inspecting the rice. On opening the car, it was found that the car was a small one, and that it was impractical to inspect the rice in the car. Respondent thereupon procured the rice to be taken from the car to its warehouse, where it is claimed it was taken for the purpose of inspection, and, upon such inspection being made, respondent claims that the rice was found to be damaged and of a quality inferior to the sample before referred to. Respondent refused to accept the rice and forthwith returned the same to the car, and notified the appellant of what it had done, and refused to pay for the rice or any part thereof. Upon substantially the foregoing facts the jury found that the rice was not in accordance with the sample; that it was damaged and of an inferior quality, and that the respondent had not accepted the same, and, in view of these facts, the jury found that respondent was not liable for the purchase price.

Appellant asserts that in unloading the rice and removing the same to its warehouse respondent as a matter of law accepted it, and that the court erred in refusing appellant's request to so instruct the jury. We are clearly of the opinion that the court did not err in refusing appellant's request. It is agreed by both parties that respondent

had the right of inspection before accepting the rice. And, in any event, in ¹²⁵ view that the sale was by sample, that the appellant and not the respondent selected the rice, that there was no express warranty upon which respondent could rely and for a breach of which it could recover in a proper action the right of inspection must have been intended by the parties as a condition precedent to the passing of title. No doubt, under the facts disclosed by this record, if respondent inspected and in fact had accepted the rice, it was bound to pay the purchase price without right to recoup damages for any defect in quality which might have been discovered after inspection and acceptance. The transaction is not one of an executed contract of sale upon an express warranty of quality upon which the purchaser could rely after acceptance of the article purchased. The inspection, therefore, was to protect respondent, and for this purpose it was entitled to reasonable opportunity to make an inspection as well as a reasonable time in which to make it; and, if the rice was taken from the car for the purpose only of giving respondent opportunity to make a proper inspection of the numerous sacks of rice contained in the car, the mere removing of the rice, if done for that purpose only, would not, in law, constitute an acceptance, although it may by a strict construction constitute a receipt of the rice by taking it from the car: 2 Mechem on Sales, secs. 1210-1212; Benjamin on Sales, secs. 703, 706; Pierson v. Crook, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349; Fogel v. Brubaker, 122 Pa. 7, 15 Atl. 692. In the last case referred to the distinction with respect to the doctrine applicable to executed contracts wherein an express warranty is contained and to executory contracts like the one at bar is admirably stated. It is there pointed out that in the latter class of cases the question of whether the receipt of the articles by the purchaser was for the purpose of inspection only, that whether the inspection was made within a reasonable time and in the proper manner, and whether what was actually done amounted to an acceptance or not, are all questions of fact and not of law. No claim is made, and none could well be, that there is no evidence ¹²⁶ to justify the verdict of the jury. The trial court submitted all these questions to the jury in what we conceive to be full and proper instructions; and hence the appellant has no cause for complaint. Nor did the court commit error in refusing appellant's other requests. The request that the respondent in view of the circumstances could not reject the rice upon the ground that appellant shipped a quantity in excess of what was ordered was an issue not submitted to the jury. Upon that issue appellant obtained an advantage, for the

reason that the trial court permitted respondent to refuse acceptance upon the sole ground that the rice was not in accordance with the quality of the sample submitted. The court, therefore, committed no error in refusing this request. Request No. 6, which was likewise refused, contains no propositions of law which were not substantially covered by the court's general charge; and hence the court committed no error in refusing this request. Nor was the appellant prejudiced in the admission of the exhibits complained of. In this connection we remark that the case was fully and fairly tried and appellant was given every right to which it was entitled, and the real issue in the case, namely, as to whether the acts of the respondent in handling the rice constituted an acceptance of it, and whether the respondent had the right to reject it on the ground of a defect in quality, were fairly submitted to the jury in terms that men of ordinary intelligence could not fail to comprehend.

From a careful inspection of the record we can discover no prejudicial error. The judgment, therefore, ought to be, and is accordingly affirmed, with costs to respondent.

Straup, C. J., and McCarty, J., concur.

As to What Constitutes a Transaction a Sale, see the note to *Fleet v. Hertz*, 94 Am. St. Rep. 209.

Buyer's Right of Inspection.—Under an executory contract for the future sale and delivery of goods of a specified quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of an inferior quality, the buyer is not bound to accept them. This gives him the right of inspection, and he is entitled to an opportunity therefor before becoming liable for the price: *Eaton v. Blackburn*, 52 Or. 300, 132 Am. St. Rep. 705. See, further, as to the right of inspection, *Flick v. Detroit etc. Ry. Co.*, 137 Mich. 708, 109 Am. St. Rep. 694; *Livesley v. Johnston*, 45 Or. 30, 106 Am. St. Rep. 647. Where a contract of sale is executory, the purchaser cannot be compelled to accept the property, unless he has had an opportunity to inspect it and ascertain whether it is such as is stipulated for: *Deutsch v. Dunham*, 72 Ark. 141, 105 Am. St. Rep. 21.

Where the Buyer has an Opportunity of Examining the Thing Purchased, there is no implied warranty, in the absence of fraud or express warranty, that it shall be fit for the purpose for which it was bought: *Farren v. Dameron*, 99 Md. 323, 105 Am. St. Rep. 297. See, also, *National Cotton Oil Co. v. Young*, 74 Ark. 144, 109 Am. St. Rep. 71; note to *Goodridge Min. Co. v. Talmadge*, 102 Am. St. Rep. 603. The right of the vendee to recover damages on the ground that the article furnished fails to correspond to the contract does not survive the acceptance of the goods by the vendee after opportunity to ascertain the defect: *Waeber v. Talbot*, 167 N. Y. 48, 82 Am. St. Rep. 712.

If Goods are Bought by Sample, the Right of Inspection before acceptance always exists; and if the goods are not up to the sample, the buyer has the right to refuse them. He cannot be required to inspect the goods at the shipping point, but is entitled to a reason-

able opportunity to do so after their arrival: *Kuppenheimer v. Wertheimer*, 107 Mich. 77, 61 Am. St. Rep. 317. In sales by sample, there is an implied warranty that the bulk shall be equal to the sample, and also where goods are sold without opportunity of inspection, that they shall be at least merchantable: *E. F. Main Co. v. Field*, 144 N. C. 307, 119 Am. St. Rep. 965.

The Receipt of Goods is One Thing, and the Acceptance Thereof Another; the receipt will become acceptance if the right of rejection is not exercised within a reasonable time, or if anything is done by the buyer which he would have no right to do unless he were the owner of the goods: *Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. Rep. 831. Goods are not accepted, so as to waive the purchaser's right to object that they are not of the quality called for by his contract, merely by the receipt and retention of a part of them by the purchaser, when he at the same time objects thereto and stipulates that such receipt shall not be regarded as an acceptance: *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199. As to what constitutes the acceptance of an automobile, see *Wirth v. Fawkes*, 109 Minn. 254, 134 Am. St. Rep. 778. The question of whether the buyer has waived his right of inspection and the question of the acceptance of goods are ordinarily for the jury: *Eaton v. Blackburn*, 52 Or. 300, 132 Am. St. Rep. 705.

To Refuse an Instruction is not Error if those given contain the whole law of the case: *Madisonville etc. R. R. Co. v. Cates*, 138 Ky. 257, 137 Am. St. Rep. 379.

TWENTY-SECOND CORPORATION OF CHURCH OF JESUS CHRIST v. OREGON SHORT LINE RAILROAD COMPANY.

[36 Utah, 238, 103 Pac. 243.]

EMINENT DOMAIN.—The Damage Clause of the Eminent Domain provisions of the constitution is limited to damages arising from some physical injury to property, or from some physical disturbance or interference with some property right, as distinguished from mere annoyance. (p. 825.)

EMINENT DOMAIN—Noise of Railroad—Disturbance of Meetings.—Under the eminent domain law damages cannot be recovered for annoyance to the occupants of property, or the disturbance of religious or other meetings held in buildings on the property, caused by the noise of operating railroad trains. (p. 826.)

NUISANCE—Noise of Trains—Disturbance of Meeting.—The noise of operating railroad trains in the usual manner and with ordinary care, which noise affects all who are similarly situated along the line of the railroad, does not constitute a nuisance, either public or private, nor does the fact that such noise interferes with and annoys those attending a religious or other meeting alter the rule. (pp. 829, 831.)

APPEAL—Theory of Action Below—Change on Appeal.—Where an action is tried upon a certain theory in the trial court, the respondent will not be heard to say that the judgment might be sustained upon an entirely different theory. Hence where an action has been tried as one for damages under the eminent domain law,

the judgment will not be considered as one awarding damages for a private nuisance. (p. 830.)

NUISANCE—Annoyance Common to All—Damnum Absque Injuria.—Where all suffer from the same kind of interference and annoyance, and the difference of annoyances as between communities and individuals is one of degree merely, not of kind, and the annoyance is caused by something that is a necessary part of some lawful enterprise which is in its nature public and cannot be shifted from place to place, all must bear the annoyance as best they may. (p. 832.)

P. L. Williams, George H. Smith, John G. Willis and H. B. Thompson, for the appellant.

Moyle & Van Cott and E. C. Ashton, for the respondent.

240 FRICK, J. This is an action for damages alleged to have been caused by the operation of appellant's trains to respondent's property used for church and other purposes.

The material facts, briefly stated, are, in substance, as follows: Respondent, in 1890, erected a certain building forty by sixty feet, to which it added, in 1900, what is termed "the annex," forty by seventy feet. These buildings are used for church purposes; that is, the usual Sunday and week day services are held in them, and, in connection therewith, Sunday-school and other religious exercises were also conducted therein. The buildings were also frequently used for entertainments, theatricals, dances, and other gatherings, so that the buildings were used for religious purposes several times on each Sunday and sometimes one or more times during the week for other purposes. The secular meetings were held mostly on evenings, while on Sundays the religious services were conducted in the forenoons, afternoons, and evenings. Prior to 1890, when the first building was erected, the appellant, or its predecessor in interest, had constructed and operated a certain line of railroad west of and in what is known as Fourth West street running north and south. When the railroad was first built, but one track was laid. Some years thereafter—the evidence does not disclose when—another track was added. These tracks were west of what we shall, for convenience, term the church property, **241** between three hundred and four hundred feet. The church property, upon which the buildings in question are located, consists of a parcel of ground five by fifteen rods running north and south fronting on Third North street, which runs east and west. The westerly side line of this parcel of ground is fifteen rods, or two hundred forty-seven and one-half feet, east of the east margin of Fourth West street. From this it will be seen that there was a parcel of ground fifteen rods in length between the church prop-

erty and the street on which the railroad tracks were laid. About the year 1903 appellant obtained a strip of ground, by purchase or otherwise, off the west end of the fifteen rod strip, aforesaid, and also, by virtue of an ordinance, obtained permission from the mayor and city council of Salt Lake City to construct additional tracks in Fourth West street. These tracks were laid in 1905 or 1906. The evidence disclosed that there were fourteen tracks that were operated by appellant. The nearest of these tracks is one hundred and five feet west from the west side line of the church property, and one hundred and fifteen feet west from the west side of the buildings thereon. The other tracks are all to the west, the farthest being between three hundred and four hundred feet distant. The station or depot of appellant is some blocks south, while its yards, which are termed "the north yards," repair and car shops are a half or three-quarters of a mile north of said buildings. The additional tracks before referred to were constructed to accommodate the increased railway traffic and to permit appellant to break up and make up its freight and passenger trains, after arriving and before departing, in the north yards. In this way many trains, or parts of trains as well as switch engines, pass north and south over the tracks immediately west of the church buildings each day and night. These engines made noises by ringing the bells and sounding the whistles in passing north and south along First West street, and especially in crossing Third North street, which, as we have said, runs east and west in front of the church buildings. It is alleged that the noises emanating from ²⁴² the engines as aforesaid disturbed the meetings and exercises that were conducted in said buildings and caused great annoyances to the speakers and singers, and at times interfered with the music and was a great annoyance to those in attendance at the meetings.

To avoid, as far as possible, any misconception with regard to what caused the interferences and annoyances, we shall give the statements of the witnesses in their own language. Mr. Nebeker, who was, perhaps, as familiar with the prevailing conditions as anyone, when asked to state what caused the disturbances and annoyances to the speakers and attendants at the various church and other meetings, said it was "the whistling of engines, the puffing of the engines, and the ringing of bells, and the jostling of the cars, switch engines, switching of the cars, and the noises caused by the momentum of the train passing." This witness gives ten specific instances by giving the dates when either the speakers or singers, or some ceremony, was interrupted by the noises referred to by him. The witness,

however, says that the disturbances and annoyances occurred at numerous other times; but he was unable to give any specific dates. Mr. Archer, another witness, could not give specific dates, but said that the disturbances and annoyances were frequent and were caused by the "passing of trains and the noise consequent thereto, the whistling and puffing of the engines, and the noise of the cars passing." Mrs. Solomon, another witness, said the disturbances were occasioned by the "trains passing and engines whistling, trains making a rumbling noise and puffing." Mr. Holmes said that the disturbances arose from noises from "the movements of the trains, the noise of the trains, the whistling and the running of the engines and the cars." Mr. Morris said the disturbances were caused "by noises made by the frequent passing of the trains and the shrieking of whistles and the ringing of bells." Mr. Beesley, when asked what caused the disturbances and annoyances, said: "It is the passing of railroad trains on the Oregon Short Line tracks and the noises attendant to the screeching of the whistles and the ringing of bells." The ²⁴³ other witnesses, Mr. Blake, Mrs. Davis, Miss Davis, Mr. Paul, Mr. Hardy, Miss Thomas, Mr. Thomas, Mr. and Miss Rees, gave the cause of the disturbances in about the same language. Mr. Rees, however, spoke of trains and engines sometimes stopping at or near Third North street and whistling for or when signals were given. These witnesses also said that the interruption would sometimes occur from four to ten times during a meeting lasting two hours, and they said that the average number of interruptions at a meeting would be four or five and would be from ten to fifteen or twenty seconds duration. Mr. Nebeker gave one instance when smoke from an engine entered the building through the open windows and he says "the smoke was very offensive." This, as far as we are able to discover from the record, is the only witness who specially speaks of the smoke. It may have been incidentally mentioned by some others; but, if so, we have failed to discover it. This, for reasons hereafter stated, is, however, not of great importance. The witnesses were, by the trial court, permitted to go into great detail with respect to the ceremonials and other religious exercises that were conducted in the buildings and the interruptions that took place from the causes and in the manner stated, and they all testified that the noises were very disagreeable and annoying. Some of them characterized them as "humiliating" in view of the sacredness of the ceremonies that were conducted from time to time.

Upon the foregoing facts the court, after telling the jury that no recovery could be had for the use of the two tracks

first laid, instructed the jury as follows: "But the defendant is liable for the damages, if any, occasioned by reason of the matters complained of involved in the operation of the additional tracks and yards constructed in 1906; and you are instructed that, although the defendant may have operated its engines and cars engaged in such additional operations as above defined in a careful and prudent manner, which manner of operation is not disputed, it is nevertheless liable for the damage, if any is proven by the evidence, to the plaintiff resulting from the noises involved in such additional operation, such as the blowing of the whistle of the engines, the discharging of steam, the puffing of engines, and the rumbling and jostling together of cars. No question of negligence is involved in this action."

²⁴⁴ Upon the instructions given the jury found for the respondent, assessing the damages at four thousand dollars. The court entered judgment on the verdict, and, after refusing a new trial, the case is brought to this court on appeal.

The appellant excepted to the foregoing instruction, and the principal question arising on this appeal relates to the propositions of law contained in said instruction. We remark that appellant excepted to the instruction as a whole. If it were not for the fact that the other parts of the instruction did not contain anything except a restatement of matters also contained in other instructions, and thus what was said by the court was merely introductory to the real proposition of law contained in the foregoing quotation, and that from the entire record it is palpable that the court's attention was specifically directed to the propositions of law contained in that part of the instruction now objected to, and that the court deliberately stated the law applicable to the facts as above indicated, we might be powerless to review the instruction. In view of the foregoing conditions, however, we feel constrained to give the appellant the benefit of the doubt, and shall review the case upon the proposition of law stated in the instruction excepted to.

It will be observed that in this case no question is raised with respect to interruptions of ingress or egress to and from the property alleged to have been damaged; nor is there any claim that there was any physical injury to the buildings or property; nor do the facts make a case where the erection of coal chutes, roundhouses, machine or repair shops, water-tanks, or other like structures in close proximity to church buildings, constituting a nuisance, is complained of. The record presents a case where the only interferences and annoyances complained of affect those using the buildings for a special purpose, and the interfer-

ences and annoyances arise wholly out of the noises incident to the operation of locomotive engines, trains of cars, and switch engines upon railroad tracks which were lawfully laid. Appellant contends that under those circumstances ²⁴⁵ respondent is simply suffering from the ordinary interferences and annoyances which are incident to the operation of trains over a railroad track or tracks lawfully constructed, and that all these are suffered by all the residents along the railroad track in common with respondent, and hence no recovery can be had. Respondent, however, contends that our constitution (article 1, section 22) provides that "private property shall not be taken or damaged for public use without just compensation," and that this provision is broad enough to authorize a recovery in view of the evidence in this case. Similar provisions are found in the constitutions of nearly half of the different states of this Union, and have been the subject of frequent and learned discussions by the appellate courts in a great number of cases since the provision was first adopted in 1870 by the state of Illinois. The leading case in Illinois in which a constitutional provision just like the one quoted above was construed is *Rigney v. City of Chicago*, 102 Ill. 64. In a similar case, entitled *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. Rep. 820, 31 L. ed. 638, the construction placed upon the provision contained in the Illinois constitution in the *Rigney* case was upheld by the supreme court of the United States. In the *Rigney* case it was in effect held that the clause in the constitution is limited to damages arising from some physical injury to property, or from some physical disturbance or interference with some property right, as contradistinguished from mere annoyance. The extent to which the so-called "damage clause" in the Illinois constitution is given effect is perhaps best illustrated in a much later case by the supreme court of Illinois, entitled *Aldrich v. Metropolitan etc. R. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237, in which it is held, in effect, that interferences like those in question in the case at bar do not give a right to recover in an independent action.

The supreme court of Washington, in a recent case, has had occasion to pass upon the "damage clause" of the constitution of that state: *Smith v. St. Paul, M. & M. Ry.*, 39 Wash. 355, 109 ²⁴⁶ Am. St. Rep. 889, 81 Pac. 840, 70 L. R. A. 1018. In that case the cases from the different jurisdictions where the damage clause has been construed and passed upon are very ably reviewed and discussed. The court, in passing upon the damage clause and what is included within it, said: "The jarring of the earth of respondents' lots and the casting of soot and cinders thereupon,

and the emission of smoke physically injuring property, are injurious physical effects to the corpus of respondents' property, which, we think, come within the scope of the term 'damaged,' as used in the constitutional provision. . . . But the ringing of bells, sounding of whistles, rumbling of trains, and other usual noises, and the emission of smoke, gases, fumes, and odors are necessarily incidental to the proper operation of the road, and, when not resulting from negligence, are such consequential injuries as must be held to have been anticipated by anyone acquiring property in or about such a city, and are regarded as *damnum absque injuria*."

In the following cases damage provisions similar to ours are found either in the constitutions or in the statutes of the several states and are thoroughly discussed and applied: *Austin v. Augusta Term. Ry.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755; *Pennsylvania Ry. Co. v. Lippincott*, 116 Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 87; *Eachus v. Los Angeles etc. Ry. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; *Carroll v. Wisconsin Cent. Ry.*, 40 Minn. 168, 41 N. W. 661; *Beseman v. Pennsylvania Ry. Co.*, 50 N. J. L. 235, 13 Atl. 164; *Gilbert v. Greeley etc. Ry.*, 13 Colo. 501, 22 Pac. 814; *Brown v. Board of Supervisors*, 124 Cal. 274, 57 Pac. 82; *Van De Vere v. Kansas City*, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695; *Louisville N. T. Co. v. Lellyett*, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A., N. S., 49.

In the foregoing cases it would seem that about all the cases upon the subject were examined, reviewed, and, where deemed necessary, distinguished. In all of them it is in effect held that the damage clause of the constitution was not intended to, nor does it, cover actions for annoyances from noises and the like arising from the operation of railroads. It seems needless to cite the many cases referred to in the cases above cited, nor could we add anything to what ²⁴⁷ is there said upon the question. It seems to us, however, that the clause in the constitution that private property shall not be taken nor damaged clearly means that some physical injury or damage to the property itself shall be committed, and does not include something which merely affects the senses of the persons who use the property. To obtain relief for the latter consequences in a case of nuisance, no constitutional nor statutory enactment was necessary. Indeed, counsel for respondent, in effect, concede this on page 16 of their brief, where it is said: "Respondent in this case has never contended that the constitutional provision heretofore referred to, 'that private property shall not be taken or damaged for public purposes without just compensation,' creates any new right." If this be so, then, in order to bring the case within the dam-

age clause of the constitution, there must be some physical interference with the property itself or with some easement which constitutes an appurtenant thereto. This, to a certain extent at least, is illustrated and applied in the recent cases of *Kimball v. Salt Lake City*, 32 Utah, 253, 125 Am. St. Rep. 859, 90 Pac. 395, 10 L. R. A., N. S., 483, and *Hempstead v. Salt Lake City*, 32 Utah, 261, 90 Pac. 397. Buildings and property may be physically affected by jarring or by the throwing of cinders or ashes thereon in considerable or large quantities, and possibly otherwise; but it is not easy to perceive how property or buildings of any kind can be physically injured by mere noises, however disagreeable or "humiliating" they might be to the occupants of the property. Such noises, no doubt, can become a disturbance and an annoyance to all those who for any purpose may have occasion to go upon, or with others make some use of, certain buildings or property; but the effect would be to or upon the sensibilities of such persons, and not to or upon the property as such.

But it is contended by respondent's counsel that numerous cases can be found where damages have been allowed for disturbances such as are made apparent by this record. It may be conceded that there are some cases, notably from Nebraska and Texas, which seem to go to this extent. ²⁴⁸ *Omaha & N. P. Ry. Co. v. Janecek*, 30 Neb. 276, 27 Am. St. Rep. 399, 46 N. W. 478, and *Gainesville, H. & W. Ry. Co. v. Hall*, 78 Tex. 169, 22 Am. St. Rep. 42, 14 S. W. 259, 9 L. R. A. 298, are such cases. While the Nebraska decision does seem to be based upon this ground, it nevertheless appears from that case that at least some physical injury was caused to the property itself apart from mere noises. Moreover, a critical examination of the cases cited by the Nebraska supreme court in support of its decision will disclose that in nearly all, if not all, of them, some easement or appurtenance to the property in question was physically interfered with, and in that way the cases in fact are within the rule laid down in the Washington case from which we have quoted. The Texas case is an extreme case. The railroad track was laid within less than forty feet from a dwelling-house, and it thus left the dwelling as though it had been erected on an ordinary railroad right of way. The decision in that case, however, seems to be squarely based upon the ground that noises which affected the owner's enjoyment of the property came within the damage clause of the constitution. By reference to a much later case emanating from the same court, it will, upon a critical examination, be seen that it is not so clear that even in Texas a recovery may be had for all annoyances arising from the mere operation of a railroad: See *Rainey*

v. Red River & T. S. Ry., 99 Tex. 276, 122 Am. St. Rep. 622, 89 S. W. 768, 90 S. W. 1096, 3 L. R. A., N. S., 590, 13 Ann. Cas. 580. That case is also reported in 80 S. W. 95, where it was decided by the Texas court of civil appeals, from which court it was taken to the supreme court of Texas, and the judgment of the lower court was reversed, as appears from the citation first given. The question involved there was a nuisance which was created and maintained by the erection of a roundhouse and machine shops.

The legal and equitable principles involved in cases relating to the construction and maintenance of machine-shops, roundhouses, and like structures have no application to the mere operation of a railroad, as the following cases, which are cited and relied upon by counsel for respondent, clearly ²⁴⁹ show. The leading case cited is the case of *Baltimore & Potomac Ry. v. Fifth Bapt. Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27 L. ed. 739. The decision in that case is squarely based upon the fact that the railroad company, in erecting and maintaining machine and repair shops and a roundhouse in close proximity to a church, caused a nuisance, in view that the church had been erected and used for a long time prior to the erection of the railroad shops. It was made to appear that a large number of chimneys or smokestacks were so constructed as to pour the smoke and offensive odors arising therefrom directly through the windows into the church building, and that the noises emanating from the shops were such as to render worship in the church almost impossible. The court, in substance, held that the railroad company had no right to erect its shops at such a place; that such shops could and ought to be erected and maintained at some other place, where their maintenance would result in the least possible annoyance to others, and not under the very windows of a church. The court, in the course of the opinion, however, clearly distinguishes that case from one like the case at bar. At page 331 of 108 U. S., and page 728 of 2 Sup. Ct. Rep. (27 L. ed. 739), Mr. Justice Field, in speaking for the court, says: "Undoubtedly a railway over the public highways of the district, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

The case of *Chicago G. W. Ry. v. First M. E. Church*, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488, in principle is precisely like the case in 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27 L. ed. 739, just referred to, and for that reason the United States court of appeals for the eighth circuit followed it. The opinion is written by Mr. Justice Wilkes of ²⁵⁰ the supreme court of Tennessee in the case of *Louisville N. T. Ry. Co. v. Lelleyett*, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A., N. S., 49, and while he discusses the damage clause of the constitution, he likewise draws the distinction with respect to the principles involved between annoyances and interferences which arise from the operation of machine-shops and other like structures and those arising from the operation of railroad trains. After reading the opinion in that case, but little, if any, room for discussion is left. In view that what is said in the opinion by Mr. Justice Wilkes in a large degree applies to the case at bar, we take the liberty to quote somewhat at length from what is said at pages 400 and 401 of 114 Tenn., and page 889 of 85 S. W. (1 L. R. A., N. S., 49), as follows: "When the first tracks were laid, the property now in controversy, as well as that contiguous, was vacant. With the growth of the city this space has been occupied and residences have been erected. Thus both the travel and traffic of the roads, as well as the growth of the locality, have gone hand in hand. We are of the opinion that, in so far as the growth and increase of travel and traffic into and through the station has brought discomfort to plaintiff, he is without remedy. In other words, the roads have the right to accommodate their increasing traffic and travel without liability, so long as their trains are operated without negligent disregard of the comfort and usable value of the plaintiff's property, and for this purpose to lay such additional tracks, side-tracks, and switches into and through the station as may be required to accommodate such travel and traffic, both passenger and freight; and it is only for the additional conveniences of roundhouses, sand-houses, coal-bins, coal chutes, and the switchyards and tracks necessary to operate such additional conveniences, which might be located elsewhere, though not so advantageously, perhaps, that plaintiff can complain, if they materially damage the plaintiff's property."

We have already shown that nothing is made to appear from the record before us that respondent is interfered with or annoyed by any shops or other structures which might be located and operated elsewhere; but the interferences and annoyances are all attributed to the operation of the additional tracks which counsel for respondent concede were necessary to accommodate the increased traffic

of appellant's railroad. Nor is there any ²⁵¹ claim made of negligent management or operation, nor that the noises and disturbances by ringing bells and sounding whistles were unnecessarily or willfully done. Neither is there any proof or claim that the buildings sustained any physical injury, nor that their use, occupancy, or access thereto was in any way interfered with except by the noises occasioned by the operation of the trains. But it is contended that, although respondent may not recover damages under the damage clause of the constitution, it may, nevertheless, recover for any interference or annoyance which is caused by what is termed a "private" as contradistinguished from a "public" nuisance; that neither the state nor the city could legally authorize the appellant to create a private nuisance and permit interference with respondent's rights with impunity. That neither the state nor the city could grant anyone the right to create or maintain a private nuisance with impunity no doubt is sound, and is conceded to be the law. The question, however, is, does the operation of a railroad by passing of trains, whether few or many, when operated with ordinary care, constitute either a public or a private nuisance? Can the noises that emanate from moving trains be eliminated without preventing the trains from running at all? Moreover, do not such noises affect all who are similarly situated along the line of the railroad? If not in the same degree, do they not affect all to some extent? If this be so, how can it be said that in a legal sense such noises constitute a nuisance either public or private? The court of appeals of New York, in a comparatively recent case, namely, *Bennett v. Long Island R. Co.*, 181 N. Y. 431, 74 N. E. 418, in passing upon this point, uses the following language: "The rumble of trains, the clanging of bells, the shriek of whistles, the blowing off of steam, the discordant squeak of wheels in going around curves, the emission of smoke, soot, and cinders, all of which accompany the operation of steam cars, are undoubtedly nuisances to the neighboring dwellings in the popular sense; but, as they are necessarily incident to the maintenance of the road, they do not constitute nuisances in the legal sense, but are regarded as protected by the legislative authority which created the corporation ²⁵² and legalized its corporate operations. Nor does the legal nature of such annoyances change as traffic increases them in volume and extent."

This doctrine is referred to and followed in nearly, if not quite, all of the cases we have herein cited. Nor do the following cases cited by counsel for respondent lay down a different doctrine: *Whitney v. Bartholomew*, 21 Conn. 213; *Duncan v. Hayes*, 22 N. J. Eq. 25; *Churchill v. Burlington Water Co.*, 94 Iowa, 89, 62 N. W. 646; *Robin-*

son v. New York & E. Ry., 27 Barb. 512; *Blanc v. Murray*, 36 La. Ann. 166; *Equitable C. & F. Co. v. Hersee*, 103 N. Y. 25, 9 N. E. 487.

These are all cases passing on interferences where the business complained of could as well have been conducted at some other place, or the interferences or annoyances were of that character which could be remedied, and hence it was held that the conduct of the business at the place and in the manner it was conducted constituted a private nuisance which could be abated, or for the maintenance of which the complaining party could recover damages. The case at bar, however, did not proceed upon the theory of either a public or a private nuisance. True, counsel for respondent now contend that the judgment may be sustained upon the theory of a private nuisance; but the contention must fail if for no other reason than the one that the case was neither tried nor submitted to the jury upon any such theory. This is made clear from the instruction quoted from at the beginning of this opinion. Indeed, counsel do not claim that there was any willful or negligent conduct in operating the trains over appellant's railroad, nor that the noises were excessive or avoidable. If they had relied upon such a state of facts, the question whether the excessive noises constitute a nuisance or not would necessarily have to be determined as a question of fact and not one of law: *Requena v. City of Los Angeles*, 45 Cal. 55; *People v. Park etc. Ry.*, 76 Cal. 156, 18 Pac. 141; *People v. Davidson*, 30 Cal. 379.

²⁵³ It is true that, in addition to the foregoing cases, there are some in which the courts have held that noises and other interferences arising from the operation of railroad trains are proper elements of damage when they affect the use and enjoyment of property. Among this class of cases are those which relate to the condemnation of property for public purposes, including railroads, where all the property is not taken, but the property not taken is, nevertheless, affected, or where some easement appurtenant to the property not taken is interfered with so as to affect the salable or usable value thereof. In that class of cases noises and similar interferences which may affect the market value of the property not taken are ordinarily permitted to be shown, not as independent elements of damage, but as elements to be considered in connection with all other things which may depreciate the market value of the property interfered with but not taken. *Weyer v. Chicago etc. Ry.*, 68 Wis. 180, 31 N. W. 710, and *Omaha S. Ry. v. Beeson*, 36 Neb. 361, 54 N. W. 557, are cases where the doctrine is illustrated and applied. It is clearly pointed out, however, in those cases, that the interferences from noises and

similar agencies cannot be made the subject of independent actions. One of the reasons why such interferences are permitted to be shown in the class of cases referred to is indicated by the supreme court of Pennsylvania in *Pennsylvania Ry. v. Lippincott*, 116 Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 871. It is there said that in that class of cases consequential damages may be offset by special benefits, and the property owner may thus show all matters specially affecting his property or the enjoyment thereof as an offset, or a partial offset, against supposed special benefits accruing to his property by reason of the contemplated improvement.

It may be noticed that our own statute (subdivisions 3 and 4 of section 3598, Compiled Laws of 1907) provides for allowances and offsets of this character; but, as pointed out in the *Lippincott* case, while such annoyances are proper to be shown in the class of cases last referred to, they nevertheless cannot be made the subject of independent actions ²⁵⁴ for damages. Nor can the owner of property abutting on a street complain because some other street is being interfered with in which he has no special easement, but only the right of passage in common with the public generally, unless, perhaps, such interference constitutes a public nuisance. Nor would a rule which permitted property owners to recover damages for disturbances from noises arising through the operation of trains either in the public streets (except, perhaps, by an interference with an easement, in front of the owner's property), or upon ground owned by the railroad company, be either just or equitable. If mere annoyances through noises which are necessarily incident to the conduct of a lawful business in its nature public can be made the subject of damage suits, then we can see no point at which a line may be drawn when such actions may not be maintained. If mere annoyances from noises give a right of action for damages, then everyone who is annoyed must be permitted to sue for and recover damages to the extent to which he is affected. The question, therefore, in each case, would depend upon the intensity of the noises and the extent of the annoyance. Everyone who may live within the radius to which the noises may extend would have a right of action, and the amount of recovery would be graduated by the distance one lived from the source of the noise, unless the noise was diminished by some artificial means. No doubt, in this case the interferences and annoyances are considerable and may be said to be out of the ordinary. The mere fact, however, that men, women and children use the building in question for worship, for religious edification, for the inculcation of morals, or for amusement, gives them no higher right as an associa-

tion to sue for and recover damages than it would an individual whose family is occupying a home in the same vicinity.

In the eye of the law property rights are the same by whomsoever occupied or owned. Property dedicated to worship is just as, and no more, sacred than property devoted to any other lawful purpose. An unlawful interference ²⁵⁵ with the property or property rights used for one lawful purpose will receive the same consideration and protection as that used for any other. The fact that the degree of interference while attending church services may be greater, nevertheless it is no different in kind from interference from the same cause to the home. If, therefore, it should be held that noises arising out of the present state of industrial pursuits and business activities shall give a right of action, all enterprises from which annoyances arise must be held liable in actions for damages. There is, there can be, no middle ground; and under our theories of government, grounded upon the fundamental principle of equality before the law, all must either suffer some annoyance, or all who cause them must be held liable for damages. The law seeks for practical as well as just results whenever such are obtainable. The practical way, therefore, out of such a difficulty is that the interferences and annoyances which are common to all—that is, where all suffer from the same kind of interference and annoyance, and the difference of annoyances as between communities or individuals is one of degree merely, and not of kind, and the annoyance is caused by something which is a necessary part of some lawful enterprise which is in its nature public and cannot be shifted from place to place—all must bear the annoyance as best they may. If the respondent can show that blowing whistles, ringing bells, and the rumbling of the trains are avoidable without undue interference with the operation and usefulness of the railroad, or that it is unnecessary to blow the whistles and ring the bells, or that these things are done willfully and for the purpose of interfering with and annoying the persons who are using the buildings for the purposes indicated in the record, then, upon such allegation and proof, the law no doubt will afford some relief. The record, however, simply makes a case where the things complained of emanate from the carrying on of a quasi public enterprise which cannot be shifted from place to place, and where the noises are a ²⁵⁶ mere incident to the business itself, which is conceded to be lawful and carried on with ordinary care.

Respondent has referred us to the case of *Stockdale v. Rio Grande W. R. R. Co.*, 28 Utah, 201, 77 Pac. 849; but there is nothing said in that case which conflicts with or in fact is not in strict harmony with what we have said in this case; nor is there anything in *San Pedro etc. R. R. Co. v. Board of Educa-*

tion, 32 Utah, 305, 90 Pac. 565, 11 L. R. A., N. S., 645, which in any way affects any question which is involved in the case at bar. Under the circumstances disclosed by this record, therefore, we cannot see wherein the appellant has violated any duty or has disregarded or invaded any of respondent's rights. It was error, therefore, to give the instruction which we have quoted and to permit a recovery thereunder.

All the other assignments, except those relating to the admission of certain evidence, although numerous, are sufficiently covered by what we have said. The assignments relating to the admission of evidence, by reason of the conclusions reached, have become wholly immaterial because they cannot possibly arise in the same way upon a retrial of the case, if one be had.

For the reasons stated, the judgment is reversed and the cause remanded, with directions to the district court to grant a new trial and to proceed with the case in accordance with the views herein expressed. Appellant to recover costs.

Straup, C. J., and McCarty, J., concur.

The Meaning of the Word "Damaged" in the constitutional guaranty that private property shall not be taken or damaged for public use without just compensation is the subject of a note to *Smith v. St. Paul etc. Ry. Co.*, 109 Am. St. Rep. 904. The elements of damages allowable in proceedings in the exercise of the power of eminent domain are discussed in the subject of a note to *Board of Trade Tel. Co. v. Darst*, 85 Am. St. Rep. 291.

The Word "Damage," as Used in the Law of Eminent Domain, refers to physical damage to the corpus of the property, or to some right appurtenant thereto, and not damage to the feelings, tastes, or sentiments of the owner: *Lambert v. City of Norfolk*, 108 Va. 269, 128 Am. St. Rep. 945. For the meaning of the word "damage" in such cases, see, further, note to *Smith v. St. Paul etc. Ry. Co.*, 109 Am. St. Rep. 905; *Pennsylvania Co. v. Pennsylvania etc. R. R. Co.*, 151 Pa. 334, 31 Am. St. Rep. 762. But, according to what seems to be the prevailing opinion, an actual, physical taking of property is not necessary to entitle its owner to compensation. A man's property may be taken within the meaning of the constitution, although his title and possession remain undisturbed. To deprive him of the ordinary beneficial use and enjoyment of his property is, in law, equivalent to the taking of it, and is as much a taking as if the property itself were actually taken: Notes to *Vanderlip v. City of Grand Rapids*, 16 Am. St. Rep. 610; *Smith v. St. Paul etc. Ry. Co.*, 109 Am. St. Rep. 905.

A Noise may Constitute a Nuisance which equity will restrain: *Reiley v. Curley*, 75 N. J. Eq. 57, 138 Am. St. Rep. 510. A loud, disagreeable noise may create a nuisance and be the subject of an action at law for damages, or a suit in equity for an injunction, or of an indictment as a public offense: *Ex parte Foote*, 70 Ark. 12, 91 Am. St. Rep. 63. Concerning railway shops and roundhouses as nuisances, see *Rainey v. Red River etc. Ry. Co.*, 99 Tex. 276, 122 Am. St. Rep. 622.

The Question Whether a Thing is a Nuisance must be settled as a question of fact, and not of law: *Village of Des Plaines v. Poyer*, 123 Ill. 348, 5 Am. St. Rep. 524.

STATE v. CANDLAND.

[36 Utah, 406, 104 Pac. 285.]

MANDAMUS—Defense of Unconstitutionality of Law.—A ministerial officer, who is directly responsible for his official acts, may attack a law in a mandamus proceeding, and justify his refusal to act, upon the ground that the law requiring the act is unconstitutional. (p. 842.)

UNCONSTITUTIONAL STATUTE—Refusal of Officer to Act Under.—When the law requires an officer to act, although in ministerial manner merely, if he is directly responsible for his official acts, he may refuse to act if in his judgment the law is in conflict with some constitutional provision. In case proceedings are instituted to coerce him, he may set up the supposed defect in the law as a defense. (p. 842.)

UNCONSTITUTIONAL STATUTE—Force and Effect of.—An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. (p. 843.)

CONSTITUTIONAL LAW—Effect of Judgment Upholding Statute.—Where a court of competent jurisdiction has entered a judgment declaring an enactment valid, and such judgment under the general law is binding upon an officer, he may not disregard the judgment and refuse to act simply because in his opinion the court has erred. Under such circumstances he is relieved from further responsibility the same as a mere subordinate, who is not responsible for the official act, would be, and hence cannot legally refuse to act. (p. 843.)

CONSTITUTIONALITY OF STATUTE—When and How Determined—Interest of Party.—A court should not refuse to pass upon the constitutionality of a law in any proceeding in which the question is properly presented and to which the party presenting it is a party; and while a party who attacks the constitutionality of a law should have some interest in having the question determined, an officer, who is responsible for his official acts, has such interest in complying with his oath of office and obeying the constitution as to entitle him to raise the question. (p. 844.)

UNIVERSITY OF UTAH—Proceeds of Land Grant.—Section 10 of the act of Congress of July 16, 1894, chapter 138, providing "that the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools," does not apply to the proceeds derived from the sale of lands granted for university purposes, such subject being provided for in section 8 of the act. (p. 845.)

CONSTITUTIONAL LAW—Validity of Statute—Reasonable Doubt.—In order to declare a legislative act void upon the ground that it is in conflict with the constitution, the conflict must be very clear. If the court entertains a reasonable doubt upon the question, then the law must be upheld. (p. 846.)

CONSTITUTIONAL LAW—"Shall Never Contract Any Indebtedness."—The phrase "shall never contract any indebtedness," as used in section 1 of article 14 of the constitution, limiting the amount of indebtedness which a state may lawfully contract, includes any obligation which the state undertakes or is obligated to pay or discharge out of future appropriations; that is, appropriations not

made by the legislature creating the debt or obligation, and to be paid from moneys to be derived from levies other than those made by the then existing legislature, which must necessarily be raised by levying a tax upon the property of the entire state, as distinguished from a mere city, county or district levy. (pp. 847, 848.)

UNIVERSITY OF UTAH—Debt of is Debt of State.—While the University of Utah is a corporation and constitutes a legal entity with a limited capacity, it is a state institution or agency. It holds all property in trust merely and cannot dispose of it without consent of the state. If the property is destroyed, the loss is that of the state, which must also provide funds to conduct and maintain the university by the same means and in the same manner that all other state institutions are maintained. Therefore any debt of the university is, in fact, a debt of the state itself. (pp. 848, 849.)

JUDICIAL NOTICE—Reports of State Institutions.—The courts are authorized to take judicial knowledge of the reports of state institutions, such as the board of regents of the university of Utah. (p. 849.)

CONSTITUTIONAL LAW—Debt of State—Loan to University. The statute directing the state board of land commissioners to convert part of the permanent land fund of the University of Utah into cash and pay the same to the university as a loan, and providing that such loan shall be a debt of the university and not of the state, was one, notwithstanding the latter provision, creating a debt of the state, and therefore in violation of the constitution. (p. 850.)

C. S. Varian, for the plaintiff.

A. R. Barnes, attorney general, for the defendants.

408 **FRICK, J.** This is an original application to this court by which the University of Utah, hereafter designated plaintiff, prays for a writ of mandate against the state board of land commissioners to compel said board, hereafter styled defendant, to comply with the provisions of a certain act, designated as chapter 124, passed by the legislature of the state of Utah in 1909: Utah Laws 1909, p. 335. An alternative writ was duly issued, to which the defendant appeared by filing a general demurrer to the application for a writ. The application for a writ is based upon the provisions of the act aforesaid, which is as follows:

409 "Sec. 1. The regents of the University of Utah are hereby authorized and directed to expend two hundred and fifty thousand dollars, or so much thereof as may be necessary to erect a central building on the University campus, and to do all acts and things necessary to accomplish such purpose.

"Sec. 2. The State Board of Land Commissioners is hereby authorized and directed to convert sufficient investments of the University of Utah permanent land fund into cash and at once to pay the same, as well as all cash on hand or that may hereafter be received, belonging to such fund as a loan, until such payments shall equal two hundred and fifty thousand dollars: Provided that such loan shall be a debt of the University of Utah, and not of the state of Utah.

"The interest on such land fund shall be paid as heretofore to the University of Utah for its general maintenance.

"Sec. 3. Whenever money is loaned from said University of Utah permanent land fund as herein provided, it is an investment thereof and a loan only, to be repaid as specified in this act.

"Sec. 4. Whenever money is paid to the University of Utah from the University of Utah permanent land fund, as herein provided, then the University of Utah, by its chairman and secretary, shall execute and deliver to the State Board of Land Commissioners, the following obligations, correctly and appropriately filling the blanks, to wit:

"Salt Lake City, Utah, _____.

"\$_____.

"On or before _____ the University of Utah promises to pay to the State Board of Land Commissioners, or its successors, or such officer as may be designated by law, _____ dollars, for the benefit of the University of Utah permanent land fund, together with interest from date until paid, at five per cent. per annum, interest payable January 1st and July 1st of each year.

"UNIVERSITY OF UTAH,

"By _____,

"Chairman of the Board of Regents of the University of Utah.

"By _____,

"Secretary of the Board of Regents of the University of Utah.

"Sec. 5. In executing such obligation the sums first aggregating twelve thousand five hundred dollars, with interest thereon, shall be made payable on or before January 1, 1912. The next sums aggregating twelve thousand five hundred dollars, with interest thereon, shall be made payable on or before January 1, 1913, and so on, making each payment for twelve thousand five hundred dollars, with interest payable one year later than the preceding payment.

"Sec. 6. That the Board of Regents of the University of Utah are authorized and empowered to pay out of the funds appropriated, ⁴¹⁰ or otherwise available, for its general maintenance, the principal and interest of the said obligations as they become due.

"Sec. 7. All officers, so far as pertains to their respective official duties, are hereby empowered with the necessary authority to carry out the provisions of this act, and are hereby directed so to do.

"Sec. 8. All laws in conflict herewith shall be construed so as to carry out the provisions of this act."

The general demurrer, among other things, is grounded upon the claim that the aforesaid act "is in conflict with the

provisions of section 5 of article 10 of the constitution and section 1 of article 14 of the constitution, and, further, that it is in direct conflict and contrary to the provisions of section 8 of the enabling act." In the brief and argument by counsel upon the demurrer other sections of the constitution are also referred to, which, it is asserted, are violated by the provisions of the act in question.

Before proceeding to a discussion of the constitutional questions raised by the defendant, it becomes necessary to dispose of a preliminary question insisted upon by counsel for the plaintiff, namely, that in the law in question, which imposes certain duties upon the members constituting the defendant, nothing is left to their judgment or discretion; that they "have no interest in the controversy"; and that "the state by its legislature, through and by means of this law regularly enacted, is dealing with its own property"; and hence, it is urged, the defendant will not be permitted to justify non-performance of the provisions of the law by the mere claim that the law offends against the constitution. In other words, it is contended that the members composing the defendant, under the law in question, are merely ministerial officers discharging a ministerial duty, and hence have not such an interest in the subject matter of the proceeding as to entitle them to refuse to comply with the provisions of the law upon the sole ground that it is unconstitutional. This proposition, it is contended by plaintiff's counsel, "has been squarely decided by this court" in the case of *Thoreson v. State Board of Examiners*, ⁴¹¹ 19 Utah, 18, 57 Pac. 175, and 21 Utah, 187, 60 Pac. 982. It may be said that the question was also referred to in the case of *State v. Standford*, 24 Utah, 148, 66 Pac. 1061. The *Thoreson* case was also mentioned by this court in *State v. Cutler*, 34 Utah, 99, 95 Pac. 1071. But it will be observed that in the latter case we carefully avoided expressing an opinion upon the question now raised. While we concede that the court, in the opinion in the *Thoreson* case, uses language that supports plaintiff's contention, and that this is likewise true of the language used by Mr. Justice Baskin in the dissenting opinion in the *Standford* case, yet, in view of the manner in which the question was presented on the first hearing of the *Thoreson* case, we entertain serious doubts upon the proposition whether that case is authority upon the precise point now raised by counsel for plaintiff. Since the attorney general, as counsel for the defendant, strenuously contends that the decision in the *Thoreson* case, as construed by plaintiff's counsel, is unsound, and because the question is one of compelling importance, we have concluded to re-examine the question upon both grounds, namely:

- (1) Whether the question was really involved in the *Thoreson*

case; and, if this be so, (2) whether that decision should be followed.

We have been unable to find the briefs of counsel filed on the original hearing in the Thoreson case. We have, however, found the briefs of both sides filed in support of and against the petition for a rehearing in that case. From the reporter's statement of the case, which precedes the opinion of the court in 19 Utah, 18, 57 Pac. 175 et seq., and from what is contained in the brief upon the petition for a rehearing, we have been enabled to determine, in a general way at least, the precise questions involved in the Thoreson case, upon which the court was necessarily required to pass judgment in deciding the case. These questions, in substance, were as follows: In 1892 the territorial legislature passed an act (Utah Laws 1892, p. 95, c. 76) authorizing the leasing of the territorial school lands. This ⁴¹² act was declared invalid by the territorial supreme court in *Burrows v. Kimball*, 11 Utah, 149, 41 Pac. 719. Pursuant to this decision the legislature of the state of Utah adopted section 963, Revised Statutes of 1898. By the provisions of this section, the state board of examiners was directed to audit and allow to all claimants the amounts paid by them upon leases of school land entered into under the law which was held invalid in *Burrows v. Kimball*. As will be seen by reference to the Thoreson case, the state board of examiners audited and allowed only a part of what it conceded had been paid by Thoreson under the law, which was declared void, and it based its refusal to allow the whole claim upon the ground that only that portion which was allowed had been paid into the state treasury by the county clerk, to whom Thoreson had paid the full amount claimed by him. In this connection it was claimed by the attorney general, who represented the state board of examiners in the Thoreson case, that if said board were authorized to pay any money at all, which he denied, that the proper construction of section 963, *supra*, authorized the board to audit and allow only that portion of the money paid by Thoreson upon the void leases which was received by the state treasury, and, if a construction were placed on said section contrary to said contention, then the section would be unconstitutional. The language of the attorney general in his brief clearly is to this effect. He says: "We desire to again say that the board has never contended that section 963 is necessarily unconstitutional, but we do contend that the construction asked for by the respondent (Thoreson) would render it so." The principal defense relied on by the attorney general in the Thoreson case, however, in effect, was that since the law under which Thoreson paid his money was invalid—that is, of no force or effect—therefore, the state officials never received any of Thoreson's money in their offi-

cial or legal capacity, but the payment by Thoreson upon the leases was in effect a mere voluntary payment on his part to the officers, as individuals, and they held the money as such and not as officers ⁴¹³ of the state; and hence Thoreson should be required to look to them as individuals for the repayment of his money, and not to the state, which had not and could not legally have received it. It is in this connection that the attorney general contended that, since the law of 1892, under which Thoreson paid his money, was held void and of no effect, no one did or could acquire any rights; and hence the state of Utah, in its legal capacity, as a state, did not and could not obtain any of Thoreson's money, and hence ought not be required to pay back any. It was the foregoing contention that the court combated in the Thoreson case, but in doing so the constitutional question in some way became involved, and in this way both the argument and what was really decided in that case are, to say the least, involved in considerable confusion, if not in doubt. But while this may be so, the real questions involved in the Thoreson case, and the ones this court was called on to determine, were singularly free from doubt. One of these questions, briefly stated, was whether the legislature of a state has the power to direct that money received by state or county officers, under a void law, should be repaid to the person who paid the same. In connection with this the further question arose whether the state officers, who were required to execute the later law, could in any way inquire into the effect of the former law, which had been held invalid in a proper proceeding by a court of competent jurisdiction. It should require no argument to show that the officers, who were, by the legislative power, directed to do certain things which were deemed necessary by reason of the invalidity of a prior law, could not interpose any objections to what the legislature may have deemed just and proper, nor could such officers inquire into the effects resulting from the invalidity of the prior law. These questions were wholly immaterial, since the later law was passed upon the accepted fact that the prior law was invalid, and, further, that it had been so declared by a court of competent jurisdiction, and hence no such officer could, either directly or indirectly, question or review the act of the legislature ⁴¹⁴ which directed that any money, which was paid under the invalid law, should be returned to the person paying the same. That is all that really was involved in the Thoreson case, but because the attorney general mooted the question of what construction should be placed upon section 963, *supra*, constituting the later act, and contended that if the construction which he placed upon it were not accepted, then the whole section would be invalid upon constitutional grounds, the court was induced to follow him into a matter which was not really

involved, and was not necessary to decide, in order to arrive at a correct solution of the real questions in the Thoreson case.

The decision that the officers of this state had no power to question the legislative discretion in providing against a miscarriage of justice and right by reason of the invalidity of a prior law, and the effect of holding that law invalid, were not matters of their concern, and could not be raised by them in the manner it was attempted in the Thoreson case, was clearly right. The authorities cited by the court in support of the doctrine that a ministerial officer, in a mandamus proceeding to compel him to comply with the provisions of an act, may not, in that proceeding, attack the validity of the act, in our judgment do not support the doctrine. The case of *People v. Salomon*, 54 Ill. 39, from which the court quotes rather copiously in the Thoreson case, was a case where a clerk refused to enter of record the proceedings of a board of equalization in raising the assessed valuation of property. His refusal was based upon the ground that the law which authorized the action of the board which the clerk refused to record was unconstitutional. Mandamus proceedings were then instituted against the clerk to compel him to enter of record the aforesaid proceedings. He defended upon the ground that the law authorizing the board of equalization to raise the valuation of the property was unconstitutional, and therefore void. The court in the mandamus proceedings permitted him to make this defense, but held the law valid, and ordered him to enter the proceedings of the board upon the books, and, ⁴¹⁵ upon his failure to comply with the court's order, contempt proceedings were commenced against him, and the language quoted by this court is found in the opinion of the court in the proceedings for contempt. It is apparent, therefore, from the very case cited as an authority against the proposition, that a ministerial officer was, in a mandamus proceeding, permitted to make the defense that the law under which he was required to make the entry was unconstitutional, and this, too, where it was made to appear that the clerk was a mere subordinate officer, and simply carried into effect the order of his superiors; that is, simply made the record required by law of their proceedings. After the law had been declared valid, however, he was not also permitted to make the defense that he failed to act because the books in which he was required to enter the proceedings and resolutions of the board of equalization, pending the mandamus proceedings, had been delivered by him to other officers and hence he could not comply with the order of the court. It is in answer to this defense that Mr. Chief Justice Breese uses some strong language with respect to the duty of ministerial officers to comply with the law. The case is, however, not an authority upon the point that a ministerial officer, who

is responsible for his official acts, may not in a mandamus proceeding attack the constitutionality of the law under which he is required to do some act which he thinks is forbidden by the higher or organic law. No such question was presented or decided in the case of Tremont School District v. Clark, 33 Me. 482. While in the case of Waldron v. Lee, 5 Pick. (Mass.) 323, it is said that a ministerial officer should not stop to question the law, yet the court clearly holds that in a proceeding to compel him to act, if it is clearly made to appear from his return that the law under which he should act is invalid, the court will not compel him to act. That is far from holding that a ministerial officer may not attack a law in a mandamus proceeding. All that is decided in Davis v. Superior Court, 63 Cal. 581, is that the supreme court, as constituted in 1883, would follow the ruling of the supreme court of ⁴¹⁶ California as constituted under the constitution of 1849 "with reference to the mode in which the invalidity of a legislative act, or its repugnancy to a clause of the then existing constitution could be presented or insisted upon." Since it had been held by that court that under the constitution of 1849 that court had no power to pass upon the constitutionality of a law in a particular proceeding, the court, in the case cited, followed the former decision, but in no way intimated how it would hold upon the question under the new constitution. In State v. Douglas County, 18 Neb. 506, 26 N. W. 315, the question was not presented. When the question was presented, however, to the supreme court of Nebraska in a later case, that court held the contrary doctrine, as appears from the case of Van Horn v. State, 46 Neb. 62, 64 N. W. 365. In Maxwell v. Burton, 2 Utah, 595, it was held that, where an act had been performed by an officer in accordance with a particular law, mandamus was not the proper proceeding to compel such officer to undo what he had done; and it was further held that under such circumstances the court would not, in a mandamus proceeding, determine the validity of the law under which the officer had acted. The question now under discussion was not referred to. In People v. Stephens, 2 Abb. Pr., N. S., 348, it is held "that it is rarely, if ever, proper to award mandamus in a case in which it can only be done by declaring an act of the legislature unconstitutional. That should be done in a more solemn mode of adjudication, upon a full trial, and not on an ordinary motion." In addition to the foregoing, three other cases are cited in the Thoreson case, namely: Smyth v. Titcomb, 31 Me. 272; Wright v. Kelley, 4 Idaho, 624, 43 Pac. 565; and State v. Buchanan, 24 W. Va. 362. While it is true that the general statement that courts will not determine the constitutionality of an act in mandamus proceedings is made in all three

cases, and in at least one of them (*State v. Buchanan*) it is said that in such a proceeding a ministerial officer will not be permitted to justify that the ⁴¹⁷ law under which he is required to perform a certain ministerial act is unconstitutional, yet, upon a close examination of the cases, it will be discovered that the precise question now presented was not involved in any one of them.

The real question involved in a majority of the cases cited in the *Thoreson* case was whether a subordinate officer could invoke the unconstitutionality of a law in a matter where the act was one in which the subordinate officer merely executed the orders of his superior, and when the superior, and not the subordinate, was in fact responsible for the official act. For the purposes of this decision, we shall assume that when the duty to act devolves upon a superior officer, who directs one of his subordinates to perform the act, such subordinate may not, in effect, review the decision and order of his superior and refuse to act upon the sole ground that the law is unconstitutional. Under such circumstances, the superior, and not the subordinate, is responsible for the official act in question.

We think a careful perusal of the authorities will disclose that while some of the cases contain general expressions which would seem to indicate that an officer in a mandamus proceeding against himself, requiring him to do a ministerial act, may not justify his failure to act upon the sole ground that the law directing the act is unconstitutional, the direct question now before us was not really involved in those cases. Where the question whether an officer acting ministerially, who is directly responsible for his official acts, may attack a law in a mandamus proceeding, was actually before the courts, the great weight of authority is to the effect that such an officer may, in such a proceeding, justify his refusal to act upon the ground that the law requiring the act is unconstitutional. The following well-considered cases leave little, if any, room for doubt or controversy upon this question: *Van Horn v. State*, 46 Neb. 62, 64 N. W. 365; *Norman v. Kentucky Board of Examiners etc.*, 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556; *McDermott v. Dinnie*, 6 N. D. 278, 69 N. W. ⁴¹⁸ 294; *Denman v. Broderick*, 111 Cal. 96, 43 Pac. 516; *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562.

When the law requires an officer to act, although the act be ministerial merely, if he is directly responsible for his official acts, he may refuse to act, if in his judgment the law is in conflict with some constitutional provision, and, in case proceedings are instituted to coerce him, he may set up the supposed defect in the law as a defense. No other conclusion is permissible if the constitution is the supreme

law, and if legislative acts in conflict therewith are not merely voidable but are absolutely void. A legislative act which is in conflict with the constitution is stillborn and of no force or effect—impotent alike to confer rights or to afford protection. This general doctrine is adopted by the courts generally, and is the doctrine promulgated by the supreme court of the United States, as appears from the case of *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. ed. 178, where Mr. Justice Field, in speaking for the court, says: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

If this be true, how can any officer, who is responsible for his official acts and who has taken the required oath of office that he "will support, obey, and defend" the constitution of the state, justify any act which in his judgment is contrary to or is forbidden by the constitution, and which is in fact so, although the act be required of him by some legislative enactment? The fact that the act required at his hands is merely ministerial does not change the effect so far as the officer is concerned. If the legislative enactment under which he is required to act is in conflict with the constitution, the constitution and not the enactment prevails, and the officer must obey the constitution or violate his oath of office. If, however, a court of competent jurisdiction has entered judgment declaring the enactment valid, and such judgment under the general law is binding ⁴¹⁹ upon the officer, then the officer may not disregard the judgment and refuse to act simply because in his judgment the court has erred. Under such circumstances he is relieved from further responsibility the same as a mere subordinate who is not responsible for the official act would be, and hence cannot legally refuse to act. But if no court has passed upon the question, and the act is not one required of a subordinate merely, as outlined above, then we cannot see upon what theory a court can refuse to pass upon the constitutionality of the law in any proceeding where the question is properly presented and to which the officer is a party. Mere personal interest of the officer cannot be the sole test. That the doctrine that a party who attacks the constitutionality of a law should have some interest in having the question determined is based upon good reason and should be enforced is conceded; but has the officer, who is responsible for his official acts, no interest in complying with his oath of office and in obeying the constitution? Moreover, if an unconstitutional act is absolutely void and affords no protection to anyone, has an officer no interest in avoiding an illegal act which, under peculiar circumstances, may subject

him to the payment of substantial damages to some injured party in case of the enforcement of a void law? Can a court absolve the officer from these consequences by the mere declaration that the proceedings in which the validity of the law is questioned is, in the judgment of the court, not the proper one because others who are not parties to the proceedings may have some interest in the question? It seems to us that such a position is illogical, if not unreasonable. It may well be that others may have a direct interest in the question whether the law in question is valid or invalid, but though this be so, and the court thinks such parties should be heard, it may afford them an opportunity to be heard by at least requesting them to appear and thus defer the enforcement of the law until it is determined that it is constitutionally enforceable. Again, in acts which affect the public at large, not every individual who may be affected can be made a party to the ⁴²⁰ proceedings. In such cases some official or board must ordinarily represent the public interests. In this case we think the defendant board directly represents the taxpayers. In our judgment, therefore, it was their duty to refuse to act if in their judgment the law which directed the act is void. If such is not their duty, then they owe no duty to the people whose servants they are.

But, considering the question entirely apart from these latter considerations, we think the rule contended for by plaintiff, and which, it is claimed, is sustained in the Thoreson case, is not sustainable upon either reason or sound principles. Moreover, in our judgment, the great weight of authority is likewise against such a rule. The question whether the officer who is required to act is a ministerial officer, and the duty imposed is merely ministerial, when such officer is nevertheless responsible for his official acts, is not material in determining whether a law may be attacked upon constitutional grounds in a mandamus proceeding. In our judgment, any officer who is not merely discharging the duties of a subordinate, and for whose official acts some superior is not responsible, of necessity must be held responsible for his own official acts, both to the people at large and to any or all individuals who may be injuriously affected thereby, in case such acts are contrary to the constitution and void. If this be not so, then those officers owe no duty to the people unless and until some court feels disposed to pass upon the question in a proceeding which the court deems a proper one. As the decisions of this court now stand, it is not clear whether such questions may or may not be reviewed in a mandamus proceeding. While in the Thoreson case the right was denied, yet in a later case, *State v. Stanford*, 24 Utah, 148, 66 Pac. 1061, the question

was entertained and passed upon. In order, therefore, that there may be no misconception with regard to what the rule is in this jurisdiction, we feel constrained to hold that anything which may be contained in the Thoreson case, or any other case, which is contrary to the rule laid down in this opinion is hereby modified and overruled.

⁴²¹ In determining the questions raised by defendant it will be necessary to refer to some of the provisions of the enabling act in which certain lands were granted by the government of the United States to the state of Utah for certain purposes, and to construe such provisions in connection with certain sections of the constitution of this state. Section 8 of the enabling act (Act Cong. July 16, 1894, c. 138, 28 Stat. 109), after granting certain lands to the state of Utah "for the establishment of the University of Utah," contains the following language: "That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds to be safely invested and held by said state, and the income thereof to be used exclusively for the purposes of such university." By section 10 of the same act it is also provided: "That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools." In view of the express provisions in section 8, supra, relating to the University of Utah, we assume that the general provisions contained in section 10 just referred to were not intended to apply to the proceeds derived from the sale of lands granted for university purposes, and we shall proceed upon such an assumption. In section 2 of article 10 of the constitution, the University of Utah is made a part of what is designated "the public school system" of this state. Section 5 of the same article reads as follows: "The proceeds of the sale of lands reserved by an act of Congress approved February 21, 1855, for the establishment of the University of Utah, and of all the lands granted by an act of Congress approved July 16, 1894, shall constitute permanent funds, to be safely invested and held by the state; and the income thereof shall be used exclusively for the support and maintenance of the different institutions and colleges respectively, in accordance with the requirements and conditions of said acts of Congress." Section 7 of the same article is as follows: "All public school funds shall be guaranteed by the ⁴²² state against loss or diversion." Section 1, article 20, reads as follows: "All lands of the state that have been, or may hereafter be, granted to the state by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted and

declared to be the public lands of the state; and shall be held in trust for the people to be disposed of as provided by law for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired."

It is insisted by the defendant that in view of the foregoing provisions the lands specified in the enabling act were granted to the state in trust for the purposes mentioned in said act, and that the people of the state of Utah, in adopting the constitution, declared that the proceeds derived from the sale of all lands granted to the state for the benefit of the university were trust funds, which must be safely invested and held by the state; that only the interest or income derived from such proceeds can legally be turned over to the officers of the university for its use and benefit; that by the act of 1909, which we have quoted in full, at least a portion of the proceeds derived from the sale of lands granted in trust for university purposes is directed to be turned over to the university for its use and benefit, and that said act in directing this to be done is in conflict with the constitutional provisions above quoted, and is therefore void. In other words, it is contended that by the act of 1909 the trust fund is being diverted, and that this may not be done because it is prohibited by the constitution. In answer to this contention counsel for plaintiff in effect says that the University of Utah is a corporation existing as such under the laws of this state; that it is legally competent to enter into contracts and to incur debts; that under the act of 1909 no more is attempted or done than to authorize a loan of the amount of money mentioned in said act to the University of Utah out of the permanent land fund created for its use and benefit, which loan is to be repaid by said university to said fund as provided in said act. It is therefore ⁴²³ insisted that the act of 1909 merely directs the defendant to invest a portion of the proceeds derived from the sale of said trust lands in the form of a loan to the University of Utah. This, it is contended, constitutes a mere investment, and whether such a loan would be a safe investment or otherwise was a matter entirely within the discretion and judgment of the legislature, and is not subject to review either by the defendant or by this court. Plaintiff's counsel also invokes the doctrine frequently announced by this and other courts, that in order to declare a legislative act void upon the ground that it is in conflict with the constitution, such conflict must be very clear, or, as it is sometimes expressed, if the court entertains a reasonable doubt upon the question, then the law must be upheld: *Edler v. Edwards*, 34 Utah, 13, 95 Pac. 367, and cases there cited. Counsel on both sides have argued the foregoing questions fully and with much force and ability.

In view, however, that it is strenuously insisted by the attorney general that the act of 1909 is in conflict with another constitutional provision, and as in our judgment it is clear that such is the case, for the reason that the loan authorized and contemplated by said act is not a loan to the university except in name, and is not an obligation or debt of said university, but is both in law and fact the obligation and debt of the state of Utah, we have therefore concluded to refrain from passing upon the very interesting questions referred to above.

The constitutional provisions referred to are contained in sections 1 and 2 of article 14 of our constitution, which read as follows:

"Section 1. To meet casual deficits or failures in revenue, and for necessary expenditures for public purposes, including the erection of public buildings, and for the payment of all territorial indebtedness assumed by the state, the state may contract debts, not exceeding in the aggregate at any one time, the sum of two hundred thousand dollars over and above the amount of the territorial indebtedness assumed by the state. But when the said territorial indebtedness shall have been paid, the state shall never contract any indebtedness, except as in the next section provided, ⁴²⁴ in excess of the sum of two hundred thousand dollars, and all moneys arising from loans herein authorized, shall be applied solely to the purposes for which they were obtained."

"Sec. 2. The state may contract debts to repel invasion, suppress insurrection, or to defend the state in war, but the money arising from the contracting of such debts shall be applied solely to the purpose for which it was obtained."

The phrase "shall never contract any indebtedness," in our judgment, includes any obligation which the state undertakes or is obligated to pay or discharge out of future appropriations; that is, appropriations not made by the legislature creating the debt or obligation, and to be paid from moneys derived from levies other than those made by the then existing legislature, and which must necessarily be raised by levying a tax upon the property of the entire state, as contradistinguished from a mere city, county, or district levy. In other words, in order to constitute an indebtedness within the provisions of the constitutional limitation, it is not necessary that the debt be evidenced by bonds, notes, or other usual evidences of indebtedness, but it is sufficient if in order to discharge the debt the state is obligated to pay it at some future time, and that it casts a future burden upon the taxpayer to the extent of a debt or obligation which must be paid by the state of Utah with funds derived from general taxation. In the following cases the general ques-

tion of what constitutes an indebtedness within a constitutional limitation clause similar to ours is fully discussed and applied. A careful perusal of these cases will, we think, convince anyone that the method adopted by the act of 1909 makes the debt or obligation authorized by the act a debt of the state of Utah pure and simple. Among other cases which might be cited we specially refer to the following: *People v. Johnson*, 6 Cal. 499; *Nougues v. Douglass*, 7 Cal. 65; *Coulson v. Portland*, Deady, 481, Fed. Cas. No. 3275; *Sloan v. State*, 51 Wis. 632, 3 N. W. 393; *State v. McMillan*, 12 N. D. 280, 96 N. W. 316; *McNeal v. City of Waco*, 89 Tex. 83, 33 S. W. 322; *State v. City of Helena*, 24 Mont. 425, 521, 81 Am. St. Rep. 453, 63 Pac. 99, 55 L. R. A. 336; *Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W. 628; *French v. Burlington*, 42 Iowa, 614; *City of Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385; *Prince v. City of Quincy*, 128 Ill. 443, 21 N. E. 768; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820, 29 L. ed. 132.

In the last two cases the decisions in the cases cited from Illinois are reviewed and sustained. In the case of *Coulson v. Portland*, Deady, 481, Fed. Cas. No. 3275, it was attempted to make the debt there in question the debt of a railroad company by declaring it to be so in terms when it in fact was intended and provided in the act that the city of Portland should pay it, if it was paid at all, just as the state of Utah must in fact pay the loan authorized by the act of 1909, if it is ever to be paid. That such is the real purpose and intent of the act of 1909 seems to us can leave no room for doubt in the minds of reasonable men. When the act of 1909 is fully analyzed, and is stripped of all technicalities, it amounts to this: The University of Utah, as a state institution, is given the use of the fund mentioned in the act, while the state assumes the debt and is obligated to pay it. While it is true that the university is a corporation and thus constitutes a legal entity with a limited capacity, yet, when all of the provisions of law, which in some way relate to and affect the government of the university, are considered and construed together, it is made very clear that the corporation designated the University of Utah was created and exists for the sole purpose of more conveniently governing and conducting the educational institution called the "University." The university is clearly a state institution, and is so treated, since the members constituting its governing board are all appointed by the governor with the consent of the Senate, and the board regularly reports to the governor. Moreover, the corporation holds all the property in trust merely. In fact the property belongs to the state of Utah. We think no one will seriously

contend that the corporation styled the "University of Utah" has the power or authority, without the ⁴²⁶ consent of the state of Utah, to dispose of any property. While the naked legal title to the buildings and paraphernalia may be vested in the corporation, it is nevertheless held in trust for the state of Utah, which is obliged to hold and use and maintain it for school purposes. The real ownership is thus in the state, and if the university property is destroyed from any cause, it is the loss of the state, and the burden of restoring it must, as it should, fall upon the state at large. The state also must provide the necessary funds to conduct and maintain the university by the same means and in the same manner that all other state institutions are maintained. The state trust funds now are, and perhaps always will be, entirely insufficient for this purpose. According to the last biennial report of the board of regents of the University of Utah to the governor, and of which we are authorized to take judicial notice, the estimated income from the proceeds of all land sales now amounts to \$22,000 annually, or to \$44,000 for the years 1909 and 1910. The estimated income from all other sources, not including appropriations from the state for the years aforesaid, amounts to \$28,000 more. The total estimated income from all sources, not including appropriations from state moneys raised by taxation, for the next two years is, therefore, \$72,000; while the expenses of conducting and maintaining the university alone, not including the other schools and institutions connected with it, for the next two years, were estimated at \$318,000. By reference to the general appropriation act of 1909, it will be seen that the following provision was made for the University of Utah, namely:

"For general maintenance of the University of Utah, including the State Normal School, the State School of Mines, the School of Arts and Sciences, including salaries, fuel, printing, advertising, stationery, insurance, general improvements and repairs, gas, electric light and power, apparatus, books and supplies, taking care of grounds and necessary and miscellaneous expenses, etc., but does not include new buildings and their equipment, the purchase of water rights or land for the two academic years from July 1, 1909, to June 30, 1911, or so much thereof as may be necessary, \$300,000."

⁴²⁷ While this is considerably less than the amount demanded for those purposes, it, nevertheless, is \$228,000 in excess of the income derived from the trust funds and all other sources. As a matter of information merely, we remark that the different schools mentioned in the foregoing quotations are all conducted and carried on in connection with the university. Every dollar in excess of the \$72,000

derived from other sources must, therefore, be raised by a tax levied upon all the taxable property within the state, and must be paid out of the state treasury. We mention this simply because it is clear that it would not change the result, even though a portion of the \$72,000 were appropriated and set aside for the payment of the principal and interest of the obligation in question. If the amount necessary to pay principal and interest were in fact taken from the income of the university, it would simply result in requiring the state to supply the amount so taken from its general fund for "general maintenance," and hence nothing would be gained, so far as the taxpayer is concerned, by making the obligation payable out of the income before referred to. It is for this reason, no doubt, that the legislature directed the board of regents to pay both principal and interest out of the general appropriations as they will be made from time to time. There is not the slightest attempt in the act to conceal the fact that the debt authorized by it must be paid, both principal and interest, from appropriations made from the funds of the state, which are obtained by general taxation. The legal effect of the act of 1909, so far as it affects the relations of the university and the state, may be said to be that while the obligation authorized by the act is in terms made the debt of the university, yet, in the same act, the university is entirely absolved from the duty and burden of paying it, while the state is made to assume this duty, and is thus made the real debtor. If this be so, it becomes entirely immaterial whether the board of regents executed the notes provided for in the name of the university or not. The state must, nevertheless, pay both the principal and interest of those notes, ⁴²⁸ if they are paid at all. These notes, therefore, both in law and fact, are state obligations. But it is nevertheless contended that the notes are in fact the notes of the university, and thus do not constitute a state indebtedness, and hence do not fall within the constitutional debt limit any more than debts of counties, cities, school districts, and other like agencies of the state come within this limit. We cheerfully concede that county, city and school district debts are not state obligations, and do not come within the constitutional inhibition. From the facts and circumstances disclosed, however, it seems clear that the debt in question is not analogous to an ordinary county, city or school district debt.

But apart from all that has been said, we think it is a state obligation for other reasons. The legislative act itself placed the duty upon the state to pay it out of state funds, all of which are to be obtained from future tax levies. Again, in section 2 of the act it is provided that the interest upon the very fund, which it is claimed is loaned

to the university, shall continue to be paid to the university. It is thus in effect provided that the interest upon the loan shall be paid to the alleged borrower. Who is it that must pay this interest? It can be no one but the state of Utah. The state of Utah is therefore obliged to pay the accruing interest upon a debt declared to be the debt of the university. Moreover, if we consider the nature of the funds that are authorized to be loaned by the act and the relation of the state to those funds, by reason of the express constitutional provision referred to, then there remains no doubt as to whose obligation it is. The funds authorized to be turned over to the university are all trust funds which the state is obliged to protect against loss or diversion. The state, by an express pledge in the constitution, therefore, must maintain the fund intact. If the state, therefore, authorizes anyone to use \$250,000 of this fund, the state, impliedly at least, guarantees the repayment thereof. The state is thus always obligated as a guarantor of the fund. If this were all, however, and it were clear that the obligation to pay the debt rested upon some other agency than the state, we ⁴²⁹ would not be inclined to hold that it is the state's obligation although the state stands in the relation of guarantor. When the whole act is considered, however, it is very clear that it was declared to be the debt of the university for no other purpose than to avoid coming in conflict with the debt limit contained in the constitution. This purpose is so manifest from the act itself that it hardly needs to be pointed out. As is well said by the supreme court of California in referring to a similar constitutional provision in the case of *Pattison v. Board*, etc., 13 Cal. 175: "The intent of this clause of the constitution is plain enough; it was designed as a check on legislation, and on such legislation as might create a charge upon the property of the entire state." Is it not palpable that the obligation in question creates a charge upon the entire property of the state in the form of interest alone amounting to more than \$130,000, and as principal and interest aggregating a sum in excess of \$380,000, all of which must be paid within the time limit fixed in the act, and must be paid with moneys obtained from general taxation and appropriated out of the general funds of the state? If this does not constitute a state indebtedness, we cannot conceive how one can be created unless it would be by issuing state bonds. If an attempt had been made to issue state bonds to the amount of \$250,000, no one would question their unconstitutionality because in excess of the constitutional debt limit, yet the necessary money for the payment of such bonds, both principal and interest, would have to be, and would be, obtained precisely in the same manner

as the money must, and is, in fact, directed to be obtained for the payment of the obligation in question. Notwithstanding this, it is contended that the indebtedness authorized by the act in question is not a state indebtedness. We are unable to yield assent to such a contention.

If the debt limit may be exceeded in the manner provided for in the act of 1909, then there is practically no limitation in this state. The next legislature may authorize the officers of the Agricultural College to incur \$250,000 indebtedness to be paid by the taxpayers in the same way. Moreover, ⁴³⁰ the legislature may authorize and direct the persons who, for the time being, are directing the affairs of other state institutions to incur obligations, if in doing so they make them payable by a particular institution. If this may be done to assist one state institution, why may not all be assisted in the same way? Why cannot this constitutional limitation be avoided by a law authorizing the creation of a corporation with authority to provide ways and means by making loans for the erection of all state buildings nominally to be paid for by such corporation, but in fact to be paid by the state out of the funds obtained from general taxation and by future appropriations? If the act in question is not in conflict with section 1 of article 14 of our constitution, then we cannot perceive why a debt incurred as indicated above would be. To our minds the conclusion that the obligation authorized by the act of 1909 is a state obligation and comes within both the letter and spirit of section 1 of article 14 of the constitution admits of no doubt. This being so, it is clearly our duty to declare the act void because in conflict with a constitutional provision.

The question as to whether the act is only void in part is not doubtful. It is quite clear that the legislative aim was to avoid any state indebtedness for the purposes stated in the act. From this we must assume that, if the act in terms had declared any part of the whole amount named in the act as constituting a state indebtedness, the whole act would have been defeated. The condition, therefore, is not one where the constitutional part can be separated from the unconstitutional, and the constitutional part upheld and the unconstitutional part declared void. In this instance the whole act must fail.

Much as we regret, even deplore, the necessity of even temporarily depriving the university of the use of a much needed building, we nevertheless must yield obedience to the constitution rather than follow our own desires or inclinations in avoiding inconveniences in conducting public institutions. The constitutional provision in question is clear, and, like all other provisions, should be obeyed, and

not ignored ⁴³¹ or frittered away by forced construction. If the people think it wise or prudent to authorize a larger debt limit, they may easily amend the constitution, but, if amended, it should be done by those who are responsible for its original design and purpose.

In conclusion, we remark that the facts and circumstances which control in the cases cited by counsel, and which have not been referred to in this opinion, are, in our judgment, clearly distinguishable from the facts and circumstances in this case, and hence we have refrained from mentioning them. From what has been said it follows that the writ prayed for should be denied; and it being clear that the application cannot be amended so as to avoid the constitutional clause, the application should be dismissed. It is so ordered.

McCarty, J., concurs.

STRAUP, C. J., Concurring. When the alleged prescribed legal duties of an officer rest upon the provisions of an unconstitutional enactment, I think he, when commanded to perform such duties, or show cause for not doing so, may justify his refusal or failure to perform on the ground of the invalidity of the statute. If a contrary rule was declared in the Thoreson case (as I think was intended to be declared), it was overruled in the Stanford case. Since then the latter, and not the former, case expresses the law on such question in this jurisdiction.

The act in question authorized the regents of the university to expend \$250,000 for the erection of a building for the university. The constitution forbids the incurring of state debts, exceeding in the aggregate at any one time the sum of \$200,000, to meet casual deficits, failures in revenue, or necessary expenditures for public purposes, including the erection of public buildings. The moneys and funds appropriated by the legislature for the university were not available, for such funds were all appropriated and needed for general maintenance of the university. The legislature ⁴³² saw that a state debt could not legally be incurred for the desired purpose in the sum of \$250,000. The constitution further provides, as does also the enabling act, that the proceeds of the sale of lands granted to the state by the United States for the benefit of the university "shall constitute permanent funds to be safely invested and held by said state, and the income thereof to be used exclusively for the purposes of said university." The proceeds derived from the sale of such lands have from time to time been invested by the state land board and the income thereof paid to the university. Such yearly income amounts to something like \$22,000. Now, the problem attempted to be

solved by the legislature is this: How can it make available the permanent land fund so invested by the land board and give the university \$250,000 thereof, and have the state pay it back, without violating the constitutional provisions referred to? I say the state, because, as is well shown by Mr. Justice Frick, the university has no property or funds nor any source of income with which to meet and pay the money, except from the funds appropriated to it by the state. The act in question is the attempted solution. It directs the regents of the university to expend \$250,000 to erect a building, and the land board to convert into cash sufficient of the investment of the permanent land fund as shall, together with the cash on hand, amount to the sum of \$250,000, and to pay the same at once to the regents. It further provides that the university, by the regents, shall execute promissory notes by the terms of which the university promises and agrees to pay the \$250,000 so received by it from the land board, the first \$12,500 of which and the interest thereon to be paid in 1912, and the further sum of \$12,500 and the interest thereon each year thereafter until the amount of \$250,000 and the interest thereon is paid. In order that the university may have funds with which to meet and make such payments, it is further provided that "the board of regents of the University of Utah are authorized and empowered to pay, out of the funds appropriated, or otherwise available for its general maintenance, the principal and interest ⁴³³ of the said obligations as they become due." The legislature saw that if the act required or directed the regents to pay "said obligations" out of the funds appropriated for such purpose, the transaction would be recognized as and would be an obligation or debt of the state. So, to avoid such effect, and not offend against the constitution in that regard, the legislature provided that the regents should pay "said obligations" out of funds appropriated for "general maintenance" of the university. Thus the idea is conceived that if funds are appropriated by the legislature for "general maintenance," and it directs the regents to apply them in payment of "said obligations," a purpose for which the appropriations are not apparently to be made, it has well behaved and not offended against the constitution, and has made itself believe that by making appropriations under the name of "general maintenance," and by permitting and directing such funds to be taken and applied in payment of "said obligations," no appropriations have been made to pay the obligations. So long as the legislature permits and directs the funds so appropriated to be applied in payment of the obligations, what does it matter in what name the appropriations are made? Furthermore, a very troublesome question arises in case appro-

priations of funds are made for a certain and specific purpose—"general maintenance" of the university—as to whether the regents could lawfully divert and apply them to another purpose, notwithstanding the power and authority attempted by this act to be conferred upon them. The two acts of the legislature, one making an appropriation for a certain and specific purpose and the other directing the funds so appropriated to be applied to another and different purpose, would seem not to be very harmonious. I cannot see wherein the legislature would more have offended against the constitution had it provided in the act that the obligation should be paid from future funds to be directly and specifically appropriated for such purpose. But in order that the obligation may not be called a debt of the state, the legislature declared that "it shall ⁴²⁴ be a debt of the university and not of the state." It would seem that the legislature, by the course pursued by it, was apprehensive of the charge that it had offended against the constitution, and desired to put such question at rest by declaring that it had not done so. And the way to do that was to declare that the obligation, no matter what in fact it may be, was a debt of the university and not of the state. So, too, since the constitution permits only the income of the permanent land fund to be paid to the university, and since such yearly income was only \$22,000, and since the legislature had provided that sufficient of the investment of such land fund should be converted into cash as would, together with the cash on hand, amount to \$250,000, and directed the same to be paid at once to the regents of the university, it might also seem that there would be, in such case, something more paid to the university than the mere income, and the charge made that the constitution was again violated, it further declared that the paying of such moneys by the land board to the university shall be and is called a "loan" and "an investment." I apprehend that a trustee, who was charged with a trust fund and who was required to safely invest it and only pay the income thereof to the beneficiary, but who, when he had paid the whole fund to the beneficiary, was called to answer a charge of a breach of his trust, might as well assert that the fund was only "loaned" to the beneficiary and "invested" with him, and by such a defense could defeat the very purpose of the trust. If the acts required to be done by the legislature are harmful and incompatible with the constitution, such effect cannot be avoided by the legislature calling them innocent, or by giving them a particular name. Neither can it be avoided by the requirement in the act that "all laws in conflict herewith shall be so construed as to carry out the provisions of this act." The direction that the laws shall be so construed,

whether they bear such a construction or not, encroaches upon the prerogative of the courts. The legislature must content itself with the power of making laws. It cannot also direct the construction that shall be given them. If we ⁴³⁵ were permitted to follow the direction and make the constitution and all other laws yield to the act, we undoubtedly would be relieved from many difficulties and much responsibility. The constitution, however, wisely forbids the adoption of such a principle of construction. The legislature's attempt to give the university a much needed building is of course commendable. But I think the manner in which the attempt is made is clearly incompatible with the constitution. I, therefore, concur in the judgment denying the writ.

When Mandamus is the Proper Remedy against public officers is the subject of a note to State v. Gardner, 98 Am. St. Rep. 863. Concerning duties, the performance of which may be compelled by mandamus, see the note to Ward v. Commissioners of Buford Co., 125 Am. St. Rep. 492.

It is the Duty of a Court, in Construing a Statute, to Uphold Its Constitutionality and Validity, if this can reasonably be done; and, if its construction is doubtful, the doubt must be resolved in favor of the law: People v. McBride, 234 Ill. 146, 123 Am. St. Rep. 82. A statute will not be declared unconstitutional unless there is a clear violation of some explicit provision of the constitution: Henrico County v. City of Richmond, 106 Va. 282, 117 Am. St. Rep. 1001; Deyoe v. Superior Court, 140 Cal. 486, 98 Am. St. Rep. 73. All acts of the legislature are presumed constitutional: State v. Pooler, 105 Me. 224, 134 Am. St. Rep. 543; Mt. Vernon-Woodberry Co. v. Frankfort Co., 111 Md. 561, 134 Am. St. Rep. 626.

That an Executive Officer of the Government has No Authority to decline the performance of a purely ministerial duty which is imposed upon him by law on the ground that the law is unconstitutional, see Threadgill v. Cross, 26 Okl. 403, 138 Am. St. Rep. 964.

Acts of the Legislature are to be Regarded as Valid Until Otherwise Declared by the courts. Until they are judicially condemned, it ordinarily is the right and duty of the public and individuals to act upon and obey them: State v. Pooler, 105 Me. 224, 134 Am. St. Rep. 543.

An Unconstitutional Law by Which It is Sought to Affect the Rights of a citizen is of no force and effect, and does not bind anyone: Mill v. Brown, 31 Utah, 473, 120 Am. St. Rep. 935; Bonnett v. Vallier, 136 Wis. 193, 128 Am. St. Rep. 1061. But the provisions of a solemn act of the legislature, so long as it has not received judicial condemnation, are as binding upon the citizen as is the judgment of a court rendered against him, and remaining unreversed: Lang v. Bayonne, 74 N. J. L. 455, 122 Am. St. Rep. 391.

Courts Usually Take Notice of Whatever Should be Generally Known within the limits of their jurisdiction: Kellogg v. Finn, 22 S. D. 578, 133 Am. St. Rep. 945; Redell v. Moores, 63 Neb. 219, 93 Am. St. Rep. 431. Facts of which the courts will take judicial notice is the subject of a note to Green v. Lineville Drug Co., 124 Am. St. Rep. 20.

All Indebtedness Incurred Beyond the Constitutional Limitation is not enforceable: See the note to *Beard v. City of Hopkinsville*, 44 Am. St. Rep. 242. As to the construction of constitutional limitations on the state's power to incur debts, see *Carter v. Thorsen*, 5 S. D. 474, 49 Am. St. Rep. 893; *In re State Warrants*, 6 S. D. 518, 55 Am. St. Rep. 852.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

**BRITTON v. WASHINGTON WATER POWER
COMPANY.**

[59 Wash. 440, 110 Pac. 20.]

EVIDENCE—Res Gestae—Declarations of Injured Party.—One exception to the rule excluding hearsay evidence is, that when something has occurred startling enough to produce nervous excitement, spontaneous utterances of parties present are admissible as a part of the *res gestae*. It is not always necessary that the statements be made at the exact time that the shock occurs. The material inquiry always is whether the statements offered as evidence were made at a time and under such circumstances as to induce the belief that they were not the result of reflection or premeditation. (p. 859.)

EVIDENCE—Res Gestae.—The Declarations of a Party Injured in an accident, by which he was rendered unconscious, made immediately upon his regaining consciousness, are as much a part of the occurrence as if they had been made immediately after the accident, and are therefore admissible in evidence as part of the *res gestae*. (p. 860.)

EVIDENCE—Res Gestae—Exclamations of Bystanders.—The exclamations and declarations of third parties and bystanders, contemporaneous with the occurrence, are as much a part of the *res gestae* as those of the parties, and are admissible in evidence under the same rule as allows the exclamations and declarations of the parties. (p. 861.)

TRIAL—Objections to Evidence—Grounds must be Stated.—The specific grounds of an objection or motion must be stated. The objection that an answer of a witness was not responsive will not be considered, where the only objection made was as to the competency of the evidence. (p. 862.)

Post, Avery & Higgins, for the appellant.

Plummer & Latimer, for the respondent.

440 GOSE, J. This is a suit to recover damages for personal injuries sustained by a minor. The fact asserted and relied ⁴⁴¹ upon for a recovery is that Roscoe Britton, a minor thirteen years of age, was stealing a ride on the step of one of the defendant's street-cars, and that the conductor opened the door of the vestibule and kicked him off,
(858)

causing him serious injury. There was a verdict and judgment for the plaintiff. The defendant has appealed.

The admitted facts are, that the appellant, at the time of the happening of the accident, was a common carrier of passengers for hire, and operating electric cars in the city of Spokane; that the car upon which the accident occurred has a vestibule, opening on each side onto steps used by passengers in entering and leaving the car; that the left door is kept closed, and the right one open, when the car is in service, and that the boy was stealing a ride on the step on the closed side of the car at the time he sustained the injury. The appellant asserts that the boy fell from the step, whilst he insists that he was kicked off the car by the conductor. This was the chief issue at the trial. It is conceded that, immediately after the accident happened, the boy was taken to his home in an unconscious condition.

The boy and his mother, who is also his guardian ad litem, were permitted to testify, in substance, that the boy remained unconscious for a period of eight days, when he became conscious and at once stated to the mother that the conductor kicked him off the car. The appellant contends that this was error. We think the statement was a part of the *res gestae*. One exception to the rule excluding hearsay evidence is that, when something has occurred, startling enough to produce nervous excitement, spontaneous utterances of parties present are admissible in evidence as a part of the *res gestae*. It is not always necessary that the statement be made at the exact time that the shock occurs. The material inquiry always is, whether the statements offered as evidence were made at a time and under such circumstances as to induce the belief that they were not the result of reflection or premeditation. ⁴⁴² They derive their admissibility and credibility purely from the circumstances out of which they arise.

"The utterance must have been before there has been time to contrive and misrepresent, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance": 3 Wigmore on Evidence, sec. 1750.

"There is no imaginary line somewhere between a few hours and a few days, or a few weeks, on one side of which declarations in favor of a party are admissible in evidence, while on the other they are inadmissible. Unless such complaints form a part of the *res gestae* they cannot be admitted. And if they are so far detached from the occurrence as to admit of the deliberate design and be the product of a calculating policy on the part of the actors, then they cannot be regarded as a part of the *res gestae*": Kennedy v. Rochester City & B. R. Co., 130 N. Y. 654, 29 N. E. 141.

"The time of the occurrence of the principal act is sometimes, by reason of some special circumstance, extended forward so as to make it coincident and connected with subsequent declarations by constructive continuity of time, as, for instance, when the party making the declarations having become unconscious at the very moment of the occurrence of the principal act, the declarations are made by him at the very moment of his regaining consciousness; under such conditions the act and the declarations are said to be simultaneous by relation, the declarations being spontaneous": 24 Am. & Eng. Ency. of Law, 2d ed., p. 685. See, also, *Walters v. Spokane International R. Co.*, 58 Wash. 293, 108 Pac. 593.

In the case last cited we said that it is not always essential that the declarations and principal occurrence shall concur in point of time, but that in many instances the fact that a considerable period of time has intervened does not destroy their admissibility as evidence. We further said that the circumstances of each case "should be carefully weighed by the trial judge in exercising his sound discretion." The controlling consideration in each case is, Was the declaration a spontaneous, impulsive statement of a fact? If so, it is a part of the occurrence and is admissible: *Dixon v. Northern* ⁴⁴³ Pac. R. Co., 37 Wash. 310, 107 Am. St. Rep. 810, 79 Pac. 943, 68 L. R. A. 895, 2 Ann. Cas. 620. Tested by the principles we have stated, it is clear that the evidence was properly admitted. The declarations were made, as the witnesses assert, as soon as consciousness was restored. There had been no opportunity for reflection or deliberation. They were as much a part of the occurrence as if they had been made when the boy was raised from the street immediately after falling. So far as he was concerned, there was no conscious intervening time between the injury and the declaration.

The appellant criticises the form of the questions, and urges that the evidence does not show that the statement was made as soon as the boy regained consciousness. We do not think a fair reading of the evidence warrants the criticism. The fact that Dr. Martin testified that the boy was semi-conscious on the fifth or sixth day after the accident does not make the declaration of the boy inadmissible. It goes to the weight, and not to the admissibility, of the declaration as evidence. But it is said: "If such evidence is admissible, then unscrupulous persons can dishonestly flood the record with evidence that can be neither combated nor anticipated, for the sole purpose of mulcting a defendant in damages." The answer is that no rule of evidence has been formulated by man that can prevent perjury. Litigants must, in the last analysis, rely upon the justice and good

sense of juries. The authorities cited by counsel from other jurisdictions need not be reviewed, as they are not in harmony with the view hitherto taken by this court.

One of the respondent's witnesses upon direct examination stated that, when the boy was observed riding upon the step, the conductor pulled the bell-cord and started to open the door, when someone said, "The boy is off!" This statement was stricken on motion of the respondent. The boy testified that, when he got onto the step, the door was closed, and that the conductor opened the car door and kicked him off. The appellant insisted at the time the statement was stricken, and ⁴⁴⁴ insists here, that it was admissible as a part of the *res gestae*. The learned trial court, however, ruled that it was inadmissible. In this, we think, he committed prejudicial error. If the declaration of the boy is admissible as forming a part of the occurrence, as we have held, it would seem to follow that the exclamation of a bystander, contemporaneous with the occurrence, is also admissible. The exclamations of third parties present are as much a part of the *res gestae* as those of the parties themselves: 3 Wigmore on Evidence, sec. 1755; Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048; Dale v. Colfax Consol. Coal Co., 131 Iowa, 67, 107 N. W. 1096; Harrill v. South Carolina & G. E. R. Co., 132 N. C. 655, 44 S. E. 109; Gulf etc. R. Co. v. Tullis, 41 Tex. Civ. App. 219, 91 S. W. 317; Seawell v. Carolina Cent. R. Co., 133 N. C. 515, 45 S. E. 850; Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 South. 318; Wharton on Evidence, sec. 262; 24 Am. & Eng. Ency. of Law, 2d ed., 685, 686.

Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048, was an action to recover damages for personal injuries. The plaintiff, a hatch-tender, alleged that he was struck by a sheave hook used to lower coal buckets into the vessel. A witness, having testified that he saw the boy fall, was permitted to state that a moment later he heard someone say, "The hook hit him!" The court said that the exclamation was clearly a part of the *res gestae*. In Dale v. Colfax Consol. Coal Co., 131 Iowa, 67, 107 N. W. 1096, the plaintiff, a brakeman, attempting to alight to make a coupling, fell to the track and was run over by the car on which he had been riding. The negligence charged was that the defendant's employees failed to stop the train after they knew of the plaintiff's peril. It was held, as bearing on the question whether the conductor had actual knowledge of the plaintiff's situation, that the statements of persons on the car in the presence of the conductor, and their acts within the scope of his observation, could be shown as tending to establish his actual knowledge.

In *Harrill v. South Carolina & G. E. R. Co.*, 132 N. C. 655, 44 S. E. 109, a personal ⁴⁴⁵ injury suit, the deceased was killed, while moving an engine over a bridge, by the falling of the bridge. The engine had crossed that part of the bridge over the water and had reached the trestle on the ground, when bystanders exclaimed, "Jake is safe!" The trestle suddenly gave way, and the engine and tender were thrown back and fell into the water. It was held that the exclamations were competent evidence, going to show the dangerous condition of the bridge, the peril of crossing, and the effect the effort to cross had on the bystanders.

In *Walters v. Spokane International R. Co.*, 58 Wash. 293, 108 Pac. 593, we held that there was a large discretion in the trial judge in receiving and rejecting evidence of this nature. A due regard for the administration of justice, however, forbids that declarations forming a part of the occurrence out of which the cause of action springs shall be admitted as to one litigant and denied as to another. The exclamation was so clearly a part of the *res gestae*, and so vitally affected the issue to which it referred, that its rejection was highly prejudicial. The respondent relies upon *Dixon v. Northern Pac. R. Co.*, 37 Wash. 310, 107 Am. St. Rep. 810, 79 Pac. 943, 68 L. R. A. 895, 2 Ann. Cas. 620. In that case it was said that "there is no showing that the stranger who was not able to be found at the trial was in any way connected with the accident." In the case at bar the evidence shows that there were passengers upon the car who were not produced as witnesses. The exclamation, "The boy is off!" shows that it was made under the pressure of excitement, and that it was the spontaneous, impulsive statement of one who believed that it expressed the truth.

The respondent asserts that the question is not properly before us, for the reason that the statement was not responsive to the question propounded to the witness. The record, however, shows that the appellant's counsel stated to the court that the exclamation was a part of the *res gestae*, and reserved his exception to the ruling. Neither the objection to the statement nor the ruling of the court was placed upon ⁴⁴⁶ the technical ground that the answer was not responsive to the question, but upon the broad ground that it was not competent. The appellant was not required to pursue the matter.

The judgment is reversed.

Rudkin, C. J., Chadwick and Fullerton, JJ., concur.

The Question of Res Gestae is discussed in the note to *People v. Vernon*, 95 Am. Dec. 51; and what is included within the *res gestae* is the subject of a note to *Hinchcliffe v. Koontz*, 16 Am. St. Rep. 407. *Res gestae* are those circumstances which are the automatic and undisguised incidents of a particular litigated fact, and which, in

contemplation of law, are a part of the act itself. To render circumstances and declarations a part of the *res gestae*, they generally must be substantially contemporaneous with the occurrence, but they need not be concurrent therewith: *State v. Miller*, 73 S. C. 277, 114 Am. St. Rep. 82, and cases cited in the cross-reference note thereto.

The Proper Test as to the Admissibility of the declarations of a person since deceased, made soon after an accident, on the ground that they are part of the *res gestae*, is whether they relate to the principal transaction, are explanatory of it, and are made under such circumstances of excitement still continuing as to show they are spontaneous, and not the result of deliberation and design; and the fact that such declarations are made in response to questions of an attending physician, when the injured person is first restored to consciousness, does not affect their admissibility: *Christopherson v. Chicago etc. R. R. Co.*, 135 Iowa, 409, 124 Am. St. Rep. 284. Statements of a person after returning from a pond are admissible to show that he was suffering, but not to show that he fell on the ice and struck his head: *Roth v. Travelers' Protective Assn. of America*, 102 Tex. 241, 132 Am. St. Rep. 871. The declarations of a grantor made ten days after he executed the deed are not so connected with the transaction as to be considered a part of the *res gestae*: *Chappell v. John*, 45 Colo. 45, 132 Am. St. Rep. 134. Testimony that while a barn was burning the manager of a ranch from which the fire was communicated to the barn stated that he had set out the fire two days before is not admissible as a part of the *res gestae*: *Johnson v. McLain Investment Co.*, 79 Kan. 423, 131 Am. St. Rep. 302. The declarations of the superintendent of a grain elevator that he had sent a boy into a bin for the purpose of removing a board obstructing the flow of grain, made within a few minutes afterward and before his death, are admissible as part of the *res gestae*: *Meier v. Way, Johnson, Lee & Co.*, 136 Iowa, 302, 125 Am. St. Rep. 254.

For Recent Cases as to what declarations and statements do, and what do not, constitute a part of the *res gestae* in criminal cases, see *Derden v. State*, 56 Tex. Cr. 396, 133 Am. St. Rep. 986; *Hunter v. State*, 54 Tex. Cr. 224, 130 Am. St. Rep. 887; *Thomas v. State*, 121 Tenn. 83, 130 Am. St. Rep. 756; *Marriott v. Williams*, 152 Cal. 705, 125 Am. St. Rep. 87; *Craven v. State*, 49 Tex. Cr. 78, 122 Am. St. Rep. 799; and *Taylor v. State*, 47 Tex. Cr. 122, 122 Am. St. Rep. 675.

PORT BLAKELY MILL COMPANY v. SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

[59 Wash. 501, 110 Pac. 36.]

INSURANCE—Construction of Contract.—Insurance Contracts, like all other contracts, should be construed with reference to what the parties meant, when interpreted in the light not only of the language employed, but of the evident object of the contract, the benefits secured on one hand, the perils or risks sought to be avoided on the other. (p. 867.)

INSURANCE—Forfeiture Abhorred.—Insurance Contracts should not be so construed as to work a forfeiture of either party's rights, or to defeat the object of the contract, unless it plainly appears that such was the intention of the parties and that the effect of the

language was well understood by them when the contract was entered into. Where the language is that of the insurance company, it is its duty to see to it that, when unreasonable and one-sided provisions are incorporated in the contract, it is understandingly entered into. (p. 867.)

INSURANCE—Construction.—The Term “Warranted” adds nothing to the force of a stipulation in an insurance contract. The expression of the word “warranty” does not necessarily constitute a warranty; there may be warranties without the use of the word, and there may not be warranties when the word is used. (p. 870.)

INSURANCE—Sprinkler System—Statement not a Warranty.—A clause in a policy of insurance, “warranted by the assured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order,” should be given its ordinary signification. It does not constitute a warranty the breach of which at any time will forfeit the insurance, notwithstanding the fact that the breach in no way contributed to the loss. (p. 871.)

INSURANCE—Contract Construed as a Whole—Warranties.—In determining whether or not a certain statement or stipulation in an insurance contract constitutes a warranty, other parts of the contract may be considered; and where other statements and stipulations are coupled with an express and specific provision that a violation thereof shall work a forfeiture, it is evidence showing that the parties did not intend the same result from the violation of the statement or stipulation not containing such provision for a forfeiture. (pp. 871, 872.)

INSURANCE—Construction—Doubtful Clauses.—A stipulation in an application for fire insurance should be construed, in a doubtful case, most strongly against the insurer by whom it was framed; and in a doubtful case that construction of the contract which will save it is to be preferred to one which will destroy it. (p. 874.)

INSURANCE.—The Temporary Breach of a Stipulation in a contract of insurance to which there is not attached a specific forfeiture, and which does not exist at the time of the loss and could in no way contribute to the loss, will not prevent a recovery on the policy. (p. 878.)

INSURANCE—Sprinkler System—“Due Diligence.”—A stipulation in an insurance contract to use “due diligence” to keep a sprinkler system in working order is not violated by a temporary closing down of the same necessary for alterations and repairs, and no forfeiture ensues therefrom where such alterations were completed and the system in good working order prior to and at the time of the fire. (p. 883.)

H. T. Granger and Hughes, McMicken, Dovell & Ramsey, for the appellant.

Hastings & Stedman, Walter S. Fulton, C. D. Sutton and Titus & Creed (Dorr & Hadley, of counsel), for the respondents.

502 DUNBAR, J. Action on fire insurance contract. Judgment was obtained in the superior court by the insured, respondents in this case, on a fire insurance policy issued by the appellant. An appeal followed, and the judgment was reversed by a majority decision of department

one of this court, filed January 14, 1910, to which reference is made for a statement of the case: 56 Wash. 681, 106 Pac. 194. A petition for rehearing was filed, addressed to the court en ⁵⁰³ banc. Said petition was granted, and the case again argued, and it is now here for final determination by the whole court.

There were three contentions made by the appellant in the first argument of the case: (1) That the Detroit Trust Company could not have maintained this action; (2) that the policy was avoided by the breach of warranty therein contained; and (3) that the automatic sprinkler system connected with the mill plant was not in working order at the time of the fire. It was stated in the opinion that each of these contentions had been considered, but that, in view of the conclusion reached on the second, the first and third would not be discussed. Inasmuch, however, as the first proposition lay at the threshold of the case and was determinative of the right to bring the action, the court must have decided that proposition against the contention of the appellant before it proceeded to the determination of the second proposition. In any event, we think the technical objection is without merit, for all the reasons urged by respondents. We have given painstaking consideration to the third proposition, for it involves the actual merits of this controversy. But from an examination of the long statement of facts, containing more than six hundred pages, we are not convinced that the findings of the trial judge were not sustained by the weight of the evidence, and will therefore consider the case from the standpoint of such findings.

The sprinkler provision, appearing on a rider attached to the policy, was as follows: "Warranted by the assured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order."

Privilege was given the assured to make additions and repairs. The fourteenth and fifteenth findings of the court bearing on this proposition are as follows: "(14) That on or about the twenty-ninth day of January, 1907, it became and was necessary, essential, and requisite to the business of the Port Blakely Mill Company that an addition, alterations, and repairs be made to that portion of said plaintiff's ⁵⁰⁴ sawmill building, which was known as the lath-mill, and on or about April 1st, 1907, it became and was necessary—in order to make the automatic sprinkler equipment more efficient, and in order to extend the automatic sprinkler equipment to the addition to that portion of said plaintiff's mill building known as the lath-mill, and in order to have all of said sawmill building, including said lath-mill, protected by automatic sprinkler equipment—to make additions,

alterations, and repairs to what was known as the No. 3 automatic sprinkler division in the easterly portion of said sawmill, and that accordingly, on or about the twenty-ninth day of January, 1907, the plaintiff, Port Blakely Mill Company, commenced the work of making said addition, said alterations and repairs to said lath-mill, and on or about April 1, 1907, commenced the work of altering, repairing, and extending said No. 3 automatic sprinkler division to the new portion or addition to said lath-mill, and for that purpose, it was necessary, essential, and requisite that the water be wholly turned off of said No. 3 automatic sprinkler division, and that said repairs and alterations could not be made to said sprinkler division and said extensions thereof could not be made, unless the water was turned off of said division. That said repairs could not safely be made while said plaintiff's sawmill was in operation; that plaintiff, Port Blakely Mill Company, on or about April 1, 1907, had progressed with the work of said additions, alterations and repairs to said lath-mill sufficiently to enable it to operate said lath-mill, and accordingly the lath-mill was put in operation after said date. That said Port Blakely Mill Company continued with the work of making said repairs and alterations and extensions to said sprinkler division with due diligence, and at all times used due diligence that the automatic sprinkler system should at all times be maintained in good working order; and on April 21, 1907, the said alterations, repairs, and extensions to said sprinkler division were so far completed that the water was wholly turned on in said sprinkler division No. 3; that said water was turned on until and during said fire, No. 3 automatic sprinkler system, and all other divisions of said plaintiff's sprinkler system in said mill, were supplied with water in such quantities and with such pressure, that the heat produced by said fire in and about said mill did melt and release ⁵⁰⁵ said sprinkler heads attached to said No. 3 automatic sprinkler division and all other parts of said sprinkler system in said mill, and permitted the water to flow through the same and out through the pipes distributed throughout said mill, and caused said water to be sprinkled upon said fire. That said sprinkler system in said mill, in all its parts and divisions, was in good and thorough working order at the time of and during said fire.

"(15) That said fire originated under what was known as sprinkler division No. 4 in said sawmill building of said Port Blakely Mill Company immediately to the westerly in said mill building of said sprinkler division No. 3 aforesaid; and said fire did not originate in said sprinkler division No. 3 aforesaid; said fire originated at what was known as the friction pulley of and under the burner conveyor on the

main floor beneath the sawing floor of said sawmill, and spread immediately on belts and pulleys above the sawing floor to the roof of said sawmill building, causing the sprinklers in the roof of said mill to operate as the fire reached the roof; but said fire rapidly spread beyond the control of said sprinklers."

So that it must be conceded that there was no lack of diligence; that the sprinkler system was in operation at the time of the fire; that the violation of the contract, if there was any violation, was not the cause of the fire, and that the fire did not even originate in the sprinkler division where the repairs had been made. It must, therefore, readily be seen that, if our former opinion is sustained, it will not be upon any equitable ground, but by reason of sustaining the hard and inflexible rule contended for by appellant, that the covenant or agreement in this case amounted to a warranty or a statement of a condition precedent, a temporary violation of which would preclude a recovery, even though it affirmatively appear that such temporary suspension was not in existence at the time of the fire and could not possibly have been the cause of the fire. This rule seems to be opposed to our primary conception of fair dealing, is not practiced or tolerated in our everyday affairs with each other, is not a commendable rule of action under any circumstances, and is ⁵⁰⁶ diametrically opposed to the general rule that only such damages can be recovered from the breach of a contract as are shown to be the result of such breach. This rule has stood the test of time, because it is based upon common sense and fair dealing, and no court has ever felt called upon to apologize for it or distinguish it out of existence.

Of course, it is fundamental that courts cannot make contracts for parties, and it follows that they must enforce such contracts as are made; but in interpreting contracts, they should not be bound by hard-and-fast rules or definitions which evidently were never within the minds of the contracting parties. Insurance contracts, like all other contracts, should be construed with reference to what the parties meant, when interpreted in the light not only of the language employed, but of the evident object of the contract, the benefits secured on one hand, the perils or risks sought to be avoided on the other. They should not be so construed as to work a forfeiture of either party's rights, or to defeat the very object of the contract for which a price has been paid, unless it plainly appears that such was the intention of the contracting parties, and that the effect of the language of the contract was well understood by them when the contract was entered into; and it ought in reason to be a sign to the court that there has been a misapprehension on the

part of the contracting party whose rights are thus contracted away that the contract was not understood. Especially is this true in this character of contracts, where the language of the contract is the language of the insurance company whose duty it is to see to it that, where unreasonable and one-sided provisions are incorporated into a contract, the contract is understandingly entered into.

This was the rule of interpretation indorsed by this court in *Poultry Producers' Union v. Williams*, 58 Wash. 64, 137 Am. St. Rep. 1041, 107 Pac. 1040, referred to by appellant in its reply brief in support of the contention that it was the settled law of this state that the breach of warranty rendered the policy void ⁵⁰⁷ even though the breach may have ceased at the time of the loss. Of course, the ordinary expression was indorsed that the truth of a warranty is a condition precedent, and there is no real objection to this statement if it means that the insured intended the representation to be a warranty which would render his contract void whether it was the cause of the loss or not. But to render a decision valuable on any given point, it is necessary to be informed what the case was which the court was deciding, and to construe the language used with reference to the facts discussed. That was an action by one Williams, an employee of the Poultry Producers' Union, who was afterward made secretary-treasurer and manager of the company. In this position a fidelity bond was required, and an application was made and signed by the president of the company. Among other questions asked and answered were the following: "(13) When were his accounts last examined? A. September 11, '07. (14) Were they at that time in every respect correct and funds on hand to balance? A. Yes. (15) Is there now or has there been any shortage due you by bondsmen? A. No." And the application contained the stipulation that: "It is agreed that the above answers are to be taken as a condition precedent and as the basis of the said bond applied for." It was further conditioned that, "if the employee's written statement hereinbefore referred to shall be found in any respect untrue this bond shall be void." It occurred that the answers to some of the pertinent questions were not true, and the insurance company resisted the payment of the policy on that ground; and the court said, in passing upon the question: "Whether the answers made by the applicant for a policy of indemnity or insurance are warranties or mere representations must depend upon the character of the question and its answer, the opportunity of the insurer to guard against the representation in the light of its consequences, or whether it is material to the risk."

It will be seen that in that case the company had no way to guard against the representation; that it certainly was ⁵⁰⁶ material to the risk, and continued to be material to the risk, for it affected the reputation and character of the party upon whom the risk was placed. This was a risk that would be a continuing risk running throughout the life of the insurance, a different proposition altogether from the one at bar, where, if there had been a violation of a condition at some time past, such violation had ceased at the time of the loss, and could not possibly, in any event, have had any effect upon the loss.

In this connection counsel for appellant also relied upon *Hoeland v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 Pac. 866. That also was a case where the defense was meritorious, the risk having been taken on representations concerning the health of the applicant, and it afterward appearing that the representations were not true, the company refused to pay the policy. There could have been no suspicion of the violation of the representations in this case, for if the representations were not true, as we have just remarked in the other case, their effect would be to follow the risk through the life of the assured, and to finally effect the loss. It is true that the court, in discussing the case, said: "The rule is that, when a representation made by an applicant for insurance is carried into a contract and expressly made a part of it, it becomes a warranty, and its materiality is settled by the agreement of the parties"; citing *Elliott on Insurance*, section 102. But that statement must have been made with reference to the facts in the case, and the writer of the opinion could not have meant to convey the idea that it would apply to all cases even where there was a discontinuance of the violation, for the same authority cited, viz., *Elliott on Insurance*, in section 205, expressly says that such is not the rule under the weight of authority. Section 205 is as follows: "The decisions are conflicting upon the question of the effect of a violation of a condition in a fire insurance policy. The weight of authority seems to support the view that a ⁵⁰⁶ violation of a condition that works a forfeiture of the policy merely suspends the insurance during the violation, and if the violation is discontinued during the life of the policy and does not exist at the time of the loss, the policy revives and the company is liable, although it had never consented to the violation of the conditions in the policy, and such violation has been such that the company could, had it known of it at the time, have declared a forfeiture therefor."

But this question has been decided by this court in *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86, and decided on principles applicable to and necessary

to the decision in this case. In that case the stipulation was as follows: "It is understood and agreed that during such time said mill is idle, or not in operation, a watchman shall be employed by the insured to be in and upon the premises constantly, day and night."

The contention of the appellant was that the terms of the policy constituted the measure of the insurer's liability and, in order to recover, the insurer must show himself within these terms. In other words, the compliance of the insured with the terms of the contract was a condition precedent to the right to recover, and the court instructed the jury that, if they believed from the evidence that at any time during the existence of the policy the assured failed to keep a watchman while the mill was not in operation, plaintiffs could not recover, adding "unless you further find from the evidence that said fire was not due to, or the result of, their failure to keep such watchman." That instruction was sustained by this court. The stipulation or representation made in that case was as strong as the representation made in this case, with the exception that the word "warranted" is used in the case at bar, instead of the words "it is understood and agreed." Here it is "warranted" that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order. There it was "understood and agreed" that such and such things should be done. ⁵¹⁰ In our judgment the word "warranted" adds nothing to the force of the stipulation. It is well understood—in fact, it is conceded—that the expression of the word "warranty" does not necessarily constitute a warranty; that there may be warranties without the use of the word; that there may not be warranties when the word is used. In Charles Dickens' *Child's History of England*, in a review of the character of Lord Dunstan, the author said that, after he died, the people called him a saint; but naively remarked that calling him a saint did not make him a saint, any more than calling him a coach horse would make him a coach horse. And so it is with the stipulation in this case. The word "warranty" is of such general signification and of such general and discursive use that the expression as used here is absolutely without any legal signification. It is common for people in ordinary conversation to say that "I will warrant this" or "I will warrant that," or "I warrant this," "I warrant you" that so and so will happen, or will not happen, when there is no intention whatever on the part of the speaker to bind himself to make good the expression. The rule of construction must be that the word used is to be construed in its ordinary signification. The legal signification may have been understood by the insurance company when it employed this word, but in order to

avail itself of such legal signification, it must appear that the other contracting party also understood it. While there may have been some things said in the discussion of the Hart case, as there generally is in the discussion of cases, which were not material to the decision of the case, a review of it will show beyond question that the essential idea in the case was the same as the essential idea here, viz., whether, by reason of a breach which did not continue, the policy was avoided. The court, in discussing the case, said: "In an ordinary contract no damages can be recovered by reason of a breach, if the breach does not result in damage. In this case, if the rule contended for by appellants should prevail, if the respondents had failed or neglected to keep a watchman for one day, and the mill had not burned for a month afterward, and it positively appeared that the fire was in no way attributable to such neglect or breach, the company could escape its liability by reason of a breach which was entirely immaterial and which in no way contributed to the damage."

It will be seen that this language is especially applicable to the case at bar, where it appears affirmatively from the findings of the court that the fire was in no way attributable to the breach in relation to the maintaining of the sprinkler system, and that such breach had been corrected before the fire. Again, it was said in that case, that "The rule is universal that statements contained in the application will not be construed to be warranties if elsewhere in the contract there can be found reason to suppose that such was not the clear understanding of the parties"; and the court proceeded to show, by other provisions of the contract, that such could not have been the understanding.

So in this case, as showing that it was not the intention of the contracting parties that the representation in regard to the sprinkler should not work a forfeiture of the contract or render it void, there are certain statements or provisions and representations made in the contract in which it is especially provided that a forfeiture or avoidance of the contract shall be the result. For instance, in the watchman clause, after stating as does the sprinkler clause, that "it is warranted by the insured that whenever any of the following named parts of the plant," etc., shall be idle, it is stated that, "if any of the above named parts is idle or not in operation for a period of more than thirty days without the written consent of the company, this policy shall be void." The same provision substantially is in the "reduced rate average clause," the language being: "In consideration of the reduced rate at which this policy is written it is expressly stipulated and made a condition of this contract that this company shall be liable for no greater

⁵¹² proportion of any loss than the amount hereby insured bears to seventy per cent of the actual cash value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon."

The term "made a condition of this contract" is probably equivalent to a stipulation that the contract shall be void if the condition is violated. Again, there is the following stipulation: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the substance thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud," etc.

There would be nothing unconscionable in construing such provisions or stipulations in a contract of this kind as warranties, for the concealment or misrepresentation of any fact would work an actual hardship upon the insurance company. Again, it is provided: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease"—another reasonable provision which is stated so definitely that there is left no room for controversy as to what was meant. Again: "This policy may by a renewal be continued under the original stipulation, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void"—another positive expression concerning the avoidance of the contract, based upon reason and good conscience. In the Hart case (9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86), certain similar conditions were reviewed, and the court held that, under the rule of *expressio unius est exclusio alterius*, the particular clause could not be construed to be a warranty. That rule applies with especial clearness ⁵¹³ to this case, where so many provisions provide especially that the contract shall be void if they are not complied with, and where there is no such provision in the representation relied upon. In that case, quoting from May on Insurance, section 164, it was said: "They are not necessarily warranties because they appear on the face of the policy. In order to have the force of a warranty, the statement must indeed constitute a part of the contract; but it by no means follows that every statement which constitutes a part of the contract is therefore a warranty. Whether they are so or not will depend upon the form of expression used, the apparent purpose of the insertion, and sometimes upon the connection or relation to other parts of the instrument."

That quotation is also expressly applicable to this case, for contrasting the form of the expression used in this representation relied upon and the form of expression used in the other representations which we have noticed, and considering the relation of the stipulation discussed to the other parts of the instrument, it must appear that it was not the intention of the parties to constitute the representation a warranty. That case has stood as the law of this state since its announcement in October, 1894, up to the time that the opinion was rendered in this case, and should not now be abrogated without being specially overruled.

But, in view of the fact that we are called upon to overrule an opinion announced by a department of this court, we will examine the authorities generally, and especially those relied upon in the opinion to sustain the decision, with a view to ascertaining if the cases cited, in consideration of the facts of the cases which were before the court, actually do sustain the appellant's contention. In the first case cited, viz., *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. 416, 59 Am. Dec. 192, it will be found that it was expressly stipulated that, under certain conditions, the insurance should be void and of no effect. In addition to the fact that the policy provided ⁵¹⁴ that, if any misrepresentations were made, the policy should be void and of no effect—a statement which is not in the provision under discussion, the decision was against the contention of the insurance company, the court saying: "The defendants, relying upon a violation of the statements in the application, contended that these statements were warranties or conditions, and if they were not strictly and literally true at the time of the application, that the policy was void; and that if they were then true, and the plaintiffs afterward ceased to comply with them, the policy thereupon became void, whether the same were or were not material to the risk. But the presiding judge instructed the jury, that the statements of the application were not warranties, requiring an exact and literal compliance, but that they were representations; and as such, must have been substantially true and correct as to things done, or existing, at the time the policy was issued, and that so far as they related to the future—to the things to be done, and rules and obligations to be observed—they were stipulations, to be fairly and substantially complied with."

The supreme court said: "The court are of opinion, that looking at the policy and the application, this instruction was correct."

Then follows a portion of the quotation set forth in the opinion: "There is undoubtedly some difficulty in determining by any simple and certain test what propositions in a

contract of insurance constitute warranties, and what representations."

In Cooley's Briefs on the Law of Insurance, page 1133, that author says: "In accordance with the principle, discussed in subdivision (b) that warranties are part of the policy, it may be laid down as the well-settled rule that, subject to qualifications to be discussed hereafter, all statements regarding the risk, contained in or appearing on the face of the policy, are warranties."

But the qualifications thereafter discussed render the rule ⁵¹⁵ announced almost without value, for no court has gone to the extent of holding that all statements regarding the risks contained in or appearing on the face of the policy are warranties; and the cases cited by Cooley to sustain the announcement made in the text treat mostly upon the qualifications which are mentioned in the citation, and hold almost uniformly that, where there is any doubt as to whether a statement in an insurance policy is an express warranty, the court should lean against that construction which imposes upon the assured the obligation of a warranty. In one of the cases cited, *National Bank v. Union Ins. Co.*, 88 Cal. 497, 22 Am. St. Rep. 324, 26 Pac. 509, it was held that, although the code of that state provided that a statement in a policy of a matter relating to the person or thing insured or to the risk as a fact is an express warranty, if taking the entire policy in all its terms and language it can be seen that such was not the intention of the parties, the statement of fact cannot be deemed an express warranty. *Redman v. Hartford Fire Ins. Co.*, 47 Wis. 89, 32 Am. Rep. 751, 1 N. W. 393, does not, either in principle or in the facts, sustain the opinion. There the court laid down the general rule that a stipulation in an application for fire insurance should be construed in a doubtful case most strongly against the insurer by whom it was framed; and that, in a doubtful case, that construction of a contract which will save it is to be preferred to one which will destroy it; that the use of the word "warranty" in a contract does not necessarily control its construction; there may be a warranty without the use of that word, and its use will not always create one; that the stipulation in the policy, that the application shall be considered a warranty by the insured, must be construed to mean such a warranty as is stipulated in the application itself. In that case, in answer to the question, "What material was used in lubricating the machinery?" the assured answered: "Lard and sperm oil"; and to the questions whether the machinery was regularly oiled and, if so, by whom and ⁵¹⁶ how often, the answer was: "Yes, by engineer and miller, as often as necessary." The proof was, that during the whole life of the

policy, an oil known as "Fine Engine Oil" was constantly used in the mill for lubricating purposes, and that the machinery was not usually oiled by the engineer or miller, but by another person specially employed by plaintiffs for that purpose. The circuit court held that the answers to the above questions were absolute and continued undertakings in the nature of express warranties, and that the failure by the plaintiffs to use lard and sperm oil and to have the machinery oiled by the engineer and miller invalidated the contract of insurance, and released the defendant from any and all obligations under it, and the plaintiff was nonsuited. This judgment was reversed by the supreme court, the court saying: "The stipulation was framed by the insurer, and had it been intended to require the insured to go beyond the interrogatories and disclose facts not called for therein (if any existed), material to the risk, a general interrogatory calling for such facts would have been inserted; or, at least, the stipulation would have been framed to express that intention more clearly. We cannot assume that the insurer would leave its intention in that behalf to rest in uncertain and doubtful inference, when it was so easy to express it clearly and unmistakably."

In *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92, while the court laid down and indorsed some of the most radical rules, going so far as to state that any statement or description, or any undertaking on the part of the insured, on the face of the policy which relates to the risk, is a warranty, and that whether this is declared to be warranty totidem verbis or is ascertained to be such by construction, is immaterial; that in either case it is an express warranty and a condition precedent; yet, as we have before indicated, to avoid the harshness of this rule, the court discriminated the facts in the particular case involved and decided the case in favor of the plaintiffs.

⁵¹⁷ In *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 466, 28 L. ed. 447, the court reaffirmed the doctrine that, when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. This contention arose out of answers to certain interrogatories in relation to the health of the applicant and the health of his ancestors, he having answered that his father, mother, brothers, or sisters had not been afflicted with consumption or any other serious family disease such as scrofula, insanity, etc., since childhood, and that there were no circum-

stances which would render an insurance on his life more than usually hazardous. He also answered that as an applicant he "reviewed the answers to the foregoing questions, clearly understood them, and reaffirmed the answers"; and at the close of the series of questions was the following stipulation: "It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentation or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company."

Notwithstanding this strong expression on the part of the appellant, the court held that, in the absence of explicit, unequivocal stipulations, requiring such an interpretation, it should not be inferred that a person took a life policy with the distinct understanding that it should be void and all premiums paid thereon forfeited if at any time in the past, however remote, he was, whether conscious of the fact or not, afflicted with some of the diseases mentioned in the question ⁵¹⁸ to which he was required to make a categorical answer, saying that: "If those who organize and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid contract, a guaranty against the existence of diseases, of the presence of which in his system he has and can have no knowledge, and which even skillful physicians are often unable, after the most careful examination, to detect, the terms of the contract to that effect must be so clear as to exclude any other conclusion"; and reversed the judgment of the lower court which held that he could not recover.

Wood on Fire Insurance simply states the general rule which is contended for by the appellant, only as decided by certain cases. We have been unable to obtain *Marshall on Insurance*, but as near as we can gather from quotations, the harsh and inflexible rule sought to be invoked by the appellant has been supported by courts which drew their conclusions from this old work from which a majority of the courts have receded. In *McKenzie v. Scottish Union & National Ins. Co.*, 112 Cal. 548, 44 Pac. 922, the decision was based upon an absolute condition stipulated, and with the stipulation that, if the building should remain shut down for more than thirty days without notice, the policy should be null and void. The condition was broken without any excuse, and the court held that the provision was a warranty. In *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. Rep. 379, 38 L. ed. 231, the policy provided that

it should become void if, without notice to the company and its permission indorsed thereon, mechanics were employed in building, altering, or repairing, and it was held that a violation of this worked a forfeiture of the policy under the express stipulation of the policy that "This policy shall be void and of no effect if, without notice to this company and permission therefor in writing indorsed hereon the premises shall be used or occupied so as to increase the risk or the risk be increased by any means within the knowledge or control of the assured, or if mechanics are employed in building, ⁵¹⁹ altering, or repairing premises named herein, except in dwelling-houses, where not exceeding five days in one year are allowed for repairs."

It is unquestionably true, however, that there are cases, though not by any means a majority of the hundreds of cases that have been decided upon this question, that hold to the strict rule contended for; but in grateful contrast to those courts which adopt the rule of strict construction by, it seems to us, making a fetich of words, expressions, and definitions, and attributing potent magic to the word "warranty," or words of similar import, comes like a refreshing breeze from the sea of judicial enlightenment, the voice of the supreme court of Kentucky, in *Germania Ins. Co. v. Rudwig*, 80 Ky. 223, where the rule is condemned. In the course of the opinion it was said: "There is no doubt that an insurance company relies upon the truth of the representations made in either case, and equally certain that, if untrue and material to the risk, no inquiry will be directed for the purpose of determining whether the statement was fraudulently or innocently made. The injury to the insurer is the same, but when no injury can possibly result to the company, where is the breach and what is the penalty? It would certainly be no breach of warranty in a chattel if the quality was better than that warranted, unless the inferior article alone would conform to the wants of the purchaser; and if a breach, the damages would be merely nominal; but in regard to insurance contracts, that it neither increases nor diminishes the risk, and which could not have influenced the action of either party in making the contract, is seized upon as a ground for forfeiting the entire policy and depriving the assured not only of the benefits of the contract, but permits the insurer to retain all the premiums paid. . . . Such contracts are to be interpreted like other agreements, and must be governed by the same rules, good faith being especially required, as one of the parties is necessarily less acquainted with the details of the subject of the contract than the other."

The defense in this case was raised because the applicant had made a mistake as to the age at which his father and

⁵²⁰ mother died; and had also violated the provisions of the contract in relation to going outside of certain territory for a limited time, which was forbidden by the contract.

In *Westfall v. Hudson River Fire Ins. Co.*, 2 Duer (N. Y.), 490, where a clause in the policy of insurance declared against the use of camphene, etc., it was held that there was no evidence that the loss resulted from the use of camphene, and if there was no other evidence than the breach of the alleged warranty, the plaintiff was entitled to judgment. Said the court: "If the use of camphene was meant to be prohibited in the same sense as the storage of gunpowder, we can discover no reason why the prohibition was not express, in the one case, as well as in the other. Had the intent been the same, it seems to us that such would have been the language; . . . " and so in the case at bar. Had the intent been to make a warranty of the stipulation in relation to the sprinkler, it would have been so expressed as it was in the other clauses above mentioned.

The case of *Au Sable Lumber Co. v. Detroit Manufacturers' Mut. Fire Ins. Co.*, 89 Mich. 407, 50 N. W. 870, was cited by this court in the case of *Hart* (9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86), and it was there said: "If it was intended that any failure to keep a watchman rendered the policy void, the parties would have so declared." That case was expressly in point in the case considered, and we think is as clearly in point in this case. To the same effect is *McGannon v. Michigan Miller's Mut. Fire Ins. Co.*, 127 Mich. 636, 89 Am. St. Rep. 501, 87 N. W. 61, 54 L. R. A. 739. *Selby v. Mut. Life Ins. Co.*, 67 Fed. 490, was practically the same kind of a case, where the parties had fixed the penalty for breach of warranty by stipulations in the contract in relation to some things, but not in relation to the matter which constituted the defense. In *Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.* (Tex. Civ. App.), 49 S. W. 271, it was decided that a temporary breach of a stipulation in a ⁵²¹ policy to which there was not attached a specific forfeiture, which breach did not exist at the time of the fire loss, and which did not contribute thereto, does not prevent recovery on the policy. The appellant contends that this case is not applicable to the case at bar, but it seems to us that the case is exactly applicable, both as to what is stated in the opinion of the court, and as to the matters decided. In *Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co.*, 76 S. C. 76, 121 Am. St. Rep. 941, 56 S. E. 654, 10 L. R. A., N. S., 736, 11 Ann. Cas. 780, where an insurance policy provided that an increased hazard within the knowledge of the insured would avoid the policy, the owner of the building insured rented to a tenant a portion thereof to be used for a business more hazardous than contemplated by

the policy, and it was held not to avoid the policy, because the temporary hazard ended without loss and the loss occurred from another source, the court saying: "And if a temporary change of possession increasing the risk while it lasts, but discontinued before the fire, does not totally avoid the policy, but simply suspends it during the prohibited use, the provisions of the policy above quoted cannot avail the defendant."

This case answers the contention that is made much of, that by reason of the provision in the policy that the sprinkler system should be employed, the insured obtained insurance at a considerably less price than he could have obtained it for if there had been no such provision. But it seems to us there is no merit in this contention, for the reason that the limited price was accorded to the insured because, by reason of the installing of the sprinkler system there would be less liability of fire, the object and efficacy of the system being to put out incipient fires. It may have been that that object was attained in this case many times before the fire which had occurred, through the agency of this sprinkler system. But, in any event, the object was attained and insured to the benefit of the insurance company, when it is conceded that the sprinkler system was in vogue and in good running order at the time of the fire; and when ⁵²² it must be further conceded that, if it had not been installed at the time of the fire the insured could not have recovered at all. The case just quoted, in the course of its argument, says: "The reasoning in *Kyte v. Commercial Assur. Co.*, 149 Mass. 116, 21 N. E. 361, the Massachusetts case just referred to, is that, unless the policy be regarded as at an end the moment the hazard is increased, the insurance company would be held to furnish insurance for which it had not received the compensation it was entitled to demand and which with knowledge of the facts it would have demanded. But this reasoning seems fallacious, for the insurer is generally held to be not liable at all if the fire occurs during the continuance of the increased risk and in consequence of it."

Appellant, in its reply brief, answers this case by saying that no warranty was involved in it, and there was no discussion therein of the law of warranty; but there was a decision of a case which involved the identical question which is presented in this case. The underlying principle was discussed and decided without, possibly, any mention of the word "forfeiture," and it is really a more helpful case in determining the question under discussion than if it had been hampered by a discussion of terms and expressions. In *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221, where a policy of insurance provided that, should the premises insured be applied during the term of insurance to

any prohibited use, the policy thenceforth, and so long as the same should be so prohibited and applied or used, should cease and be of no force or effect, it was held that the application of the property to a prohibited use within the term would not affect the right of the assured to recover in case of a loss, if at the time of the loss the property was not being so improperly applied or used, and it did not appear that such antecedent misapplication or use increased the risk or contributed to the loss.

In *Schmidt v. Peoria Marine & Fire Ins. Co.*, 41 Ill. 523 295, it was held that, where it was provided in a policy of insurance, that: "If, after insurance is effected, either by the original policy or the renewal thereof, the risk be increased by any means, or occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of none effect"; these words are construed to mean that the policy shall become inoperative only while the increased risk shall be in existence, and when it terminates, the liability of the company shall recommence. This case was reaffirmed in *Insurance Co. of North America v. McDowell & Brown*, 50 Ill. 120, 99 Am. Dec. 497. In *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595, it was held that the change of the use of an insured building increasing the hazard will not prevent recovery, where such use has been abandoned without the declaration of a forfeiture by the company before a loss occurred, and such increase of the hazard in no way continued to affect the risk at the time of the loss, although there had been a stipulation that there should be no increase of hazard. The language in that stipulation was plain and emphatic, being as follows: "If the assured shall fail to make known to the company at once any fact or circumstance which renders the risk more hazardous than at the time of the insuring, or if the hazard be increased by any means within the control of the assured, or if gasoline or petroleum or any of its products are deposited, used or kept, or burning gas is made, generated or carburetted within the building or contiguous thereto, then and in every such case this policy shall be void, unless consent is indorsed by the company thereon."

It was contended by the learned attorney for the insurance company in that case that the case which we have just cited from Illinois had been determined upon the authority of *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221, and that that case had not really determined the questions raised in the subsequent cases and the question which was raised ⁵²⁴ in the case of the *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595, now under consideration. But, notwithstanding that contention, which seems to have some merit in it, the court refused to retreat

from the principles announced in the subsequent cases, and emphatically held that the representation was not a continuing one and did not avoid the policy. It is contended by appellant, as in the preceding case, that the court in Illinois was not considering a warranty, and that there was no discussion in the opinion as to a breach of warranty, and no reference whatever made to the law of warranty. But we have the same answer to make to this criticism that was made *supra*. It is insisted, however, that the supreme court of Illinois in the case of *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551, expresses the view of the supreme court of that state on the subject of forfeiture. This case is also cited by appellant in its reply brief, but an examination of the case shows that it in no way contravenes the doctrine just cited. There the policy provided that it should be void if gasoline was kept on the premises excepting by permission, and the testimony shows that not only was gasoline kept on the premises between the time that the policy was issued and the time of the fire, but that it was on the premises at the time of the fire. The court in its opinion stated that that proposition had been firmly established and undisputed, and that the burden could not be thrown upon the insurance company to prove that the fire was attributable to the unlawful storing of the gasoline in the house. This opinion seems to be in consonance with both reason and authority.

In *Born v. Home Ins. Co.*, 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676, where a policy on property provided a forfeiture for mortgaging it without the company's consent, and assured did mortgage a portion of the property, but before loss paid the encumbrance, it was held that such payment operated to restore the property to the protection of the policy, and hence plaintiff was entitled to recover for the loss thereof.

525 "The theory," said the court, "upon which an existing mortgage is held to be a violation of a clause in the policy against an increase of risk is that it does increase the risk."

But, according to the opinion of the court, there was no increase of the risk after the mortgage had been paid off. So the theory upon which the insurance company in this case stipulated for the installment of the sprinkler system was that such installment would decrease the risk. And it did increase the risk during the time it was not in working order, but the same reasoning would apply as in the mortgage case in holding that, after its installment, the increase of risk would be at an end. In *Athens Mut. Ins. Co. v. Toney*, 1 Ga. App. 492, 57 S. E. 1013, the policy contained the following provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, . . . if a building herein described, whether

intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days."

The house covered by the policy became vacant and unoccupied and so remained for thirty days, when it was reoccupied. The house was destroyed after reoccupancy. Held, that the policy did not become absolutely void by reason of the house having become vacant and remaining so for thirty days, but the insurance was merely suspended during the period of violation, and revived upon the reoccupancy of the house and became again of binding force and effect. In *Insurance Co. of North America v. Pitts*, 88 Miss. 587, 117 Am. St. Rep. 756, 41 South. 5, 7 L. R. A., N. S., 627, 9 Ann. Cas. 54, under a provision of a fire policy that it should be void if the building be or become vacant or unoccupied and so remain for ten days, where the building was unoccupied for more than ten days, but a fire occurred afterward during its occupancy, it was held that the policy did not become void. In *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740, where an insured encumbered his personal property by a ^{52nd} chattel mortgage, after such property had been insured and contrary to the provisions of the insurance policy, he was allowed to recover the value of the insured property destroyed, by showing that, at the time of its destruction, it was free from the lien of the mortgage; citing *State Ins. Co. v. Schreck*, 27 Neb. 527, 20 Am. St. Rep. 696, 43 N. W. 340, 6 L. R. A. 524. In *Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38, 54 Am. Rep. 445, 1 N. E. 737, it was held that the temporary illegal use without a license of property insured, if un contemplated at the time of taking the policy, would not of itself, and, as a matter of law, render the policy void during the whole of the rest of the time it was to run. It would simply vitiate the policy during the time of the illegal use and, when the illegal use stopped, the policy would revive; the court saying: "It is not the necessary meaning of the word 'void,' as used in policies of insurance, that it shall under all circumstances imply an absolute and permanent avoidance of a policy which had once begun to run; but the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being"; citing *Phillips on Insurance*, section 975, where it is said: "After it [i. e., the policy] has begun, so that the premium is become due, it surely is but equitable that a temporary noncompliance should have effect only during its continuance. To carry it further is to inflict a penalty on the assured, and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it"; citing many cases to sustain the rule.

It is useless to cite a greater number of cases. But we are satisfied, from an examination of all the cases cited by both appellant and respondents, and of all that we have examined on our own motion, that the statement of Elliott on Insurance above quoted, to the effect that the weight of authority seems to support the view that a violation of a condition that works a forfeiture of the policy merely suspends ⁵²⁷ the insurance during the violation, is a correct announcement. In *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595, the court, to show the fallacy of the rule contended for, says: "That a recovery on a policy on a building in the center of the burned district in Chicago's great fire should be defeated because a gallon of gasoline was therein kept and used a year before that time does not commend itself as a reasonable rule."

To still further show the fallacy, by distorting the proposition, yet still leaving it within the bounds of possibility or even probability, under the rule contended for, if the holder of a life insurance policy in the state of Washington, which prohibits by its terms the departure of the applicant from the territory of the United States, should inadvertently or otherwise straggle across the boundary line into British Columbia and, after detecting the mistake which he had made geographically, should return to the state of Washington, live here for twenty, thirty, or forty years, paying his annual premiums which are accepted and appropriated by the company, upon his death, occurring by an accidental discharge of a firearm or by being cremated in a burning theater—causes which could not possibly have been affected by the breach of his contract—his beneficiary would be deprived of the benefit of his life insurance policy by reason of such violation. The thought is too abhorrent to be maintained for a moment, and yet in principle it is exactly the same.

But, in addition to all these questions which we have discussed, we think probably there is no case which would hold that the appellant in this case could successfully urge this defense, for, according to the findings of the court, there has been no violation of any contract whatever by the respondents. Conceding that there was a warranty, there was no warranty that the assured should at all times maintain the automatic sprinkler system, but the representation was only that the assured should "use due diligence" in maintaining the sprinkler system; and, as we have seen, under the ⁵²⁸ findings of the court, due diligence was used in that regard. So that it seems absolutely at variance with any theory of the law to prohibit the insured from recovering under this policy.

The judgment of the lower court will therefore be affirmed.

Crow, Parker, Fullerton and Mount, JJ., concur.

Morris, J., Dissenting. I dissent for the reasons given in the opinion on the original hearing in department one, to which I still adhere. The majority opinion as herein expressed wipes out the law of warranty in this state, a principle that is as old and well founded as any other principle in insurance law. There is no conflict between the Hart case referred to in the majority opinion and the rule announced in the opinion on the original hearing herein. The Hart case deals with a representation which the court refuses to extend into a warranty either by interpretation or implication, and holds that, in order to be read as a warranty, the provision must appear to be expressly so intended by the insured and insurer, and in case of ambiguity or doubt, the construction should be that of a representation rather than a warranty. The same rules are announced and adhered to in the original opinion, and there was no expressed or implied intention to depart from them. It is said in the Hart case that, notwithstanding the policy contains hard and unjust conditions, the insurance company has the right to make such a contract, and when so made, it is the duty of the courts to enforce them regardless of their harshness, when it appears such a contract was actually made. The original opinion goes no further. Finding an express warranty in the policy based upon a reduction of the premium, it gave effect to it, and in so doing followed the law both in principle and upon authority.

A Representation is Clearly Distinguishable from a Warranty. The former is a part of the proceedings which propose a contract, while the latter is a part of the completed contract. The falsity of the former may render the contract voidable for fraud; but a noncompliance with the latter is an express breach of the contract: *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415, 9 Am. St. Rep. 216. Statements in an application for insurance, though declared to be warranties, will not be given effect as such if qualified by other stipulations which show that the parties did not so regard them: *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415, 9 Am. St. Rep. 216. In determining whether a statement in a policy of insurance is a warranty on the part of the insured, the entire policy must be considered, and if, from the whole, it appears that such statement was not intended as a warranty, it will not be so construed: *National Bank v. Union Ins. Co.*, 88 Cal. 497, 22 Am. St. Rep. 324. The warranty as to the truth of an answer which by its nature expresses only the opinion or judgment of the applicant should not extend further than to insure the honesty and good faith of the party answering the question, and that it was in truth and in fact his honest opinion or judgment: *Rasicot v. Royal Neighbors of America*, 18 Idaho, 85, 138 Am. St. Rep. 180.

Whether the Discontinuance of a Cause of Forfeiture Revives the Insurance is the subject of a note to *Born v. Home Ins. Co.*, 80 Am. St. Rep. 305.

IN RE SALL.

[59 Wash. 539, 110 Pac. 32, 626.]

GUARDIANSHIP — Nonresident Incompetent.—The Superior Courts have an inherent jurisdiction to protect estates of nonresident incompetent persons, and while it is generally said the power to appoint guardians is purely statutory, the power in fact lies in the sovereignty of the state, and the procedure only is statutory. (p. 887.)

GUARDIANSHIP — Nonresident Incompetent.—The Superior Court has jurisdiction to appoint a guardian of the local estate of a nonresident incompetent, irrespective of any statute, by the application of general equitable powers and principles. (p. 887.)

GUARDIANSHIP — Incompetent Person Whose Whereabouts are Unknown.—The jurisdiction to appoint a guardian of the estate of an incompetent does not depend upon his domicile. The appointment may be made when he has disappeared and his whereabouts are unknown. (p. 891.)

GUARDIANSHIP.—A Nonresident may be Appointed Guardian of the estate of an incompetent, if the statute makes no reference to residential qualifications. (p. 891.)

GUARDIANSHIP—Property Without the Borders of the State. An order appointing a guardian of the estate of a nonresident incompetent is limited in its application to property within the state. (p. 892.)

James J. McCafferty, for the appellant.

Samuel Morrison and Charles Loring, for the respondent.

540 CHADWICK, J. Charles G. Sall, a resident of the state of Minnesota, filed his petition under chapter 118 of the Laws of 1909, page 408 (Rem. & Bal. Code, sec. 1622 et seq.), praying that he be appointed guardian of the estate of his brother, Nels Oscar Sall, whom he alleged to be an incompetent person. At the time of the application, Nels Oscar Sall was of the age of forty-five years. For several years he had been a resident of the territory of Alaska, where he with two others discovered a group of mining claims in the year 1907. In December of that year the claims were bonded to James J. Godfrey, who resists the petition for guardianship. By the terms of the option agreement, a certain sum was paid down and a deed was executed and placed in escrow at the Puget Sound National Bank, which bank was made the agent of all parties to the escrow agreement, with power to receive the deferred payments, and upon final payment to surrender the deed. In November, 1909, when these proceedings were commenced, there was nineteen hundred and eighty-five dollars of the moneys coming to Nels Oscar Sall and paid under the option on deposit in the Puget Sound National Bank and subject to his check.

Prior to April, 1908, Nels Oscar Sall had been a man of usual mental strength, but in that month, while with a sled

and team upon the Chitna river in Alaska, the ice broke, precipitating the team and sled and Mr. Sall into the waters of the river. He floated under the ice for a distance of about seventy feet, when he was rescued by his companions. He suffered an immediate shock to his nervous system. Thereafter he was in ill-health, and it was noticed that his conduct and demeanor toward others was not as it had formerly been. He was taken to the hospital at Valdez, from whence, after some weeks' treatment, he suddenly disappeared, and was afterward found by the United States marshal's office acting through the intervention of Senator Nelson of Minnesota.⁵⁴¹ When found he was working in a railroad camp at Cordova. He seemed to have forgotten his name; at any rate he was working under an assumed name, and there is evidence tending to show that he at times lost the faculty of remembering his own identity. At the railroad camp he is said to have displayed almost superhuman strength, a condition not unusual in those of failing mentality, and in some cases a marked symptom of mental alienation. Thereafter he came to Seattle, where several of his former friends met and conversed with him. While they were not willing to say that he is not capable of attending to his own business, they all agree that they would not trust him to attend to business of any kind for them. The opinion is expressed that he was "batty," or "off his nut," and it is shown that, contrary to his former disposition, he was silent, melancholy, and morose; that when spoken to he would answer questions sullenly, almost insolently. There is evidence to show that he was afraid of losing his money and dying poor, and that the banks were unsafe; and while at the hotel, the clerk says that "he would walk around; walk to his room six or seven times in ten minutes." In November, 1908, he disappeared from the Diller hotel, and has not since been seen or heard of, although search has been made in Alaska, Seattle, Tacoma, Portland, and other places. These are the facts which moved the court to appoint Charles E. Sall guardian of the estate of his brother, and are sufficient, in the judgment of this court, if the law does not intervene to prevent it.

Mr. Godfrey has appealed, assigning as error that the superior court had no jurisdiction to appoint a guardian for a nonresident, or one not within the jurisdiction of the court. It will be observed that chapter 118, Laws of 1909, page 408 (Rem. & Bal. Code, sec. 1622 et seq.), refers only to property, and has nothing whatever to do with the guardianship of the persons of the classes referred to therein. It provides in section 1 that a petition shall be filed showing, not only that the incompetent person has property needing care and attention,⁵⁴² but that the owner is a resident of the county where the petition is filed. Section 4 of the act provides that, where

the incompetent person resides out of the state of Washington and has property within said state requiring the care of a guardian, and a petition is filed in the county where such incompetent has property, service by publication may be had.

It is contended that section 1 defines the jurisdiction of the court, and that section 4 cannot be given effect unless it is also made to appear that the incompetent is, in fact, domiciled in the county. If this effect is given to the statute, we think, unquestionably, that the contentions of the appellant should prevail. But, construing the act as a whole, and recognizing the necessity as well as the duty of the state to protect the estates of incompetent persons, the construction put upon the statute by appellant may well be doubted. A careful examination of the law on our own account convinces us that the superior courts have an inherent jurisdiction to protect estates of nonresident, incompetent persons; and that, while it is generally said that the power to appoint guardians is purely statutory, the power in fact lies in the sovereignty of the state, and the procedure only is statutory. In England, from whence we have derived our common law and the accepted heads of equity jurisdiction, the king assumed the care of insane persons and their property in *parens patriae*. After a declaration or finding of insanity, the jurisdiction in lunacy cases was held in some early cases to be no longer exercisable under the king's sign manual, but in virtue of the general powers of the court: *Ex parte Grimstone*, 2 Amb. 706; *Burford v. Lenthall*, 2 Atk. 551; *In re Fitzgerald*, 1 Ll. & G. t. P. 20, 2 Sch. & L. 439.

Mr. Woerner, in his work on the American Law of Guardianship, section 18, says that it is the prevalent conviction of lawyers, judges, and text-writers in America that, in the absence of countervailing statutes, American courts having equity powers possess a general jurisdiction for the appointment of guardians. Story draws no distinction between the powers of ⁵⁴³ American and English courts in this respect. Story's *Equity Jurisprudence*, chapter 35, and Mr. Pomeroy, in his *Equity Jurisprudence*, at section 1306, says that American courts have this power in so far as it has not been taken away by statute. It is, therefore, held that, where the power to appoint guardians has been conferred upon other courts, as, for instance, the probate court of the territory before the creation of the state of Washington, the power is cumulative and concurrent with the court of chancery: *Lee v. Lee*, 55 Ala. 590; *Wilson v. Roach*, 4 Cal. 362; *Ex parte Miller*, 109 Cal. 643, 42 Pac. 428; *Board of Children's Guardians v. Shutter*, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740; *Corrie's Case*, 2 Bland. (Md. Ch.) 488; *Wilcox v. Wilcox*, 14 N. Y. 575; *Durrett v. Davis*, 24 Gratt. (Va.) 302; *Glasscott v.*

Warner, 20 Wis. *654; Harlin v. Stevenson, 30 Iowa, 371; Sterritt v. Robinson, 17 Iowa, 61.

It would follow, then, that the statute, in declaring that the court might appoint a guardian for the property of an incompetent person resident of the county, would not bar a court of general jurisdiction of its general equity powers, provided the constitution is broad enough to warrant its exercise. That the superior court of this state has such general jurisdiction has been frequently declared. In Moore v. Perrott, 2 Wash. 1, 25 Pac. 906, it is said: "The language of the constitution [article 4, section 6] is not that the superior courts shall have exclusive jurisdiction, but it gives to the superior courts universal original jurisdiction, leaving the legislature to carve out from that jurisdiction the jurisdiction of the justices of the peace, and any other inferior courts that may be created."

In Krieschel v. Board of Commissioners of Snohomish County, 12 Wash. 428, 41 Pac. 186, it was said of the same provision: "The language there used is certainly very broad and comprehensive, and might well be said to apply to cases of this character, as they are 'not otherwise provided for,' and, if contemplated at all, fall within the purview of this provision. At all events, it is manifest that it was not the intention of the ⁵⁴⁴ framers of this section 6 to exclude any sort or manner of causes from the jurisdiction of the superior court."

In Filley v. Murphy, 30 Wash. 1, 70 Pac. 107, it is said: "In this state we have no probate court, properly speaking, as distinguished from the court that entertains jurisdiction of other matters. The court of general jurisdiction also hears and determines probate matters. Matters pertaining to probate are referred to what is called 'probate procedure,' as distinguished from what is denominated 'civil' or 'criminal procedure.' But when the court, sitting in a probate proceeding, discovers in a petition the statement of facts which forms the basis of a controversy, we see no reason why it may not settle the issues thereunder when an appearance has been made thereto, and then proceed to try it in a proper manner, as any other civil cause."

In Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502, the latest and perhaps the strongest expression of the court is as follows: "The constitution does not make the superior courts probate courts. On the contrary, it vests the superior courts with jurisdiction 'of all matters of probate'; hence the court is not shorn of its general powers simply because the cause before it may be one which was cognizable formerly in a court of probate. It possesses in every case and at all times its powers as a court of superior and general jurisdiction, and among these is the

power to hear and determine the question to whom a bequest made by a decedent rightfully belongs. A statute, therefore, can neither add to nor take away the power, and it is immaterial to inquire whether or not one conferring such a power is in existence."

Hence, the superior courts have this jurisdiction irrespective of any statute, and may exercise it as a matter of obvious necessity, by the application of equitable principles. This is well established.

In *Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111, the power of the court to exercise jurisdiction over the estates of incompetent persons was called in question. It was contended "That upon the organization of our state government the state, as a political sovereignty, in its character of parens ⁵⁴⁵ patriae, succeeded to all the rights and duties previously enjoyed or exercised by the crown of England with respect to idiots and lunatics and their estates. That the power to which the state thus succeeded is not of a judicial character, wherefore, in the distribution of the powers of government under the constitution, it was not thereby delegated to or conferred upon the judicial department of government, and hence, without express legislation, a court of chancery was not authorized to exercise it."

After an exhaustive discussion of the relative rights and limitations of the legislative and judicial branches of the government, the court came to the conclusion that the courts could, in the exercise of their general chancery jurisdiction, order a sale of real property of an incompetent under either one of the following equitable principles: "(1) The duty of the state to protect and provide for such of its citizens as are incapable of taking care of themselves. (2) The right of every owner of property to have it applied to his support. (3) The absolute necessity for such relief. (4) Such applications involve the exercise of judicial power. (5) The duty which the state owes to those laboring under disabilities can be more appropriately and efficiently performed through courts of equity than in any other way."

All of which the learned writer of the opinion proceeds to discuss, saying in conclusion: "All who are conversant with the history of equity jurisprudence know that as a distinct system, it has been of constant growth and development from its inception to the present time, covering a period of hundreds of years. The jurisdiction of a court of equity does not depend upon the mere accident whether the court has, in some previous case or at some distant period of time, granted relief under similar circumstances, but rather upon the necessities of mankind, and the great principles of natural justice, which are recognized by the courts as a part of the law of

the land, and which are applicable alike to all conditions of society, all ages, and all people."

⁵⁴⁶ Without committing ourselves to the doctrine there announced, that a court might sell the property of an incompetent person for any purpose other than to relieve his immediate necessities and contribute to his comfortable support, the reasoning is conclusive upon the question of jurisdiction, and is sustained by the following authorities: *Allman v. Taylor*, 101 Ill. 185; *McCord v. Ochiltree*, 8 Blackf. (Ind.) 15; *Corrie's Case*, 2 Bland (Md. Ch.), 488; *Latham v. Wiswall*, 37 N. C. 294; *Dowell v. Jacks*, 58 N. C. 417; *Ashley v. Holman*, 15 S. C. 97; *Burke v. Wheaton*, 3 Cranch C. C. 341, Fed. Cas. No. 2164.

While there are cases holding that this special jurisdiction over the estates of incompetent persons does not come to us as inherent to the equitable jurisdiction of our courts, reference to our constitution, article 4, section 6, as construed by the cases heretofore decided by this court, will show that jurisdiction is given "in all special cases and proceedings as are not otherwise provided for." This must include power over the estate of an incompetent when properly brought before the court, for the object of the people in establishing their courts and defining their jurisdictions was to safeguard and protect property rights. It is only where there is no general or plenary jurisdiction conferred upon the court by statute or constitution that the jurisdiction of the courts exercising power over the persons or estates of incompetents is to be considered limited or special: *Modawell v. Holmes*, 40 Ala. 391. To put the property of an incompetent to such uses as will tend to his relief and comfort should be one of the first duties of the court, or as is desired in this case, to use the funds on hand for the protection of his property and to finding the ward if possible. Under the general provisions of our constitution distinctions are preserved between the common law, equity, and probate practice, but it is for convenience, rather than because of the original reasons underlying the segregation of such courts under the English procedure. The power, then, being in the superior court, covering as it ⁵⁴⁷ does the functions of the common-law courts, courts of equity and probate, the name of the particular jurisdiction is immaterial to our discussion so long as a procedure is provided to carry it into execution. This the legislature has undertaken to do in section 4 of the act of 1909, page 409 (Rem. & Bal. Code, sec. 1625).

Nor do we think that the jurisdiction depends upon the domicile of the incompetent. If it did, the humane purposes of the law might be defeated entirely. The first case in which this phase of the law is noticed is that of *Ex parte Southcote*, Amb. 110. *Southcote* was confined in an asylum

in Belgium. He had property in England. Upon a petition to appoint a commission for his estate, which of course involved an inquiry de lunatico, Lord Hardwicke, who delivered the opinion, expressed some doubt as to the practice, but was convinced that he had power to issue a commission where the lunatic was a nonresident and had property within the jurisdiction of the court. In *Re Devausney*, 52 N. J. Eq. 502, 28 Atl. 459, a guardian was appointed for a nonresident ward. It was held that the court was not ousted of its jurisdiction to issue a commission because of the nonresidence of the incompetent. In this case it was held that the Southcote case "is an authority for issuing a commission when the alleged lunatic is nonresident, if he or she owns an estate within the jurisdiction." The court in the opinion mentioned reviews the English cases as well as the following American cases: *In re Perkins*, 2 Johns. Ch. 124; *Matter of Petit*, 2 Paige, 174; *Matter of Ganse*, 9 Paige, 416; *Matter of Fowler*, 2 Barb. Ch. 305. The only case we have found where the whereabouts of the incompetent was not known at the time of the petition was that of *Ganse*. *Ganse* had been a resident of the town of Fishkill, New York, and had considerable property at that place. He had become deranged and thereafter disappeared. His whereabouts was unknown to his friends at the time the application was made for guardianship. Upon the authority of the Southcote case, the commission⁵⁴⁸ issued, and the court took jurisdiction of his property.

It is next insisted that the court, in any event, had no power to appoint a nonresident as a guardian. It will be remembered that the statute, chapter 118, Laws of 1909, page 408 (Rem. & Bal. Code, sec. 1622 et seq.), provides for a guardian for the estate only. No reference is made to residential qualifications. The general rule, as we understand it to be, is that, in the absence of a statute, the court may appoint any fit and proper person if he be a resident or nonresident. His bond answers for his presence and, in theory at least, he is always before the court. While a court should not, and probably would not, have the power to appoint a nonresident guardian of the person of a resident incompetent, the manifest objections to such a procedure can have no application where it is the thing and not the person which is the subject of the court's intervention. Although in the absence of a statute a nonresident guardian for the person as well as the estate was sustained in *Berry v. Johnson*, 53 Me. 401, this authority may well be doubted in so far as it covers the person of the incompetent.

Other errors are assigned, but it seems to us that they all depend upon the power of the court to appoint a guardian for a nonresident ward, and not upon further construction of

the statute, and, like respondent's objection to the capacity of the protestant to appear in this and the lower court, need no discussion.

Gose and Morris, JJ., concur.

FULLERTON, J., Concurring. In my opinion the statute affords ample authority for the action of the court, and I concur in the conclusions reached by the majority. On the question of the inherent power of the court to appoint a guardian under the circumstances recited, I express no opinion.

ON PETITION FOR REHEARING.

549 PER CURIAM. A petition for a rehearing has been filed in this cause, in which the appellant earnestly insists that the court below was without jurisdiction to appoint a guardian for the state of a nonresident insane person. We adhere to the views expressed in our former opinion upon that question. But it might be inferred from the argument set forth in the petition that the guardian assumes that he has been appointed for all the estate of the insane person, where-soever situated. This position is untenable. The jurisdiction of the courts of this state is limited to the property within its borders and, properly construed, the order appointing the guardian is likewise limited in its application.

The rehearing is denied.

Rudkin, C. J., Dissenting. I agree with the majority that our superior courts have jurisdiction to appoint guardians, for nonresident insane persons who have property in this state, but do not think that such jurisdiction should be exercised under the facts disclosed by this record. The person for whom a guardian has been appointed mysteriously disappeared more than a year and a half ago, and diligent search and inquiry throughout the entire Pacific Coast has failed to discover either him or his whereabouts. Under such circumstances, when we consider the state of his mind and the state of his health, the presumption of death is far stronger than the presumption of continued insanity. If dead, the order appointing the guardian is a nullity (*Scott v. McNeal*, 154 U. S. 34), and will afford no protection to third persons dealing with the alleged guardian. The court below has commissioned a nonresident of this state to demand and receive money from citizens of this state, when payment to the person thus commissioned will, in all human probability, constitute no acquittance of the debt. For this reason I dissent.

The Guardianship of Lunatics is discussed in the note to *Schmidt v. Shaver*, 89 Am. St. Rep. 267.

The Superior Court has Jurisdiction to Appoint Guardians for insane persons wholly independent of its jurisdiction to commit to hospitals for the insane: *Donaldson v. Winningham*, 48 Wash. 374, 125 Am. St. Rep. 937.

The Power to Appoint a Guardian Depends on the Statute, and cannot be exercised, it has been held, unless the conditions prescribed by the statute exist, though it may appear that the person for whom the guardian is sought is not capable of caring for his property judiciously: In re Streiff, 119 Wis. 566, 100 Am. St. Rep. 903.

The Powers of a Guardian in chancery and at common law are considered in the note to Thompson v. Boardman, 18 Am. Dec. 689; and the common-law powers of guardians are discussed in the note to Schmidt v. Shaver, 89 Am. St. Rep. 257.

STATE v. SUPERIOR COURT.

[59 Wash. 621, 110 Pac. 429.]

EMINENT DOMAIN—Irrigation.—The Constitutional Provision that "private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic or sanitary purposes," includes ditches for irrigation purposes, in view of the vast extent of arid land within the state and the benefits of irrigation thereto. (p. 897.)

EMINENT DOMAIN—Public Use—How Determined.—A constitutional provision that "whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public," does not mean that in the judicial determination of the question all other constitutional provisions shall be lost sight of, and such determination should not be made without reference to constitutional assertions upon the subject. (p. 898.)

EMINENT DOMAIN—Irrigation—Single Land Owner.—The exercise of the right of eminent domain for acquiring a right of way for irrigation ditches may be exercised by a single land owner, as the benefit to the public which supports the exercise of the right is not public service, but the development of the resources of the state, and the increase of its wealth generally, by which its citizens incidentally reap a benefit. (p. 900.)

EMINENT DOMAIN—Irrigation—Character of Land.—Neither the constitution nor the statute limits the right of condemnation to owners of land which is entirely devoid of agricultural value without irrigation. It is sufficient if the value and usefulness of the land, from an agricultural standpoint, will be materially enhanced by its proposed irrigation. (p. 900.)

EMINENT DOMAIN—Irrigation by Gravity—Possibility of Other Means.—In providing for the exercise of the power of eminent domain for the purpose of irrigation, the constitution and the statute law both contemplate irrigation by gravity, and the right should not be withheld simply because water might be put upon the land by pumping. (p. 901.)

EMINENT DOMAIN—Irrigation—Speculative Use of Land.—Where land and water to irrigate it are owned by one company, it is immaterial, in a proceeding to condemn a right of way for a ditch to irrigate the land for the purpose of enhancing its agricultural value, what purpose the company had in acquiring the land, or

whether it proposes to farm the land itself or sell it off in tracts to others. (p. 902.)

Peacock & Ludden, for the relators.

Allen & Allen, for the respondents.

⁶²³ PARKER, J. The respondent Spokane Valley Land and Water Company, which we will hereafter call the company, commenced eminent domain proceedings in the superior court for Spokane county to acquire a right of way over land of the relators for the purpose of a canal to carry water to and irrigate land belonging to it. The cause came on for hearing before the court upon the questions of public use and necessity, when the court, after the introduction of evidence and argument of counsel upon those questions, adjudged that the proposed use was public and that the right of way sought to be acquired was necessary to the proposed use, and ordered a jury to be impaneled to determine the amount of damages resulting to the relators on account of the taking. The relators, considering themselves aggrieved, have by writ of review brought the cause to this court, asking a reversal of these rulings of the trial court; their main contention being that the company's proposed use of the right of way sought to be acquired is not a public use.

The company claims the right to acquire by condemnation a right of way for its proposed irrigation canal over the ⁶²⁴ relators' land under the provisions of chapter 131, page 261, Laws of 1899 (Rem. & Bal. Code, section 6325 et seq.), which, so far as necessary for us to notice, are as follows:

"§ 6326. All persons who claim, own or hold possessory right or title to any land, or parcel of land or mining claim within the boundaries of the state of Washington, when such lands, mining claims or any part of the same are on the banks of any natural stream of water, shall be entitled to the use of any water of said stream not otherwise appropriated for the purposes of mining and irrigation to the full extent of the soil for agricultural purposes.

"§ 6327. When any person owning claims, lands or mining claims as specified in the foregoing section, is not a riparian proprietor or being such has not sufficient frontage on said stream, lake, artificial stream, ditch or reservoir, to obtain a sufficient flow of water to irrigate his land or use on his mining claim, he shall be entitled to the right of way through the farms or tracts of lands or other mining claims which lie between him and said stream, lake, artificial stream, ditch or reservoir, or the farms, tracts of lands or mining claims which lie above and below him on said stream, lake, artificial stream, ditch or reservoir.

"§ 6328. Such right of way shall extend only to a ditch sufficient for the purpose required, together with the right of ingress and egress to construct, maintain and repair the same; and whenever any person or persons find it necessary to convey water for the purposes of irrigation or mining through the improved or occupied lands of another, he or they shall select for the line of such ditch through such property the shortest and most direct route practicable upon which can be constructed with uniform or nearly uniform grade, and discharging the water at a point where it can be conveyed to and used upon the land or lands or mining claim of the person or persons constructing such ditch, canal or works.

"§ 6329. Upon the refusal of the owner of the lands, lessees or those in possession, through which it is proposed to run said canal, ditch or works to permit the passage of the same through their property the person or persons desiring the right of way for such ditch, canal or works may proceed to condemn and take the right of way therefor as hereinafter provided."

⁶²⁵ The substance of the facts upon which the learned trial court based its decision may be briefly summarized from its findings as follows: The respondent company is a corporation, organized and existing under the laws of this state for the purpose of owning lands and water rights, and for the purpose of constructing and maintaining irrigating canals and ditches and conducting water through the same to irrigate such lands. The Spokane river flows westerly through the county of Kootenai, in the state of Idaho, and the county of Spokane, in the state of Washington. The company has appropriated and acquired the right to divert and use for irrigation purposes two hundred and fifty cubic feet per second of time of the water flowing in the Spokane river, at a point about five miles east of the boundary line between the states of Idaho and Washington, to be conveyed by a canal in a westerly direction in the valley of the Spokane river through the counties mentioned, a total distance of nineteen miles. The company has caused the line of its proposed canal to be surveyed and located upon the ground from the point of diversion in a westerly direction a distance of nearly nineteen miles, and has constructed and completed twelve miles of its canal, with lateral ditches leading therefrom by means of which large quantities of land are being irrigated. The company is the owner of lands amounting to about fifteen hundred acres in Spokane county, situated along and adjacent to the proposed line of its canal where the same is not yet completed. These lands, without irrigation, will produce no crops of value and are of little value, but with irrigation will pro-

duce large and valuable crops of vegetables, grain, hay, fruits, and other agricultural products. These lands the company desires and intends to irrigate with the water from its proposed canal, and it has sufficient water for that purpose which it can convey through its proposed canal, providing it is completed so as to reach these lands. The line of the proposed canal is located through the land of the relators where the company seeks its right of way therefor, which line so located is the most direct ⁶²⁶ route practicable upon which the canal can be constructed with uniform or nearly uniform grade and discharge the water by gravity at a point where it can be used upon the lands of the company proposed to be irrigated thereby; and the right of way for the proposed canal over the land of the relators is necessary for the construction thereof and to enable the company to irrigate its lands which are along and adjacent to the proposed line of the uncompleted portion of the canal. A portion of the lands of the company sought to be irrigated by this proposed canal abut upon the Spokane river, but the larger part of the lands do not abut upon the river, and are separated therefrom by land not owned by the company, and the company has not sufficient frontage to obtain a sufficient flow of water to irrigate the lands proposed to be irrigated; and it is impracticable and unprofitable to irrigate any of the lands by pumping water from the Spokane river or from wells, or in any other manner than that proposed by the company. In connection with this last fact, it may be stated, though the court made no findings thereon, that the evidence shows that practically all of the land abutting upon the river is too high above the river to be irrigated by gravity from any point at which such lands abut upon the river.

Exceptions were taken by counsel for the relators to most of the findings, the substance of which we have briefly stated; but a careful reading of all the evidence brought here for our review convinces us that the court found the facts substantially as they exist, except that the lands of the company sought to be irrigated may not be quite so arid and devoid of crop producing value as the findings indicate. This fact, however, does not affect our conclusions, as will be seen later. We regard the foregoing as all the material facts affecting the right of the company to condemn, though we will later have occasion to notice some other facts in connection with some minor contentions made in behalf of the relators.

By far the larger part of the argument of learned counsel ⁶²⁷ for the relators is based upon the fact that the company is not a public service corporation, and that it does not claim the right to condemn the land of the relators upon

that ground, but claims the right only as any single private land owner may claim such right under this law. We will proceed upon the assumption that such is its claim; and that the company is under no obligation whatever to serve the public, though we do not decide what its public service obligations are.

It is the law in this state, as it appears to be in many western states having large areas of arid land capable of being reclaimed or rendered more productive by irrigation, that the test of public use in the acquiring of water rights and rights of way for canals and ditches to convey water to land for the purpose of irrigating the same is not necessarily the service the parties seeking to acquire such rights may be compelled to render to the public in connection therewith. Section 16, article 1 of our state constitution, provides: "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes."

Here is an inference so strong as to amount almost to an affirmative declaration that private property may be taken for private use when the use is confined to the purposes enumerated in this provision, one of which is ditches on or across the land of others for agricultural purposes; and it is no strained construction of the provision to say that this includes ditches for irrigation purposes, in view of the vast extent of arid land within our state and the benefits of irrigation thereto in the increase of its productiveness and value. The very thought of agriculture in connection with this vast arid portion of our state suggests irrigation in connection therewith. These facts and conditions were well known at the time of the making of our constitution, and it seems idle to doubt that they were in the minds of both the constitution ⁶²⁸ framers and the people in the making and adoption of that instrument as the fundamental law of the state. The constitution further provides in section 1, article 21: "The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use."

Learned counsel for the relators call our attention to the case of *State v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A., N. S., 842, 4 Ann. Cas. 987, where it was held that this last-quoted provision does not authorize the giving of the power of eminent domain to a private manufacturing company, to enable it to acquire water rights by condemnation; from which it is argued that, since this respondent company is under no obligation to serve the public, but seeks only to acquire this right of way for the purpose of conveying its own water to its own land for irriga-

tion thereof, it is in no better position to assert the right of eminent domain than was the Tacoma Industrial Company in that case. We do not think that decision is controlling here, as is clearly indicated by the comment therein upon the irrigation case of *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171, affirming the supreme court of Utah, which case was there cited as apparently supporting the industrial company's right to condemn. Judge Rudkin, in speaking for this court, there said, at page 670: "There is, however, a vast difference between the use of water for manufacturing and for irrigation. In the latter case, there is no choice of means or location. The necessity is an absolute one, if the land is to be reclaimed at all. Not so, with a manufacturing plant. The question of location and motive power is one of economy and convenience at most."

We have seen that this statute, under which the company claims the right to condemn, clearly purports by its terms to give this right without any reference whatever to any obligation on the part of the party seeking to condemn to serve the public. Learned counsel's argument does not seem to be an attack upon the constitutionality of the law, but is, in effect, ⁶²⁹ that the question of public use must be determined solely as a judicial question regardless of the legislative assertion upon that subject. In support of this view, reliance is placed upon the concluding language of section 16, article 1 of the state constitution, which is as follows: "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."

But this does not mean that in judicially determining a question of public use we are to lose sight of all other constitutional provisions. We have quoted the constitutional provision which clearly indicates that property may be taken under the power of eminent domain for certain enumerated private uses, among which are ways for ditches for agricultural purposes. While this provision in terms seems to give the power to take for private use, it was evidently adopted upon the theory that the public would be sufficiently benefited by the taking for such a purpose to warrant the taking; that is, though it be seemingly called a private use by these words of the constitution, it is also in effect a public use in view of the necessities of a state like ours having vast areas of arid land. These considerations lead us to conclude that, notwithstanding our constitution has declared that the question of public use shall be a judicial one, and is to be determined without reference to

Legislative assertion upon the subject, such question is not to be so determined without reference to constitutional assertions upon the subject.

The supreme court of Utah, under a law giving the right of condemnation for irrigation substantially as is given in this law, in the case of *Nash v. Clark*, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371, 1 L. R. A., N. S., 208, 1 Ann. Cas. 300, held that a private owner of eighty acres of arid land had the right to acquire a right of way by condemnation over private property for the purpose of conveying water to such land for irrigation thereof,⁶³⁰ and that in view of the conditions existing in that state, such use of the water and the right of way sought to be acquired for its conveyance is a public use. It appears in that decision that the court gave no consideration to any constitutional provision save, "Private property shall not be taken or damaged for public use without just compensation," which is there considered as meaning, "That private property cannot be taken for strictly a private use." We assume that the court did not regard any other provision of the Utah constitution as bearing upon this subject. Therefore, it would seem that the court reached its conclusion without the aid of other constitutional provisions such as are found in our state, which we have seen clearly indicate that property may be acquired by right of eminent domain for such use. That case was removed to the supreme court of the United States—*Nash v. Clark*, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171—by writ of error, and there affirmed, the court holding that the right of eminent domain thus conferred was within the legislative power of the state of Utah, and did not violate any rights guaranteed by the federal constitution.

The supreme court of Montana also upholds the right of condemnation for irrigation purposes in favor of private land owners: *Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757, under a state constitutional provision reading as follows: "The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use and the right of way over the lands of others, for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use."

This provision, it seems to us, goes no further in support of this right than those we have quoted from our constitution. The following decisions from this court lend some support to this view, though they do not involve this exact question: ⁶³¹ *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Weed v. Goodwin*, 36 Wash. 31, 78 Pac. 36. The latter

involved the validity of this same law, but not on the question of public use: 1 Lewis on Eminent Domain, 3d ed. sec. 308; *Oury v. Goodwin*, 3 Ariz. 255, 26 Pac. 376; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. ed. 369.

These authorities, we think, support the company's contentions in this case, though they relate to an exercise of the right of eminent domain by, or for the benefit of, more than a single land owner. If, however, this point be urged to avoid the force of these authorities in support of the company's contention in the present case because the right is here claimed by a single private land owner, we would answer it in the language of the supreme court of Montana, used in the *Ellinghouse* case, at page 464, as follows: "What real distinction is there, so far as the term 'public use' is concerned, between the benefit that results to a state from the reclamation by artificial irrigation of one hundred and sixty acres of agricultural land owned by one or two persons, and the reclamation by the same means of thousands of acres owned by many different persons living together in one subdivision of the state? We do not think there is any in principle. The reclamation of one small field by means of artificial irrigation promotes the development and adds to the taxable wealth of the state as well as the reclamation by the same means of a number of fields. The only difference is the extent of the benefit."

The benefit to the public which supports the exercise of the power of eminent domain for purposes of this character is not public service, but is the development of the resources of the state, and the increase of its wealth generally, by which its citizens incidentally reap a benefit. Whether such development and increased wealth comes from the effort of a single individual, or the united efforts of many, in our opinion does not change the principle upon which this right of eminent domain rests. What we have said thus far is sufficient to determine the case, so far as the general principle involved is ⁶³² concerned. It only remains to notice some minor contentions made in behalf of the relators.

We have noticed that the land sought to be irrigated may not be so arid and devoid of agricultural value as indicated by the court's findings. Exception was taken to the findings upon this question, and it is contended that the land is not in fact so devoid of agricultural value as to warrant the exercise of the condemnation right here sought. We are convinced, however, from the evidence that in any event the value and usefulness of the land from an agricultural standpoint will be very materially enhanced by its proposed irrigation. One of the witnesses testified, in substance, that without irrigation about the only crop that is raised in this

valley is a light crop of wheat or wheat hay, and that with irrigation there can be raised all the so-called small fruits, also alfalfa, sugar beets and vegetables, all producing good crops; and that the land with water is worth several times as much as without water. Another witness testified that it is semi-arid land, and without irrigation will grow fairly good crops of wheat, and wheat and oat hay; but will grow only such crops as mature before the middle of July, after which it dries up; and that with irrigation it will produce abundantly most any crop put upon it; and that irrigation will increase its value from one hundred and twenty-five dollars to one hundred and fifty dollars an acre over its value without irrigation. The testimony of these witnesses is not materially different from that of others. The witnesses differ somewhat in their opinions as to the extent of the wheat and oat crops capable of being produced without irrigation; but all agree that irrigation very materially enhances the productiveness of the land. Neither the constitution nor this law limits the right of condemnation to owners of land which is entirely devoid of agricultural value without irrigation, and we think the evidence clearly shows that a sufficient benefit will result to the land by the proposed irrigation to warrant the exercise of the right of eminent domain here invoked to accomplish that end: *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. ed. 369.

⁶³³ It is also claimed in behalf of the relators that the evidence shows, and findings were so requested, that the water in the river flowing by portions of the land, and the water under the land which could be reached by wells, was sufficiently accessible to enable the owner to irrigate by pumping. It is true the evidence indicates that water may be gotten upon the land to some extent by this method; but we think the evidence also shows that such method is not at all a practical or profitable method of irrigation, as compared with the method proposed; besides, it is clear that the constitution and this law both contemplate irrigation by gravity; and we do not think the right to condemn was intended to be withheld simply because water might be put upon the land by pumping.

It is also claimed that the learned trial court erred in refusing to find that the company is engaged, and has been engaged, in buying up lands for the purpose of bringing the same under irrigation by means of its canal as already constructed and as proposed to be constructed; and that its purpose is speculative. Finding upon this fact was evidently refused because the learned trial court regarded such fact as immaterial rather than because such fact did not exist. We agree with the learned trial court that as long as the lands are proposed to be irrigated for the purpose of enhancing

their agricultural productiveness and value, it is utterly immaterial what the purpose of the company was in acquiring the lands, or whether it proposes to farm the lands itself or proposes to sell them off in tracts of varying size to others. The fact remains that the company owns the water and owns the lands proposed to be irrigated, and that their irrigation will promote the public good by means intended to be fostered by our constitution. Of course it acquired the lands with intent to profit by their use or sale. That is only exercising a right incident to ownership as any private owner may exercise it.

We are of the opinion that the proposed use of the right of way sought to be acquired over the relator's land is such as to ⁶³⁴ support the exercise of the right of eminent domain in acquiring the same by this respondent company, under the provisions of our constitution and this law. The judgment of the learned trial court is affirmed.

Rudkin, C. J., Dunbar, Crow and Mount, JJ., concur.

Uses for Which the Power of Eminent Domain cannot be exercised are discussed in the note to *Zircle v. Southern Ry. Co.*, 102 Am. St. Rep. 809. Irrigation of lands is for a public use, and the owner of an arid farm may condemn a right of way through the ditch of another for the purposes of carrying water to his land for irrigation purposes: *Nash v. Clark*, 27 Utah, 158, 101 Am. St. Rep. 953. See, further, *Borden v. Trespalacios R. & I. Co.*, 98 Tex. 494, 107 Am. St. Rep. 640, and authorities cited in the cross-reference note thereto.

STATE v. THUNA.

[59 Wash. 689, 109 Pac. 331, 111 Pac. 768.]

COMMON PROSTITUTE.—The Idea of Gain is not Essential to constitute one a common prostitute. A woman who submits herself to indiscriminate intercourse with men, without hire, is as much a common prostitute as one who does so solely for hire. (p. 903.)

CRIMINAL LAW—Evidence of Other Crimes.—Letters Written by a person accused of crime, showing his guilt of the offense charged, are competent evidence, although they contain admissions of other crimes. (p. 904.)

COMMON PROSTITUTE—Time of Offense of Living With—Indictment.—The offense of living with a common prostitute is a continuing one, and may be charged as between certain dates; but the living together of the parties for a single day with an intention of remaining together is sufficient to constitute the offense, and an indictment charging its commission on a certain day is therefore sufficient. (p. 904.)

Brightman & Tennant, for the appellant.

George F. Vanderveer and Jerold Landon Finch, for the respondent.

⁶⁸⁹ MOUNT, J. This appeal is prosecuted from a judgment upon conviction of the crime of living with a common prostitute, alleged to have been committed on December 30, 1909. Appellant argues that the court erred in defining a common prostitute as follows: "A common prostitute is a woman who offers her body to an indiscriminate intercourse with men. Intercourse confined ⁶⁹⁰ exclusively to one man does not make a woman a common prostitute. If a woman by words or acts or by any device invites and solicits and submits to indiscriminate intercourse, she is a common prostitute. Whether a woman is a common prostitute is a question of fact which does not depend alone upon the number of persons with whom she has had illicit intercourse, nor does it depend alone upon the question of whether she submits herself for gain. Her avocation may be known or inferred from the manner in which she plies it. The jury are to consider her general conduct and all other circumstances, if any are shown by the evidence in the case, tending to show whether or not she so holds herself out to the public."

It is contended that this instruction is erroneous because it states that the fact that a woman is a common prostitute does not depend alone upon the question whether she submits herself for gain. Several definitions by text-writers and several cases are cited, which say in substance that a common prostitute is a female given to promiscuous sexual intercourse for the sake of gain.

While we are of the opinion that the sake of gain is probably the most usual motive, it is not the only one, and it is not necessarily essential to constitute a common prostitute. A woman who submits herself to indiscriminate sexual intercourse with men, without hire, is certainly as much a common prostitute as one who does so solely for hire. In *State v. Clark*, 78 Iowa, 492, 43 N. W. 273, the court said: "Counsel, if we understand him correctly, thinks that prostitution consists in sexual commerce for gain. It is sometimes so defined, but we think if a woman submits to indiscriminate sexual intercourse, which she invites or solicits by word or act, or any device, she is a prostitute. Her avocation may be known from the manner in which she plies it, and not from pecuniary charges and compensation gained in any other manner": See, also, *State v. Rice*, 56 Iowa, 431, 9 N. W. 343; *State v. Nixon*, 18 Vt. 70, 46 Am. Dec. 135. The court therefore did not err in this instruction.

⁶⁹¹ It is also argued that the court erred in receiving in evidence certain letters written by the appellant to a friend,

because such letters showed that the appellant was guilty of other crimes beside the one charged, and also because some of these letters did not show that the appellant was living with the woman referred to therein. Certain of the letters did show that the appellant was guilty of other crimes, but they also showed conclusively that the appellant had been for some time living with the woman; that she was a common prostitute for hire, and that appellant knew the facts. The letters were, therefore, clearly admissible as evidence upon this charge. It is true that other crimes may not be shown for the purpose of conviction upon the one charged, but these letters showed guilt of the crime charged and were therefore competent. They were not to be excluded entirely because they at the same time contained admissions of other crimes. Certain of the letters made no further reference to the woman than "Lilly sends regards," but this statement was some evidence of the fact that "Lilly" was present at the time the letters were written, and was occupying the same relation to the appellant that she had theretofore established.

It is next argued that the information is insufficient, because it charged the appellant with living with a common prostitute on one day only, to wit, on December 30, 1909, and that to live with implies that the parties shall dwell together for some considerable period of time, and the information to be sufficient should have charged an offense as having been committed between certain dates. The argument is sound that the offense of living with a prostitute is a continuing offense, and it may be charged as such between certain dates. But it does not follow that it may not be charged upon a particular day. The fact that the parties lived together for one day is sufficient, if it is shown that they were doing so with an intention of remaining together. The proof in this case is clear that the woman was a common prostitute for hire, and that appellant lived with her on that day and for months prior thereto in violation of decency and law.

There is no error in the record, and the judgment is therefore affirmed.

Crow, Parker and Dunbar, JJ., concur.

ON REHEARING.

PER CURIAM. A hearing en banc was granted in this cause, but after a reargument a majority of the court are of opinion that the judgment should be affirmed, and it is so ordered. From this conclusion, Rudkin, C. J., and Chadwick, Gose and Morris, JJ., dissent, for the reasons stated in the dissenting opinion heretofore filed by the chief justice.

Rudkin, C. J., Dissenting. The information in this case was filed under section 2440, Rem. & Bal. Code, which provides, among other things, that "every person who shall live with or accept any

earnings of a common prostitute," shall be punished by imprisonment in the state penitentiary. The generally accepted definition of a common prostitute is a woman given to promiscuous sexual intercourse for hire or gain: Commonwealth v. Cook, 12 Met. 93; State v. Gibson, 111 Mo. 92, 19 S. W. 980; Davis v. Sladden, 17 Or. 259, 21 Pac. 140; Springer v. State, 16 Tex. App. 591; State v. Ruhl, 8 Iowa, 447; State v. Stoyell, 54 Me. 24, 89 Am. Dec. 716.

It occurs to me that the legislature had this class of prostitutes in mind when it enacted the above section, else why refer to their earnings? I am therefore of opinion that the instruction complained of was erroneous and calls for a reversal of the judgment. If the woman was not a common prostitute, as thus defined, the appellant is guilty of another and lesser offense, for which he should be prosecuted and punished.

That a Woman Who Strolls the Streets at night for the unlawful purpose of picking up men for lewd intercourse, though without expectation of gain, is guilty of night-walking, see Stokes v. State, 92 Ala. 73, 25 Am. St. Rep. 22.

SCHUSTER v. KNIGHTS AND LADIES OF SECURITY.

[60 Wash. 42, 110 Pac. 680.]

FRATERNAL INSURANCE—Reinstatement of Delinquent—Estoppel.—A fraternal insurance society is estopped from denying that a member was reinstated under a by-law providing that a member whose certificate has been voided by nonpayment of assessments shall be reinstated by the payment of all arrearages within sixty days, "provided that he be in good health at the time of reinstatement," by the acceptance of such arrearages within the sixty days, and the retention of the money for about a year. (p. 907.)

FRATERNAL INSURANCE—Reinstatement of Delinquent.—A By-law of a fraternal insurance society, in relation to the reinstatement of delinquent members upon payment of arrearages, which provides that "the receipt and retention of such assessments or dues in case the suspended member is not in good health shall not have the effect of reinstating said member or of entitling him or his beneficiaries to any rights under his benefit certificate," cannot be upheld, and by the receipt and retention of the delinquent assessments and dues the society estops itself from questioning the reinstatement of the member. (p. 907.)

FRATERNAL INSURANCE—Local Officers—Agents of the Society.—Cunningly contrived provisions in policies, to the effect that local officers are the agents of the home lodge only, and that solicitors of insurance are the agents of the insured, may be ignored by the courts. The local secretary of a fraternal insurance society with power to receive assessments and dues is the agent of the society. (p. 908.)

FRATERNAL INSURANCE—Retention of Delinquent Assessments—Waiver.—The retention of delinquent assessments, received with knowledge of the circumstances and that the delinquent member was not then in good health, is a waiver of a condition that

a delinquent member must be in good health to be entitled to reinstatement. (p. 908.)

Scott & Campbell, for the appellant.

Samuel T. Crane and Fred H. Moore, for the respondent.

⁴² GOSE, J. The defendant is a foreign corporation, organized and doing business as a fraternal beneficiary society. It has a subordinate lodge in the town of Chattaroy, in this state, known as Royal Council No. 1,380 of The Knights and Ladies of Security. On the twenty-seventh day of October, ⁴³ 1906, Minnie A. Schuster became a member of the lodge at Chattaroy, and the defendant issued to her a beneficiary certificate in the sum of one thousand dollars, payable to her daughter, Ethel H. Schuster, upon the death of the assured. The assured thereafter made timely payments of her dues and assessments, up to August 1, 1908. On September 30, 1908, her husband paid her assessments for the months of August, September, and October of that year, to the financial secretary of the local lodge, she then being ill at the hospital in the city of Spokane. Her dues were paid up to January 1, 1909. The assured died on October 2, 1908. Thereafter due proof of death was submitted to the defendant, and payment was demanded and refused. This action was commenced for the recovery of the amount due on the policy on the twenty-first day of June, 1909. The defendant answered on the twenty-fourth day of September following. The assessments were transmitted to the defendant in October, 1908, by the financial secretary of the home lodge, and were retained by it until the last of September, 1909, when the amount was returned to the local secretary at Chattaroy, who tendered it to the plaintiff on October 9th following.

It is conceded that the financial secretary of the local lodge was the proper officer to receive and transmit the assessments. The defendant's by-laws, which under the certificate constitute a part of the contract of insurance, provide that the certificate of each member who has not paid his assessment on or before the last day of the month shall ipso facto stand suspended without notice; that no right thereunder shall be restored until it has been duly reinstated; that it may be reinstated within sixty days from date of suspension by payment of all arrearages, provided "that he be in good health at the time of reinstatement; provided, further, that the receipt and retention of such assessments or dues in case the suspended member is not in good health shall not have the effect of reinstating said member or of entitling him or his beneficiaries to any rights under his benefit certificate."

⁴⁴ They further provide: "The National Council shall not be liable for the illegal receipt of arrears of beneficiary or reserve fund, or National Council general funds or assessments,

from suspended members, and the receiving of any such arrears, and receipting therefor by any officer of a subordinate council and the reinstatement of any suspended member except as provided in the laws of the order, shall not be binding on the National Council"; and that a member in default in the payment of his assessments for more than sixty days and less than six months can only be reinstated by the payment of all arrearages and by presenting a health certificate approved by the company's national medical examiner. The plaintiff offered testimony tending to show that, when the husband paid the assessment on September 30, 1908, he informed the secretary of his wife's illness. This the secretary denies. Upon the facts stated, after both parties had submitted their evidence, a judgment was entered in favor of the defendant for costs. The plaintiff has appealed.

It was alleged in the answer, and it is urged here, that because of the illness of the assured, the payment of the arrearages to the financial secretary within sixty days from the date of the suspension of the certificate did not reinstate it. A reference to the by-laws, to which we have adverted, will disclose that a payment of the assessments to the secretary within sixty days after the suspension of a certificate for the nonpayment of an assessment reinstates the policy, if the member is in good health, and that no method is provided for determining that fact.

The appellant contends that the retention of the assessments by the respondent after having notice of all the material facts operates as a ratification of its acceptance by the local secretary and estops the respondent from asserting the invalidity of the certificate. We think this contention must be sustained. Summarizing the facts, it appears that the tender was made more than a year after the death of the ⁴⁵ insured, about four months after the commencement of the action, and fifteen days after answering. No excuse is offered for the delay. We have seen that the only reason assigned for the nonpayment of the policy is that it was suspended in the lifetime of the assured for the nonpayment of the assessments. Upon the facts stated, when proof of the death of the assured was submitted, it was the duty of the appellant to pay the policy or refund the money which it asserts the secretary accepted without authority. It should then have disaffirmed his acts, and restored, or offered to restore, the money. It sought to do the former, but made no pretense of doing the latter until October 9, 1909. The tender was not timely. We are not unmindful of the language of the by-law quoted, but we are unwilling to stand sponsor for a principle of law which would uphold such a stipulation. The language seemingly has reference to the retention of assessments by local officers. But if it includes the retention by the respondent,

the injustice of the provision is too glaring to receive judicial sanction. Cunningly contrived provisions in policies, to the effect that local officers are the agents of the home lodge only, and that solicitors of insurance are the agents of the insured, have been ignored by the courts. The local secretary was the agent of the respondent: *Hoeland v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 Pac. 866; *Modern Woodmen of America v. Tevis*, 117 Fed. 369, 49 C. C. A. 256; *Pringle v. Modern Woodmen of America*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231.

To adopt the construction of the by-law contended for by the respondent we would be required to hold that it could have continued to receive the assessments for twenty years, if the assured had lived, and then retained the money and claimed immunity from liability upon her death. That the retention of the money with knowledge of all the material circumstances operates as a waiver of the right to assert that the policy is suspended, is supported by the following authorities: *Staats v. Pioneer Ins. Assn.*, 55 Wash. 51, 46 104 Pac. 185; *Rasmussen v. New York Life Ins. Co.*, 91 Wis. 81, 64 N. W. 301; *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915; 29 Cyc. 194, 195, 196; *Masonic Mut. Benefit Assn. v. Beck*, 77 Ind. 203, 40 Am. Rep. 295; *Life Ins. Clearing Co. v. Altshuler*, 55 Neb. 341, 75 N. W. 862; *Spitz v. Mutual Benefit Life Assn.*, 5 Misc. Rep. 245, 25 N. Y. Supp. 469.

It is conceded that, under the abatement provisions in the certificate, the liability of the respondent is eight hundred and fifty dollars, if there is in fact a liability. We think that, under the admitted facts, the learned trial court should have directed a verdict for the appellant. The judgment will be reversed, with direction to enter a judgment for the appellant for eight hundred and fifty dollars, with legal interest from the date of the death of the assured.

Rudkin, C. J., and Fullerton, J., concur.

Chadwick, J., Dissenting. I dissent. Mrs. Schuster had been a member of a local lodge of The Knights and Ladies of Security, but had voluntarily allowed her membership to lapse. She became ill, was taken to a hospital in Spokane, where it was made known to her husband that she must submit to a capital operation. Thereupon her husband, the present plaintiff guardian, hastened to the home of the financial secretary of the local lodge and paid the arrearage of dues, as well as some in advance. Even though the local officer had notice or knowledge of the true state of facts, it should not be held to bind the company. The reinstatement was in direct violation of her contract and was a fraud upon the membership. The policy was designed to prevent such frauds. It provides in terms that the receipt and retention of assessments or dues, in case the suspended member is not in good standing, shall not have the effect of reinstating the member or entitling the beneficiary to any rights

under the beneficiary certificate. Beneficiary associations are not like insurance companies. Their affairs are not conducted for profit. The details of their affairs are not conducted by trained business agents, but of necessity must go through the hands of lodge members who are frequently unskilled in the ways of business and have no knowledge of the technical rules of the law. The parties had a right to make the contract in the terms stated, and should now be held to it. In my judgment the cases cited in the majority opinion are not in line with the case at bar. Indeed, no case will be found holding that a fraud can be worked against a voluntary fraternal benefit association under the cover of an estoppel. The most the plaintiff is entitled to recover is the amount paid for reinstatement, and judgment should be entered for that amount.

Morris, J., concurs with Chadwick, J.

A Fraternal Beneficiary Association may be bound by the action of a local camp clerk who collects arrearages from a member suspended for nonpayment of assessments and restores his name to the membership list without demanding or receiving a health certificate required by the by-laws, where the clerk acts with full knowledge that the member is sick at the time, and there is no fraud on the latter's part: *Henton v. Sovereign Camp of the Woodmen of the World*, 87 Neb. 552, 138 Am. St. Rep. 500, and see the authorities cited in the cross-reference note thereto.

The Local Officers of Fraternal Insurance Societies are Agents of the Societies: *Henton v. Sovereign Camp of the Woodmen of the World*, 89 Neb. 552, 138 Am. St. Rep. 500; *Rasicot v. Royal Neighbors of America*, 18 Idaho, 85, 138 Am. St. Rep. 180.

The Waiver of Conditions in Insurance Policies by Agents of the insurer is discussed in the note to *Johnson v. Aetna Ins. Co.*, 107 Am. St. Rep. 99.

STATE v. MCFARLAND.

[60 Wash. 98, 110 Pac. 792.]

CONSTITUTIONAL LAW—Class Legislation—Province of Legislature.—Where any classification can be sustained, it rests entirely within the discretion of the legislature to determine and establish its basis, and its determination when expressed in statutory enactment cannot be questioned successfully, unless it is so manifestly arbitrary, unreasonable, inequitable and unjust that it will cause an imposition of burdens upon one class, to the exclusion of another, without reasonable distinction. (p. 912.)

CONSTITUTIONAL LAW—Class Legislation—Basis of Classification.—The legislature, within the limitations of the exercise of a reasonable discretion, is required to base its classification upon some practical consideration suggested by necessity. Any class created by legislative enactment must be such as to embrace all persons or corporations in like circumstances or situation and be practical, reasonable and certain, and not factitious, arbitrary or unjust. (p. 912.)

CONSTITUTIONAL LAW—Inspection, etc., of Hotels.—A statute classifying hotels for the purposes of inspection, sanitary measures

and protection from fire, according to the number of rooms contained therein, is not unreasonable or unconstitutional class legislation. (pp. 911, 913.)

CONSTITUTIONAL LAW—Inspection, etc., of Hotels.—A statute providing sanitary measures, fire protection, and inspection for hotels is not unconstitutional as depriving the owners thereof of property or liberty without due process of law, or as denying them the equal protection of the law. (pp. 911, 914.)

CONSTITUTIONAL LAW—Inspection of Hotels—Payment of Fees.—A provision in a statute providing for the inspection of hotels that any owner, manager, agent or person in charge of a hotel "who shall refuse or neglect to pay the fee for inspection prescribed herein shall be guilty of a misdemeanor," and prescribing a penalty of fine or imprisonment, or both, is unconstitutional, as violative of the prohibition against imprisonment for debt. (p. 914.)

CONSTITUTIONAL LAW—Inspection, etc., of Hotels.—An Entire Statute will not be held invalid by reason of a single unconstitutional provision which is not essential to its purposes and validity as a whole; a statute providing for the inspection of hotels will not be held invalid by reason of the invalidity of a provision regarding the payment of the fees of inspectors. (p. 915.)

Percy Gardiner, for the appellant.

Ralph C. Bell and O. T. Webb, for the respondent.

⁹⁹ CROW, J. On April 1, 1910, the prosecuting attorney of Snohomish county filed an information against the defendant, George McFarland, which contained the following charge: "That on or about the third day of March, 1910, in the county of Snohomish, state of Washington, the above named defendant, George McFarland, was the person in charge of the certain hotel commonly known and designated as the 'Mitchell Hotel,' in the city of Everett, county of Snohomish, state of Washington; that said Mitchell Hotel then and there was a hotel containing more than twenty (20) rooms and less than one hundred (100) rooms for the accommodation of the public, and was then and there used, maintained, advertised and held out to the public to be an inn, hotel, public lodging-house, and place where sleeping accommodations were furnished for hire to transient guests; that one W. L. Gritman¹⁰⁰ was then and there a duly appointed, qualified and acting deputy inspector for the state of Washington; that said W. L. Gritman, as such deputy inspector aforesaid, did then and there proceed to make, and did make, an inspection of said 'Mitchell Hotel' as provided by law; that said defendant George McFarland, did then and there unlawfully neglect to pay to said W. L. Gritman, as such deputy hotel inspector aforesaid, the fee provided by law for such inspection, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington."

A demurrer to the information being overruled, the defendant was adjudged guilty of refusing to pay the legal inspection fee, was punished by the imposition of a fine and

costs, was remanded to the custody of the sheriff for detention until payment, and has appealed to this court.

Appellant attacks the constitutionality of chapter 29, Session Laws of 1909, page 43, entitled "An act relating to hotels, inns and public lodging-houses, creating the office of state hotel inspector and providing penalties for the violation thereof, and making an appropriation therefor"; the same being sections 6030 to 6049, inclusive, Rem. & Bal. Code. He contends that the entire act is unconstitutional and void. He insists that it makes an unreasonable, arbitrary and illegal classification of inns, lodging-houses and hotels; that it deprives him and other citizens of this state of liberty and property without due process of law; that it denies them the equal protection of the law; that it delegates legislative powers to an individual; that it is an invasion of private affairs, and that it provides for imprisonment for debt.

Section 1 of the act defines hotels as follows: "Every building or structure kept, used or maintained as, or held out to the public to be an inn, hotel or public lodging-house or place where sleeping accommodations are furnished for hire to transient guests, whether with or without meals, in which ten (10) or more rooms are used for the accommodation of such guests, shall for the purpose of this act be defined to be a hotel, and whenever the word 'hotel' shall occur in this act it shall be construed to mean every such structure as is described in this section."

¹⁰¹ Section 2 provides that every hotel more than two stories high shall be provided with certain halls, with iron fire-escapes of specified size and construction, with ways of egress to such fire-escapes, and also provides for the posting of notices calling attention to, and directing the way to, such fire-escapes. Section 4 provides for the maintenance of certain fire protection. Section 10 provides for drainage, plumbing, and other sanitary protection. Section 12 creates the office of, and provides for the appointment of, an inspector of hotels, and fixes his salary. Section 13 authorizes the inspector to appoint deputies and prescribe their compensation. Section 17 reads as follows: "Any owner, manager, agent or person in charge of a hotel who shall obstruct or hinder an inspector in the proper discharge of his duties under this act, or who shall refuse or neglect to pay the fee for inspection prescribed herein shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten dollars (\$10) nor more than one hundred (\$100) dollars or shall be imprisoned in the county jail for not less than ten days, nor more than three months or both": Rem. & Bal. Code, sec. 6046.

Section 19 fixes inspection fees to be paid by the hotel-keeper, as follows: "Every hotel containing twenty (20)

rooms or less, for the accommodation of the public, shall pay an annual inspection fee of five dollars (\$5) when inspected under the provisions of this act, and every hotel containing more than twenty (20) and less than one hundred (100) rooms for the accommodation of the public shall pay an annual inspection fee of ten dollars (\$10), and every hotel containing one hundred (100) rooms or more shall pay an annual inspection fee of twenty dollars (\$20) when inspected under the terms of this act. Such fees shall be collected by the inspector at the time of inspection, and if not paid on demand the inspector or deputy may sue therefor in his own name for the use of the state, and in such case the court shall allow and enter as a part of the judgment against the defendant all the costs of such action, including a reasonable fee for any attorney necessarily employed in such action by the inspector. ¹⁰² All moneys collected under the provisions of this act shall be paid into the state treasury in the manner provided by law."

The first question presented for our consideration is whether the definition and classification of hotels adopted for the purposes of this act, based upon the use of ten or more guest rooms, is arbitrary, unreasonable and invalid.

"Class legislation, often called local or private legislation, consists of those laws which are limited in their operation to certain individuals or corporations or to certain districts of the territory of the state. Although from its nature this species of legislation must cast extra burdens on some and relieve others from burdens, yet aside from state inhibitions it has been held to be constitutional when the line drawn between two persons or places is reasonable": 8 Cyc. 1051.

Unless all hotels, without regard to the number of rooms used for the accommodation of guests, whether one or one hundred or more, must be brought within the operation of the law to preserve its constitutionality and to avoid the charge of invalid class legislation, it is manifest that some classification must be adopted to distinguish them. If any such classification can be sustained, it rests entirely within the discretion of the legislature to determine and establish its basis, and its determination when expressed in statutory enactment cannot be questioned successfully, unless it is so manifestly arbitrary, unreasonable, inequitable and unjust that it will cause an imposition of burdens upon one class to the exclusion of another without reasonable distinction. The legislature, within the limitations of an exercise of a reasonable discretion, is required to base its classification upon some practical consideration suggested by necessity. Any class created by legislative enactment and subjected to the operation of the law must be such as to embrace all persons or corporations in like circumstances

or situation. The classification must be practical, reasonable and certain, not factitious, arbitrary, or unjust. To be constitutional it must be ¹⁰³ predicated upon such a substantial distinction as suggests needed legislation relative to one class as distinguished from another.

In *Hubbell v. Higgins*, 148 Iowa, 36, 126 N. W. 914, the supreme court of Iowa, having under consideration a similar statute pertaining to the inspection and regulation of hotels, in an able opinion, which we adopt and follow, sustained the entire act, with the single exception hereinafter mentioned. Discussing class legislation, Evans, J., speaking for the Iowa court, well said:

"Classification must be reasonable and based upon real differences in the situation, conditions and tendencies of things. If there is no real difference between persons, occupations, or property, the state cannot make one in favor of some persons over others.

"The true practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggest the necessity or propriety of different legislation with respect to them: *State v. Garbroski*, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. 959, 56 L. R. A. 570; *Bailey v. People*, 190 Ill. 28, 83 Am. St. Rep. 116, 60 N. E. 98, 54 L. R. A. 838; *State v. Cooley*, 56 Minn. 540, 58 N. W. 150; *State v. Mitchell*, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800.

"Legislation which affects alike all persons similarly situated is not class legislation: *Sisson v. Board of Supervisors*, 128 Iowa, 464, 104 N. W. 454, 70 L. R. A. 440; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923; *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. Rep. 350, 30 L. ed. 578.

"It is not denied but that some classification is desirable and proper, and that some line of division may be reasonably adopted as limiting the application of the law. Can it be said that the line of division which is provided in the statute is based upon a natural reason and one in harmony with the necessities of the situation. There is a sense, it is true, where the adoption of ten as the minimum number is arbitrary; that is to say, the legislature might as reasonably have adopted ¹⁰⁴ the number 9 or the number 11 or even a larger or a smaller number. But this fact does not render the act arbitrary in a legal sense. It was essential to the practicability of the enactment that some fixed limitation be provided. Such limitation must be based upon a natural rather than an arbitrary reason. If

the limitation adopted was a natural and reasonable one, it would be none the less so because some other limitation could have been adopted in lieu thereof.

"It seems quite clear to us that the limitation adopted in this act was natural and reasonable and was in harmony with the necessity of the situation. This provision of the act is manifestly based upon the assumption that the peril to the life and safety of guests is somewhat proportionate to the size of the hotel. We cannot say that this is an unreasonable assumption. On the contrary, it impresses us otherwise. If a fire were to obtain in a hotel containing a thousand rooms occupied by guests; surely the problem of rescue confronting the public authorities in such a case would be immensely more difficult than would be that presented by a like situation in a building containing only a few rooms and guests."

Further discussion of the statute contained in the opinion and not here quoted may be profitably examined and considered. All constitutional objections which the appellant now makes are considered and determined by the Iowa court. Following their opinion, we hold that appellant's objections to the validity of our statute are without merit, save and except his single contention that section 17 by its provisions in effect subjects appellant to imprisonment for debt, in violation of section 17, article 1 of the state constitution. The legislature had authority to fix inspection fees, to provide for their payment, and to authorize their collection by the inspector in a civil action. In passing on section 16 of the Iowa statute, similar to section 17 of our act, the supreme court of Iowa in *Hubbell v. Higgins*, 148 Iowa, 36, 126 N. W. 914, said: "It is said that under this section a mere failure on the part of the hotel-keeper to pay the inspection fee is made a misdemeanor, and that this is so, even though he comply with every other requisite of the law, and that the effect of such provision is to subject the hotel-keeper to imprisonment for ¹⁰⁵ failure to pay a debt. We think this contention must be sustained. That is to say, that part of section 16 which makes a mere failure to pay the inspection fee a misdemeanor punishable by fine and imprisonment is clearly unconstitutional as being a violation of section 19, article 1, of the constitution of this state, which forbids imprisonment for a debt: See *Chauvin v. Valiton*, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194. It is also clear to us, however, that this provision is not essential to the integrity of the act as a whole, and that its elimination does not carry down with it the rest of the enactment. We do not find that the act under consideration in any other respect con-

travenes any provision of the constitution either of Iowa or of the United States."

An entire statute will not be held invalid by reason of a single unconstitutional provision which is not essential to its purposes and validity as a whole. In this case the entire act, purged of the single invalid feature which provides for imprisonment for debt, can and must be sustained. The only alleged criminal offense, with the commission of which the appellant has been charged, is that he did not pay the inspection fee. He cannot be fined nor imprisoned for any such act, as it cannot be made a criminal offense. The demurrer to the information should have been sustained.

The judgment is reversed, and the cause remanded with instructions to sustain the demurrer.

Rudkin, C. J., Mount and Parker, JJ., concur.

What Statutes Violate Prohibitions Against Imprisonment for Debt are discussed in the note to *State v. Brewer*, 37 Am. St. Rep. 758. The word "debt," as used in the constitutional prohibition against imprisonment for debt, is confined to obligations arising out of contracts, express or implied, as distinguished from torts: *In re Milecke*, 52 Wash. 312, 132 Am. St. Rep. 968; and does not forbid the enactment of a statute authorizing the imposition on a prosecuting witness of costs of a criminal prosecution and his imprisonment until such costs have been paid, where his complaint has been found to be frivolous and without probable cause: *Colby v. Backus*, 19 Wash. 374, 67 Am. St. Rep. 732. An ordinance authorizing the fine and imprisonment of an abutting property owner for his failure to construct a sidewalk is not invalid as authorizing an imprisonment for debt: *O'Haver v. Montgomery*, 120 Tenn. 448, 127 Am. St. Rep. 1014.

Where Parts of a Law, Viewed by Themselves, are Constitutional and other parts so viewed are not, the former may be condemned and the latter upheld if the two are separable; otherwise not: *State v. Peet*, 80 Vt. 449, 130 Am. St. Rep. 998; *Village of Little Chute v. Van Camp*, 136 Wis. 526, 128 Am. St. Rep. 1100; *Bonnett v. Valier*, 136 Wis. 193, 128 Am. St. Rep. 1061; *Mutual Loan Co. v. Martell*, 200 Mass. 482, 128 Am. St. Rep. 446; *Berea College v. Commonwealth*, 123 Ky. 209, 124 Am. St. Rep. 344; *Davidson v. Hine*, 151 Mich. 294, 123 Am. St. Rep. 267; *Ex parte Massey*, 49 Tex. Cr. 60, 122 Am. St. Rep. 784; *Commonwealth v. Hanna*, 195 Mass. 262, 122 Am. St. Rep. 251; *Malone v. Williams*, 118 Tenn. 390, 121 Am. St. Rep. 1002; *Matter of Metz v. Maddox*, 189 N. Y. 460, 121 Am. St. Rep. 909.

ABRAMS v. CITY OF SEATTLE.

[60 Wash. 356, 111 Pac. 168.]

ELECTRICITY—Liability of Municipality—Res Ipsa Loquitur. In an action against a municipal corporation engaged in furnishing electricity for lighting purposes, for profit, to recover damages for the death of one caused by shock from an excessive current while turning on a light in his residence, the doctrine *res ipsa loquitur* should be applied to the fullest extent. (p. 919.)

ELECTRICITY—Degree of Care.—A Municipal Corporation which contracts to furnish electric light for a house is under an implied contract to do so in the safest manner possible. It must exercise the highest degree of care, skill and diligence in its selection, construction and maintenance of devices and appliances. (p. 919.)

ELECTRICITY—Liability to Patrons—Res Ipsa Loquitur.—One who has contracted for electric light for a house is entitled to assurance, while attempting to use the current in the customary manner, that he will not be subjected to personal injury. If he is electrocuted when so attempting to use it, a presumption of negligence on the part of the one furnishing the current immediately arises. The fact of the injury is itself sufficient to constitute a *prima facie* case. The doctrine of *res ipsa loquitur* applies, and casts the burden of proof on the defendant, and an instruction that it must show by a fair preponderance of testimony that it was not negligent is not erroneous. (pp. 919, 920.)

ELECTRICITY—Municipality—Safety Appliances—Duty to Adopt.—An instruction in an action against a municipal corporation, engaged in furnishing electricity for light, for death caused by an excessive current, due to the improper working of a ground, that it was the duty of the defendant to make every reasonable effort to adopt and use all proper means readily obtainable and known to science for the prevention of accidents, when read in connection with other instructions, is not improper. (p. 921.)

ELECTRICITY—Municipality—Negligence—Question of Fact. In an action against a municipal corporation for damages for death caused by an excessive electric current while attempting to use an electric light, the current for which was furnished by the defendant, after the making of a *prima facie* case by the plaintiff, the question whether the defendant was negligent or whether it had exercised that high degree of care and diligence which the law required from a person dealing with such a deadly agency is one of fact for determination by the jury. (p. 923.)

Scott Calhoun and H. D. Hughes, for the appellant.

McClure & McClure, H. W. Hogue and Howard Waterman, for the respondents.

359 CROW, J. About 10 o'clock P. M. on March 12, 1908, W. L. Abrams, living in the city of Seattle, went into the kitchen of his residence, attempted to turn on an electric light, and received a shock which instantly killed him. The city of Seattle then owned and operated an electric power plant, from which, under contract, it was furnishing current to Abrams' house for illuminating purposes. This action was commenced against the city by Anna E. Abrams, and

Eleta L. Abrams by Anna E. Abrams, her guardian ad litem, widow and daughter of W. L. Abrams, to recover damages resulting from his death. From a judgment in their favor, the defendant has appealed.

³⁶⁰ The electric current was transmitted from the original source of energy to a substation, from which it was further transmitted to various localities throughout the city over what were called primary wires, each carrying about two thousand two hundred volts. By means of an instrument known as a transformer, the current from a primary wire was reduced to about two hundred and twenty volts, and then transmitted over a secondary wire into residences for lighting purposes. The wire carrying two thousand two hundred volts is called the "primary," and the wire which leaves the transformer and carries only two hundred and twenty volts is called the "secondary." The former carried a current dangerous to human life, and the latter one that a man may receive into his body without injury. To prevent too heavy a current being carried into a residence, a properly constructed lighting system is provided with a ground, which is a device to divert any excessive current with which the secondary may become charged, and conduct it to the earth, whence it returns to the source of supply at the central station and registers upon a switch-board panel. When a large amount of excess current is so conducted to the earth, the ground is a heavy one. When the amount is small, a light ground results. The ground device used by the city consisted of an iron rod about five feet and a half in length, driven full length into the earth. To this rod was securely riveted and soldered a No. 6 copper wire which, running up one of the light poles, connected with the secondary wire. The various circuits extending from and returning to the station were numbered. The Abrams residence was on No. 2. When a ground occurred, it registered on the switch-board panel at the station by means of two lamps known as ground lamps, which ordinarily burn but dimly. When the ground registered, one of these lamps would go out, while the other would burn with great brilliancy. The city had a "two-phase" system, by which one set of ground lamps was used for two circuits. Circuit No. 2, conducting the current resulting in Mr. Abrams' death, was on the same phase with circuit No. 8. If ³⁶¹ one of these circuits registered a ground, the operator at the station would be unable to observe a subsequent ground coming over the other circuit on the same phase, until the first ground had been corrected. About 10 o'clock on the evening of the accident, a ground was registered from circuit No. 8 and continued for several hours. The effect of this condition was that a subsequent

ground on circuit No. 2 would not register at the central station.

A short time before his death, Mr. Abrams, from his window, had noticed some electrical phenomena on the wires near his home, afterward shown to have been caused by the "primary" crossing and coming in contact with the "secondary." This contact was not continuous but intermittent, a variable but heavy wind occasionally throwing the wires together. Evidence was introduced to show that the "secondary" wire and the insulator to which it was attached had become separated from the cross-arm of the light pole; that the secondary had fallen across the primary where insulation had become defective from rain and other causes; that the two thousand two hundred voltage from the primary was thus transmitted to the secondary; that this excess voltage did not reach the earth because the ground device was out of repair; that this condition of the wires and ground might have been caused by the blasting of a large stump near by; that the ground did not carry the excess current from the secondary, and that it was therefore carried into the dwelling-house where it electrocuted Mr. Abrams. The appellant contended that it had exercised due diligence in the inspection of its wires and other appliances; that it had used such modern and proper devices as were ordinarily used and required; that the defective condition of the wires and ground was caused without its participation, knowledge, or consent, by third parties, and that the death of Mr. Abrams resulted from an unavoidable accident and not from its negligence.

Appellant first contends that the trial judge erred in giving the following instruction: ³⁶² "I instruct you that if you find that the accident complained of was one which, in the ordinary course of business, would not have occurred except for failure or neglect on the part of the defendant, its agents or employees, to use that degree of care which the law requires and which I will hereafter explain to you, and you further find that the negligent operation of the defendant's electrical apparatus is naturally accompanied with danger, and that knowledge of its condition is practically limited to the defendant or its servants, and evidence as to the same is unavailing except through it or them, and that the deceased was under no obligation to know, and did not know, or have reason or opportunity to know of the danger that threatened him, then the mere happening of the accident under such circumstances creates the presumption that the defendant was negligent, and in that case the burden would be shifted to the defendant to show by a fair preponderance of the testimony that it was not guilty of such negligence."

In substance, appellant's contention is that the trial judge erred in holding the burden of proof, which was shifted to it to show that it was not negligent, should be sustained by it by "a fair preponderance of the testimony." We think no prejudicial error was committed in this regard. The doctrine of *res ipsa loquitur* should be applied to its fullest extent in this case. The appellant, for its own profit, was dealing in one of the most dangerous agencies known to modern science. Electricity is a silent power which ordinarily can be neither seen nor heard. Yet it can be so controlled, by those upon whom the duty of its control is imposed, that it may safely be conducted into a private residence, where it becomes harmless and useful. The city had contracted to furnish the Abrams house with light. It was under an implied contract to do this in the safest manner possible. Its duty was to protect Abrams and his family, by exercising the highest degree of care, skill, and diligence in its selection, construction, and maintenance of devices and appliances. Mr. Abrams was entitled to assume, when attempting to utilize the electric current in the customary manner, that he would not be subjected to personal injury or sudden death. When ³⁶³ he did so attempt to use it and was electrocuted, a presumption of negligence on appellant's part immediately arose. The fact of his injury was itself sufficient to constitute a *prima facie* case of appellant's negligence. To say that his heirs or representatives cannot recover damages until they affirmatively prove some specific act of negligence by a fair preponderance of the evidence, might result in a denial of their right of recovery, no difference how negligent the appellant may have been. Two thousand two hundred volts of electric current could not have passed through the body of Abrams without some negligence, mismanagement or mishap which, under ordinary circumstances, could only have been known to, or be explained by, the party in charge of the system. The accident being shown, the burden devolved upon the appellant either to disclose a cause for which it was not responsible, or otherwise show that it (the appellant) was guilty of no negligence. How could appellant do this? Manifestly by affirmatively showing the true cause of the accident, or that its system was in as perfect condition and repair as it could be kept by exercising the highest degree of diligence and that Abrams' death was the result of some accident beyond appellant's control. This burden devolved upon appellant, and while it might perhaps have been better for the trial judge to have omitted from the instruction the words "by a fair preponderance of the testimony," we cannot say that their use, in the light of admitted conditions and of other instructions given, was prejudicial, or deprived

appellant of any substantial right. "While it is true, as a general proposition, that the burden of showing negligence on the part of the one occasioning an injury rests in the first instance upon the plaintiff, yet, . . . when he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus rests upon the defendant to prove that the injury was caused without his fault.' When the physical facts surrounding an accident in themselves create a reasonable probability that the accident resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms evidence ³⁶⁴ of negligence, in conformity with the maxim '*Res ipsa loquitur*.' It would seem more accurate to say, not that negligence is presumed from the mere fact of the injury or accident, but, rather, that it may be inferred from the facts and circumstances disclosed, in the absence of evidence showing that it occurred without negligence": Jaggard on Torts, p. 938.

Practically speaking, it is immaterial whether to the duty of explaining the cause of the accident which the law imposes upon appellant we apply the term "burden of proof" or the term "preponderance of the evidence." As suggested by counsel for respondents, there can be no magic in any particular form of words. To grant a new trial on the theory that the instruction given was so erroneous as to be prejudicial, would, we think, be a miscarriage of justice.

Appellant further contends that the trial court erred in instructing the jury as follows: "Every reasonable effort must be made to adopt and use all proper means readily obtainable and known to science for the prevention of accidents"; and in refusing the following requested instruction: "I charge you that the law does not require that the city should install and adopt every new device and electrical appliance and safeguard that may be put upon the market for sale; the city has done its whole duty in regard thereto when it installs and uses all those appliances and devices and safeguards which are in common and general use and generally approved by electrical experts and men who know about such matters, and when it has exercised that degree of care and caution heretofore defined to you in these instructions in the adoption and use of such appliances and devices."

The instruction to which the appellant excepts is an excerpt from the following instruction given by the court, in which we italicize the words to which appellant objects: "The general charge of negligence or carelessness made by the plaintiffs against the defendant includes negligence in the appliances and devices adopted and installed as a part of its system, and negligence in the maintenance and opera-

tion ³⁶⁵ of its system as installed. With reference to the city's duty in the matter of its appliances, devices, etc., the law requires that the city shall, in selecting and installing its appliances and devices, use that degree of care which reasonably prudent men engaged in the same line of business would use under similar circumstances, to have and to procure and install such as the experience of men so engaged has shown to be reasonably safe for the purposes for which they are used, in view of all the conditions and circumstances connected with the business and of the dangers to be reasonably apprehended. *Every reasonable effort must be made to adopt and use all proper means readily obtainable and known to science for the prevention of accidents.* In determining the question of the city's negligence in this respect it is proper for you to consider whether as to any particular appliance, device or manner of installment or arrangement, complained of in the evidence in this case, there exists a reasonable difference of opinion among electrical experts and men possessing knowledge, and qualified to speak thereon, concerning the efficiency of such appliances or system, and in the light of all these facts to determine whether the city is or is not properly chargeable with negligence in the adoption or arrangement of its devices or appliances."

It seems to us that this instruction is such a fair statement of the law as not to mislead the jury to appellant's disadvantage. It would be difficult to frame a more satisfactory or complete statement of appellant's duty in the matter of adopting modern and safe appliances. The rights of both parties were well guarded, and the question of fact whether appellant did discharge its duty was thereby properly submitted to the jury for determination.

Appellant vigorously insists that the trial court erred in denying its challenge to the sufficiency of the evidence, and its later motion for judgment notwithstanding the verdict. Its position seems to be that the sole and direct cause of the accident was the wrongful and illegal act of a third party in firing a blast, which caused the crossing of the wires and so disturbed the ground device as to impair its usefulness; that the blasting occurred in the morning about 7 o'clock, on ³⁶⁸ the day of the accident; that the city had but recently inspected its wires, ground device, and other appliances; that it had no knowledge, until after the accident, of the disarrangement of its wires, caused by the blast; that it exercised the utmost diligence, and that the accident resulted from the wrongful and illegal act of a third party, for whom it is not responsible. This contention necessarily assumes that other acts of negligence, alleged by

respondents, must be eliminated from the consideration of the jury.

The respondents contended, and offered evidence to show, that certain appliances used by appellant were not suitable or appropriate for the purposes they were intended to serve. But without regard to such contentions, we have concluded, from an examination of all the evidence, too voluminous to be here stated, that the questions whether the blast mentioned caused the accident, whether the city had timely notice of such blasting, whether it was diligent in inspecting and protecting its wires and equipment, and whether it used such modern appliances as were required by that high degree of care imposed upon it, were all for the jury, and the evidence on these issues was clearly sufficient to support the verdict. Mr. Abrams was killed in his own residence, without warning, without his fault, by an excessive current of electricity, transmitted over appellant's wires. Appellant's wires were crossed. There was evidence that its ground device did not properly perform its functions, and that its servants in charge of the central station were not informed of the condition of its wires for several hours after Mr. Abram's death. It was its duty to have and keep all of its appliances in safe condition and proper repair. It did not do so, and it was certainly a question for the jury to determine whether it was negligent or whether it had exercised that high degree of care and diligence which the law requires from a person dealing with such a deadly agency.

In *Royal Elec. Co. v. Heve*, 11 Quebec L. R. (K. B. 1902), page 436, plaintiffs recovered damages for the death of a ³⁶⁷ husband and father who had been electrocuted by coming in contact with an electric light bulb, and the defendant appealed. It contended, and had introduced evidence to show, that the current came through the guy wire of another electric company which had crossed its secondary. Hall, J., speaking for the court, at page 452, said:

"But in my opinion, it is a matter of indifference, legally speaking, where this current originated. The appellants should be held responsible for it under any circumstances. They deal in a commodity of a recognized dangerous character, the control of which is a matter of technical knowledge and experience, and entirely uncomprehended by the general public. When a company like the appellants, organized under the name of an electric company, hold themselves out to the public as dealers in and suppliers of that commodity for gain, and make contracts with private individuals for furnishing light or power over a system constructed and controlled by themselves, they are bound to deliver it in a form and under conditions of safety for the person and property for whose use the company charge and receive compensation, and they are also bound, in the

discharge of their part of the contract, to a supervision and diligence proportionate to the peculiar character and danger of the commodity in which they deal. . . . The implied contract between the appellants and deceased was that they should supply his premises with a safe electrical current for lighting purposes by the lamps which they furnished. They failed in this respect, and in the use of their lamps he received a current of electricity by which he was instantaneously killed. The presumption is that it came over the same system and from the same source as that by which his ordinary supply was delivered to him by appellants. The burden of proof is upon them to show the contrary. This they have failed to do, and the judgment holding them responsible for the accident should be confirmed."

It is evident from the verdict in this case that the jury concluded the appellant had not sustained the burden of proof resting upon it to show that the accident was not caused by its negligence. In *Chaperson v. Portland Elec. Co.*, 41 Or. 39, 67 Pac. 928, plaintiff's horse was killed during the night season at about 3 o'clock A. M., by coming in contact with ~~as~~ a broken wire heavily charged with electricity. The defendant introduced evidence tending to show careful and frequent inspection on its part, and that the break was caused without its knowledge by a violent storm which occurred at an earlier hour of the same night. Relying on this evidence, it moved for a directed verdict. Its motion was denied. The appellate court, at page 47, said: "When plaintiff made a *prima facie* case, this imposed upon the defendant the burden of showing, as we have seen, that the fracture of the wire was a condition not due to its fault, or that it used due care in the construction and maintenance of its system, and that the accident was one that could not have been provided against by reasonable foresight and precaution. This burden should not be confused with the burden of making the better case as between the plaintiff and defendant. The plaintiff must have made the better case in the end by the preponderance of evidence. When the defendant produced its evidence, the case rested; and it became a matter for the jury to determine whether it had succeeded, or whether, notwithstanding its attempt at exoneration, plaintiff's *prima facie* case was even yet the stronger and more satisfactory. The questions to be passed upon were of fact, and it was not within the province of the court, under the evidence adduced, to say to the jury, by directing a verdict, that its exoneration has been substantiated, and therefore that plaintiff's *prima facie* case had been overcome. So there was no error in finally submitting the case to the jury."

Other assignments of error, based upon instructions given and refused, and upon the admission of evidence relative to previous blasting near the wires, we find to be without merit.

The appellant has been awarded a fair trial. The jury found against it, and their verdict must stand. The judgment is affirmed.

Dunbar, Mount and Parker, JJ. concur.

Budkin, C. J., Dissenting. I concur in the foregoing opinion, in the main, but cannot approve of an instruction that the burden of proof is on the defendant to show a want of negligence, by a fair preponderance of the testimony, in cases where the doctrine of *res ipsa loquitur* applies. Such an instruction is inherently and fundamentally wrong. The presumption of negligence which arises from the mere happening of an accident in this class of cases is a mere presumption of fact. Its weight will vary according to the circumstances of each individual case and is wholly for the jury. The distinction between the burden cast upon the defendant to explain the cause of an accident, or exculpate himself from the charge of negligence, and the burden of proof on the main issue in the case, is clearly pointed out in *Chaperon v. Portland Elec. Co.*, 41 Or. 39, 67 Pac. 928, cited in the majority opinion, where the court said: "This burden should not be confused with the burden of making the better case as between the plaintiff and defendant. The plaintiff must have made the better case in the end by the preponderance of evidence. When the defendant produced its evidence, the case rested; and it became a matter for the jury to determine whether it had succeeded, or whether, notwithstanding its attempt at exoneration, plaintiff's prima facie case was even yet stronger and more satisfactory." In other words, when the proof is all in, the jury must be satisfied from the entire testimony that the charge of negligence is established by a preponderance of the evidence, for, if not, the plaintiff fails in his action. This rule is so elementary that I deem further discussion unnecessary. Nor can it be said, as a matter of law, that an instruction which imposes the burden of establishing a cause of action or defense, by a preponderance of the testimony, on the wrong party, is not prejudicial.

The Duties and Liabilities of Electric Corporations are discussed in the extended note to *Hebert v. Lake Charles Ice etc. Works*, 100 Am. St. Rep. 515, evidence of negligence being treated at page 524; and see the subsequent cases of *Pennabaker v. San Joaquin Light & Power Co.*, 158 Cal. 579, 139 Am. St. Rep. 202; *Moren v. New Orleans Ry. etc. Co.*, 125 La. 944, 136 Am. St. Rep. 344; *Gentzkow v. Portland Ry. Co.*, 54 Or. 114, 135 Am. St. Rep. 821; *Olson v. Nebraska Telephone Co.*, 85 Neb. 331, 133 Am. St. Rep. 660; *Hodgins v. Bay City*, 156 Mich. 687, 132 Am. St. Rep. 546.

A City Engaged in an Enterprise of a Private Nature, such as the furnishing of light to its inhabitants, appears to be held to the same responsibility for injuries received on account of the negligence of its officers or agents as would an individual operating an electric light plant: *Eaton v. City of Weiser*, 12 Idaho, 544, 118 Am. St. Rep. 225; *Pineus v. Atlantic etc. R. R. Co.*, 140 N. C. 450, 111 Am. St. Rep. 857; *Hodgins v. Bay City*, 156 Mich. 687, 132 Am. St. Rep. 546. And it would seem that the same rule of liability applies to a city furnishing water to its inhabitants: *Brown v. Salt Lake City*, 33 Utah, 222, 126 Am. St. Rep. 828; *Piper v. City of Madison*, 140 Wis. 311, 133 Am. St. Rep. 1078.

STATE v. SUPERIOR COURT FOR KING COUNTY.

[60 Wash. 370, 111 Pac. 233.]

ELECTIONS—Mandamus—Premature Application—Public Importance of Questions.—A proceeding for a writ of mandamus to compel the placing of the name of a candidate under the party denomination of a certain political party upon an election ballot is prematurely brought where the names of candidates have not, at the time of the institution of the proceeding, been certified to the county auditor, but the questions raised may be considered and decided by the court when of great public importance. (p. 926.)

CONSTITUTIONAL LAW—Statutes Presumed Valid.—All laws passed by the legislative branch of the government and approved by the executive are presumed to be constitutional, and the courts will not conjure theories to overturn and overthrow the solemn declarations of the legislative body. There must be a plain violation of some provision of the fundamental law. (p. 927.)

ELECTIONS—Right to Vote—Regulation by Legislature.—The right to vote is a constitutional right, given to certain citizens and withheld from others. But the manner in which the franchise shall be exercised is purely statutory. It is not within the power of the legislature to destroy the franchise, but it may control and regulate the ballot, so long as the right is not destroyed or made so inconvenient that it is impossible to enjoy it. That which does not destroy or unnecessarily impair the right must be held to be within the constitutional power of the legislature. (p. 927.)

ELECTIONS—Right to Vote—Constitutional Guaranty.—So long as an elector has the privilege of voting for the candidate of his choice, and a way is provided, there can be no challenge of an election law on constitutional grounds. Only such provisions as may in their operation shut off the voter from the ballot-box will be held obnoxious to the constitutional guaranty of the right to vote. (p. 928.)

ELECTIONS—Right to Vote—Nature of Right.—The right to vote is neither a property right nor a right of person, but a mere political privilege which the legislature may regulate to any extent not prohibited by the state or federal constitutions. (p. 928.)

STATUTES—Conflicting Laws—Repeal by Implication.—A statute will not be held unreasonable or in conflict with another, or repealed by implication, unless the legislative intent can be gathered from the later enactment. (p. 933.)

ELECTIONS—Names not to Appear More Than Once on Ballot.—Section 4893, subdivision 6, Rem. & Bal. Code, providing that no candidate's name shall appear more than once upon the ballot, was not repealed by the amendment to the direct primary law (Laws 1909, p. 179, sec. 11, Rem. & Bal. Code, sec. 4842) providing that the names of judges shall appear upon the ticket of all parties holding a joint convention. (p. 934.)

ELECTIONS—Political Parties not Recognized by Constitution. The constitution takes no concern of political parties. Both state and federal constitutions consider political parties evanescent things, born of political emotions and of uncertain tenure of life, and go no further than to protect the elector in his right to cast a ballot; not a coerced party ballot, but for the candidate of his choice, whether he is upon one ballot or another. (p. 934.)

ELECTIONS—Constitutional Law—Names not to Appear but Once on Ballot.—Section 4893, subdivision 6, Rem. & Bal. Code, pro-

viding that no candidate's name shall appear more than once upon the ballot does not violate any express or implied guaranty of the constitution, and is a valid exercise of the power of the legislature. (p. 935.)

Thomas M. Vance, J. W. Robinson, W. H. B. Thomas and C. G. Heifner, for the relators.

George F. Vanderveer and W. V. Tanner, for the respondent.

³⁷¹ CHADWICK, J. This proceeding is directed against Otto Case, the county auditor of King county. The question put to this court by the relators is whether that provision of the general election law, which reads as follows: "No candidate's name shall appear more than once upon the ballot: Provided, that any candidate who has been nominated by two or more political parties may, upon a written notice filed with the clerk of the board of county commissioners at least twenty days before the election is to be held, designate the political party under whose title he desires to have his name placed": Rem. & Bal. Code, sec. 4893, subd. 6—violates the constitutional rights of a candidate who has been nominated by two political parties, and is an unwarranted interference with the rights of political parties. Relators insist that the names of the candidates filed with the Secretary of State as the nominees of the Democratic party shall appear under that title or designation upon the official ballot, and the same persons being nominated by a voluntary convention styling itself "Independent Non-Partisan Judiciary Party," that the same names shall likewise appear under that designation. Before proceeding to the discussion of these propositions, it may be known that technically the question is not properly before the court, and ordinarily we would decline to hear a petition filed under such circumstances. It is not shown, and in fact is not asserted, that at the time the proceeding was instituted in King county, the names of the candidates had been certified to the county auditor; nor is it certain that they have even now been so certified. But because of the supposed political advantage which the relators assume will result to them from a decision by this court, and the public importance of the question, we shall unhesitatingly meet the issue.

Before proceeding to the main discussion, there is another ³⁷² question which may be disposed of. The point was made in argument that the Independent Non-Partisan Judiciary Party is not in fact a political party. It may, indeed, be questioned whether a limited number of electors may gather together, and although still claiming allegiance to existing political parties, nominate candidates in opposition to them, and be a political party within any accepted definition of

that term. However, having no desire to deprive relators of any right, or to enter into the discussion of even doubtful rights, we shall accept the situation as we find it. The filing having been made under the advice of the attorney general, we shall assume that the relators are the nominees of regular political parties, and will not pursue the subject further.

In determining the constitutionality of the law, there are certain fundamental principles to which we may safely recur. All laws passed by the co-ordinate branch of the government and approved by the executive are presumed to be constitutional, and courts will not conjure theories to overturn and overthrow the solemn declarations of the legislative body. There must be a plain violation of some provision of the fundamental law. The right to vote is a constitutional right, given by the people to certain citizens and withheld from others. But the manner in which the franchise shall be exercised is purely statutory. It is not within the power of the legislature to destroy the franchise, but it may control and regulate the ballot, so long as the right is not destroyed or made so inconvenient that it is impossible to exercise it. It follows, then, that that which does not destroy or unnecessarily impair the right must be held to be within the constitutional power of the legislature.

Bearing in mind these general principles—and they will not be challenged, it may be said also that, in almost every state which has adopted the Australian ballot system, or a modification of it, a provision similar to the one before us for construction has been adopted, and where questioned, has been sanctioned by the courts, with one exception, as a lawful and constitutional exercise of the legislative power. A law which ³⁷³ has been generally adopted by the legislative bodies of the country and approved by the executive, when challenged as unconstitutional, demands more than passing consideration; for it cannot be presumed that the judicial department is the only one endowed with sufficient wisdom and integrity to insure the preservation of the constitutional right of the citizen. Constitutional government by the people represents the greatest and grandest struggle of humanity for its betterment, and in its accomplishment marks the uttermost political accomplishment of the human race. The people have reserved to themselves the general right to legislate, fixing certain boundaries, and the province of the court is to see that the pendulum of popular emotion does not swing beyond the limit fixed by the people themselves in the fundamental law. Therefore, a law comes to the courts clothed with every presumption of regularity, and unless it be clear that it violates some express provision or inherent principle of the Bill of Rights, the court must give sanction to the will of the people as presently declared, and uphold

the law. In this case it is not contended that any constitutional right of the voter is violated; but it is insisted that the candidate, and the political party which is his sponsor, are denied a constitutional right; that the voter is denied the privilege of voting for a nominee under the party designation which represents his party principles, while others are not so denied.

The people have purposely, and we must presume for some reason, left details to the legislature, for the only provision of the constitution which refers to the manner of conducting elections is article 6, section 6, which reads as follows: "All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot."

So long, then, as the elector has a right to vote by ballot, and the secrecy of that ballot is preserved, he cannot, nor can the candidate, complain. A law may, in some instances, work a hardship to the individual. In fact, all law works ²⁷⁴ hardship and inconvenience to the individual. But organized society is founded upon the principle that the convenience of the individual must give way to the common good. So long, then, as the elector has the privilege of voting for the candidate of his choice, and a way is provided, there can be no challenge of the law on constitutional grounds. Only such provisions as may in their operation shut off the voter from the ballot-box will be held obnoxious to the constitutional guaranty of the right to vote: *State v. Black*, 54 N. J. L. 446, 24 Atl. 489, 1021, 16 L. R. A. 769.

The error of the relators' reasoning lies in assuming that an elector has an inherent right to vote in his own way, or in the manner of his choice. On the contrary, the law is—and it is declared without division of the courts—that the right to vote is neither a property right nor a right of person, but a mere political privilege which the legislature may regulate to any extent not prohibited by the state or federal constitutions: 15 Cyc. 281; 10 Am. & Eng. Ency. of Law, 2d ed., 568; Cooley's Constitutional Limitations, 6th ed., 752. See, also, the following late cases: *Riter v. Douglass* (Nev.), 109 Pac. 444; *Russell v. State*, 171 Ind. 623, 87 N. E. 13; *Savage v. Umphries* (Tex. Civ. App.), 118 S. W. 893; *Morris v. Colorado Midland R. Co.*, 48 Colo. 147, 139 Am. St. Rep. 268, 109 Pac. 430, 31 L. R. A., N. S., 1106; *Healey v. Wipf*, 22 S. D. 343, 117 N. W. 521; *Coggeshall v. City of Des Moines*, 138 Iowa, 730, 128 Am. St. Rep. 221, 117 N. W. 309; *State v. Goldthait*, 172 Ind. 210, 87 N. E. 133, 19 Ann. Cas. 737; *De Walt v. Bartley*, 146 Pa. 529, 28 Am. St. Rep. 814, 24 Atl. 185, 15 L. R. A. 771.

It is upon this principle that registration, laws requiring a voter to vote in the precinct of his residence, laws requir-

ing educational or property tests, the arbitrary fixing of the times for opening and closing the polls, the difference in time during which the polls shall be kept open, and similar laws, are sustained, and upon which the right to regulate the form of the ballot must be made to rest. In *De Walt v. Bartley*, the court, in construing a similar regulation, said:

³⁷⁵ "It was contended that the provision or discrimination against the Prohibition party is in violation of that clause of the constitution which declares that elections shall be free and equal; and also section 7, article 8, which declares that all laws regulating the holding of elections by the citizens shall be uniform throughout the state; that these constitutional provisions were intended to secure to every citizen equality in the manner of voting, and to prohibit the legislature from passing any law which shall give, directly or indirectly, an advantage to some voters, which will not equally apply to all voters. This contention is plausible, but unsound. The act does not deny to any voter the exercise of the elective franchise because he happens to be a member of a party which at the last general election polled less than three per cent of the entire vote cast. The provision referred to is but a regulation, and we think a reasonable one, in regard to the printing of tickets. The use of official ballots renders it absolutely necessary to make some regulations in regard to nominations, in order to ascertain what names shall be printed on the ballot. The right to vote can only be exercised by the individual voter. The right to nominate, flowing necessarily from the right to vote, can only be exercised by a number of voters acting together. Three persons may claim to be a political party, just as the three tailors of Tooley street assumed to be 'the people of England.' It follows, if an official ballot is to be used, nominations must be regulated in some way; otherwise the scheme would be impracticable, and the official ballot become the size of a blanket."

The same reasoning was pursued by this court when it sustained the direct primary law: "From the fact that the state has assumed to provide an official ballot for the general election, it must resort to some process of selection to determine the candidates whose names shall appear upon the ballot. It cannot print the names of the entire list of electors on the ballot, nor can it print thereon the name of every elector who may choose to become a candidate. Such a proceeding would make the ballot too cumbersome for any practical purpose, and in consequence the election a farce. Since then, the state by its legislature must resort to some process of selection, the only limitation that can be put thereon is that the process adopted be reasonable. ³⁷⁶ The legislature

should not go to extremes in either direction. To print the names of every person who desires to become a candidate would be an extreme in the one direction, while to print only the names of the candidates of the party dominant at the last preceding election would be an extreme in the other. But between the extremes it is at once apparent that there is a wide field for choice, within which it cannot safely be said that the legislature has violated its just discretion. The method here adopted the court cannot say is unreasonable": *State v. Nichols*, 50 Wash. 508, 97 Pac. 728.

The voter having, then, only such inherent right as the constitution gives, and not, as contended, such unrestrained privileges as it does not expressly deny, the main question has been met without difficulty, by reference to these general principles, by the courts of Wisconsin, Michigan and Ohio. In *State v. Anderson*, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239, it was contended that a similar statute violated that section of the constitution which provides that all votes shall be by ballot, in that it deprived the voter of a political party of his right to vote the ticket of the party to which he belonged. The court met the issue, saying: "No reason for this contention is perceived. The word 'ballot' and the expression 'vote by ballot' had a well-understood and universal meaning at the time of the adoption of the constitution, and it must be taken as the law that the thought which was in the minds of the framers of the constitution was in harmony with such meaning. Any attempt to go outside of that would be usurpation, not interpretation or construction. It would be a method of judicial procedure that would render any legislation, however plainly worded, subject to change by judicial construction to suit the judgment of courts as to the best legislative policy. The word 'ballot' means, in the election of public officers, and always meant, a paper so prepared by printing or writing thereon as to show the voter's choice, and 'vote by ballot' the deposit of such paper in a box in such a way as to conceal the voter's choice if he so desires. In that sense, and in no other, the words were used in the constitution, and they secure to each person entitled to vote the rights which their meaning clearly conveys, and they are in no way ³⁷⁷ interfered with by the act under consideration. The official ballot, so called, is not complete when furnished to the elector as he enters the booth to prepare his ballot. It is a mere form for ballot. When marked and prepared by the voter so as to show his choice at the election, then, and not till then, does it become his constitutional ballot; and it is not, and cannot be, contended but that the freest opportunity practicable is given under the law for the voter to deposit such ballot so as to conceal his choice of candidates, indicated therein, if he so desires. It follows that no con-

stitutional guaranty in regard to voting by ballot is in any way contravened."

In *Todd v. Election Commissioners*, 104 Mich. 474, 62 N. W. 564, 64 N. W. 496, 29 L. R. A. 330, the same question was resolved in the same way. Grant, Justice, who pronounced the judgment of the court, said: "It is also insisted that the candidate has the constitutional right to have his name appear upon the ticket of every party which indorses him. It gives every candidate the right to have his name appear upon the ticket once. Naturally, it belongs in the column of that party with which he is openly affiliated; but if he chooses to have his name attached to the ticket of some other party, and that party does not object, he possesses that right. But I know of no reason or authority for saying that any candidate possesses the constitutional and inalienable right to have his name appear more than once upon the official ballot containing the tickets of two or more political parties. The Australian ballot contemplates that his name shall be there but once. It follows, then, that every voter has a reasonable opportunity to vote for him. This is the sole constitutional right guaranteed him. He has no occasion to find fault so long as he is permitted to have his name upon the ballot upon such ticket as he chooses, with the constitutional right following of an opportunity given to every voter to vote for him, which he can do by simply making two crosses instead of one. The law is general, and aims at no political party. One party may be affected at one election, and another at another, or all parties may be affected at one election, some in one locality and others in another. It does not prevent coalition between different political parties, which is often very commendable and patriotic. It does not deprive the members of those political parties of ³⁷⁸ the means to put their coalition into effect by their votes, but furnishes all reasonable facilities for so doing. It only requires some degree of intelligence and care on the part of the voters. We hold the law to be constitutional."

So, in Ohio, the court, in *State v. Bode*, 55 Ohio St. 224, 60 Am. St. Rep. 696, 45 N. E. 195, 34 L. R. A. 498, held the statute to be constitutional. The whole case is covered by the following quotation: "No form of ballot is prescribed by the constitution, and therefore the General Assembly is free to adopt such form as in its judgment shall be for the best interests of the state. The election must be by ballot, but the form of the ballot, so long as it is a ballot, is left to the sound discretion of the General Assembly. The ballot or ticket in question is clearly a ballot, and therefore does not contravene the second section of the fifth article of the constitution. By the second section of the first article of the constitution, it is provided, in substance, that government

is instituted for the equal protection and benefit of the people. It seems clear that the placing of the name of each candidate upon the ballot once, and only once, would be equal protection and benefit to all the candidates. To place the name of one on the ballot in two places, and the name of his opponent in only one place, would not be exactly fair. It would give the candidate whose name appears twice an advantage over the candidate whose name appears but once. So that the statute, instead of being in conflict with this section of the constitution, is in harmony with it, and may have been passed for the purpose of doing away with this advantage which existed under the former statute. It is a proper regulation of the elective franchise, well calculated to avoid and prevent corruption and fraudulent practices, as well as undue advantage to one candidate over another. But it is argued that the voters have a right to have the names appear upon both ballots, so that they may more easily vote for the candidates of their choice. No legislature and no court can know in advance how the electors desire to vote, and if an opportunity is given them to vote for the candidates of their choice, by placing the names once in plain print upon the ballots, it is all that can in fairness be required. The ballot is the same for all, and gives equal protection and benefit to all. There is no discrimination against or in favor of anyone; and if any inequality ³⁷⁹ arises, it arises not from any inequality caused by the statute, but by reason of inequalities in the persons of the voters, and such inequalities are unavoidable."

The same reason is announced in *State v. Porter*, 13 N. D. 406, 100 N. W. 1080, 67 L. R. A. 473, 3 Ann. Cas. 794, the court saying most aptly: "The legislature has declared that it shall be printed in but one column. Does this deprive the relator or the electors of any constitutional right? We think not. Counsel have failed to point out any provision of the constitution which is violated, and we know of none."

It was held in the following cases that, in the absence of a controlling statute, the names of a candidate might appear more than once on the same ballot: *Simpson v. Osborn*, 52 Kan. 328, 34 Pac. 747; *Fisher v. Dudley*, 74 Md. 242, 22 Atl. 2, 12 L. R. A. 586; *Miller v. Pennoyer*, 23 Or. 364, 31 Pac. 830; *Payne v. Hodgson*, 34 Utah, 269, 97 Pac. 132. But each of these cases turned upon statutory, and not upon constitutional, grounds, and the principle we announce was thereby affirmed as completely as in the cases we have heretofore alluded to. As against the reason and logic of these decisions we have the case of *Murphy v. Curry*, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97, holding that a similar statute was unconstitutional. This case stands alone. It was finally repudiated by a constitutional amendment. The case was decided

by a divided court, a bare majority declaring the rule. The court clearly put itself in the place of the legislature and determined the law, not upon constitutional grounds, but rejected it as unwise, impolitic and inexpedient. The case proceeded upon two false theories, as is made plain by reference to the dissenting opinion of Garoutte, Justice; the one the inconvenience of the voter, and the other the denial of a right to a political party. The writer of the dissenting opinion said: "Here the question is simply a mere matter of regulation as to the form of the election ballot. By this provision of the law all parties are treated alike, all candidates are treated alike, and all voters are treated alike. Under those conditions ³⁸⁰ I do not see how the law can be declared unconstitutional. If the general reasoning found in the main opinion in this case, as well as in the Britton case, be constitutionally sound, then the whole Australian law of this state will be set aside the first time an assault upon constitutional grounds is made upon it."

The case just cited has heretofore been considered by this court. It was invoked by those who sought to overturn the direct primary law, and because of its conclusion, rather than its logic, seems to be a favorite, in fact the only, weapon available to those who would thwart the attempt of the legislature to insure a ballot free of party coercion, by invoking the supposed rights of political parties. The case was repudiated as an authority in *State v. Nichols*, 50 Wash. 508, 97 Pac. 728, and, as far as the writer has been able to find, has never been approved by any of the courts of the several states.

But it nevertheless suggests the only remaining ground to be discussed, and that is that the provision of the Australian ballot law now under discussion deprives a political party of its right to appear upon the ballot. It is urged that, under subdivision 3, section 4893, Rem. & Bal. Code, it is the right of every political party to print its full ticket although it contains the names of candidates appearing on other party tickets, and that this section, when considered in connection with the amendment to the direct primary law (Laws 1909, p. 179, sec. 11; Rem. & Bal. Code, sec. 4842), which provides that the names of judges shall appear upon the ticket of all parties holding a joint convention, indicates a legislative intent to supersede or repeal subdivision 6, section 4893—subdivision 6 being the section which provides that names shall appear but once. The answer to this argument is that a statute will not be held to be unreasonable or in conflict with another, or repealed by implication, unless the legislative intent can be gathered from the later enactment. Courts cannot look to the working of the law or reject it because it does not affect all alike, so long as it covers all who come

within its terms in the same way. The legislature having full ³⁸¹ power, then, to make such regulations as it saw fit, the law will not be held to be repealed by implication merely because it does not cover an unforeseen contingency. The legislature foresaw and covered the contingency of a joint or fusion convention, and whether it failed to legislate so as to permit the names of candidates of independent conventions or parties from going on the ballot more than once, from design or oversight, is not within the purview of our inquiry. The remedy is not to strike down the law, but to extend its operation. The remedy is in the hands of the legislature, and not to be sought in the courts.

Recurring again to fundamental principles, the whole argument in this behalf is met by the undisputed proposition that the constitution takes no concern of political parties. The people, in adopting the constitutions, both state and federal, wisely considered that political parties are evanescent things, born of political emotions and of uncertain—sometimes precarious—tenure of life, and went no further than to protect the elector in his right to cast a ballot; not a coerced party ballot, but for the candidate of his choice, whether he be upon one ballot or another. The same argument, that such laws will tend to destroy party organizations, was made when the direct primary law was attacked two years ago, and was squarely met by this court.

“The last general objection to be noticed is that the law tends to destroy political parties. Counsel confess that they can find no specific provision of the constitution on which to base the contention, but they assert the general utility and necessity of parties, and argue therefrom that legislation tending to destroy them must receive the condemnation of the courts. It has seemed to us, however, that this is a political rather than a judicial question, and that an appeal from the legislative decision must be made to the people rather than to the courts”: *State v. Nichols*, 50 Wash. 508, 97 Pac. 728.

In *State v. Anderson*, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239, it was said: “Men are supposed to stand for principles when placed in nomination by political parties, and when the candidates of ³⁸² one party are identical with those of another it is supposed, and not unreasonably, that for the time being at least, though there be two organizations there is but one platform of principles, and that one party designation on the official ballot will satisfy all legitimate requirements of both. The confusion and uncertainty that would arise in such a case from the double printing of names furnishes a strong reason for prohibiting it, and that, with the other reason mentioned, strongly support the wisdom of the prohibition as a proper legislative regulation.”

Political parties being neither mentioned, protected, nor favored in the constitution, a law will not be held to be unconstitutional, although in its workings it may destroy these organizations. If a party is to be protected at all hazards, the Australian ballot, the primary law, and the commission plan of government must all fall upon the first attack, for the working, if indeed it is not the design, is to break down parties and put the burden entirely upon the elector.

"In other words, the scheme is to permit the voters to construct the organization from the bottom upward, instead of permitting leaders to construct from the top downward": *People v. Democratic General Committee*, 164 N. Y. 335, 58 N. E. 124, 51 L. R. A. 674. See, also, *Healey v. Wipf*, 22 S. D. 343, 117 N. W. 521; *State v. Frear*, 142 Wis. 320, 125 N. W. 961.

Finding no guaranty, express or implied, in favor of either a candidate or a party in the constitution, it follows that he or his party can claim no greater rights than the voter himself. The fountain cannot rise higher than its source. There being no valid constitutional objection to the statute, and being powerless to supply omissions or to whittle the law to meet conveniences or emergencies, it follows that relators must follow the law as it has been written by the legislature, and designate the name of the party under whose name they desire their names to be placed.

The judgment of the lower court is affirmed.

Dunbar, Mount and Crow, JJ., concur.

Rudkin, C. J., presided, but took no part.

The Right of a Qualified Elector to Vote is neither a property right nor right of person. It is a mere political privilege as distinguished from a property or personal right: *Morris v. Colorado Midland R. R. Co.*, 48 Colo. 147, 139 Am. St. Rep. 268. It is not a natural or inherent right, but exists only as conferred by a constitution or statute: *Coggeshall v. City of Des Moines*, 138 Iowa, 730, 128 Am. St. Rep. 221; and is a political, not a civil, right: *United States etc. Co. v. Hobson*, 132 Iowa, 38, 119 Am. St. Rep. 539. It is a mere political privilege: *Gougar v. Timberlake*, 148 Ind. 38, 62 Am. St. Rep. 487.

PETERSON v. TACOMA RAILWAY AND POWER COMPANY.

[60 Wash. 406, 111 Pac. 338.]

MUNICIPAL CORPORATIONS—Extension of Limits.—Where the limits of a municipal corporation are extended and new territory brought in, general ordinances control the new as well as the old territory. (p. 939.)

MUNICIPAL CORPORATIONS—Franchises—Construed in Favor of City.—Franchises granted by a municipal corporation, and contracts made in pursuance thereof, are, if doubtful, to be considered in favor of the city. (p. 941.)

STREET RAILWAYS—Ordinance Fixing Fare—Extension of City Limits.—A franchise ordinance, enacted pursuant to an agreement between a city and a street railway company, requiring the company to transport passengers to or from any point on its lines within the city limits for a single fare of five cents, includes a line of such company running outside the city limits at the time of the making of the contract and enactment of the ordinance but subsequently brought within the city by extension of its corporate limits. (p. 941.)

STREET RAILWAYS—Ordinance Fixing Fare—Extension of City Limits.—The requiring of a street railway company to transport passengers over one of its lines which formerly ran without the limits of the city, but was subsequently brought within the city by an extension of its limits, for a single fare, under a franchise ordinance enacted pursuant to an agreement between the city and the company requiring the transportation of passengers for one fare on any line or lines within the city limits, does not impair the obligation of a contract within the meaning of the federal constitution. (p. 942.)

STREET RAILWAYS—Franchise in Territory Annexed to City. A county franchise to operate a street railway in territory subsequently annexed to a city dies with the annexation, and the right to operate must thereafter be held to be amenable to the will of the city authorities. (p. 942.)

B. S. Grosscup, Jas. B. Howe and Wm. C. Morrow, for the appellant.

Fitch & Jacobs and T. L. Stiles, for the respondent.

407 CHADWICK, J. In its inception the present Tacoma Railway and Power Company acquired control of various lines of street railway operating under a number of distinct franchises in the city of Tacoma. These lines operating independently were under no obligation, unless so provided in the franchise, to exchange or transfer passengers from one to the other. In consequence great confusion was put upon the citizens. Transfers would be allowed, some from one line to another, and denied upon the same lines to others. Transfers would be allowed at certain points and denied at others. The growth of the city demanded a correction of these abuses, and to save further trouble and disputes, the Tacoma Railway and Power Company and the city of Tacoma entered into a contract in which mutual promises and concessions were made.

We shall quote the parts of the contract pertinent to the present inquiry, together with the preamble of the ordinance authorizing the commissioner of public works to enter into it:

"An ordinance authorizing and directing the commissioner of public works of the city of Tacoma to enter into a contract for and on behalf of said city with the Tacoma Railway and Power Company for the settlement of certain differences and disputes heretofore existing between said city and said company.

"Fifth. On and after the first day of April, 1903, the said party of the first part shall transport any person from any point or place within the corporate limits of the city of Tacoma, on any line or lines of street railway owned, operated, or controlled by said party of the first part, to the terminus of its line in Point Defiance Park, for a single fare not exceeding five cents, and the party of the first part agrees that it will from and after the date of this agreement, extend its present transfer system for a continuous trip one way to and from all lines within the city of Tacoma (and including that portion of the Point Defiance line outside of the city of Tacoma), but nothing in this section shall be so construed as to require the issuance of transfers which can be so used on parallel or other lines as to make it possible for a passenger to make a round trip for one fare, nor to prevent the party of the first part from making and enforcing all reasonable ⁴⁰⁸ rules and regulations necessary, in its judgment, to prevent fraud.

"Seventh. And said party of the first part further stipulates, agrees and consents to and does hereby waive and relinquish each and every right, privilege and authority conferred and granted in and by any street railway franchise now held and owned by said party of the first part to the extent only that the same are inconsistent and in conflict with the terms, conditions and provisions of these articles of agreement.

"Eighth. That said city of Tacoma, the party of the second part, for and in consideration of the foregoing agreements made and to be executed by the party of the first part, does hereby agree that upon the proper execution, in duplicate, and delivery of this agreement, by each of said parties to the other, to give its consent, by ordinance, to the transfer and assignment of all the right, title and interest in and to each and every of these certain franchises granted by the city of Tacoma for street railway purposes, which the said party of the first part may now own, either as the original grantee or as assignee."

So far as the record shows, no dispute has arisen between the city and the railway company, excepting in so far as the contract may be held to apply to the following condition: A

part of one of the railway company's acquired lines runs beyond the city limits about a mile, terminating at the village of Fern Hill, a suburb of the city of Tacoma. From the point where this line crosses the city limits to Fern Hill, the road was operated under a franchise granted by the commissioners of Pierce county, and the company had been accustomed to charge an additional fare of five cents for a passenger going beyond the city limits, and also an additional fare of five cents for each passage initiated beyond the city limits. So that the fare to or from the village of Fern Hill was ten cents, instead of the customary five-cent fare charged on all other lines in the city. On July 9, 1909, the city passed an ordinance under which the limits of the city were extended so as to take in additional territory. The line of the railway from the city limits to Fern Hill was in the included area.

⁴⁰⁹ It is the contention of the railway company that the line from the old city limits to Fern Hill, being built and operated under a county franchise and being beyond the legislative jurisdiction or contractual power of the city at the time the contract was made, and further that the spirit and terms of the contract as well as its object were to cover only existing disputes, it still has a right to charge a ten-cent fare to and from Fern Hill. The city contends that the object of the contract was not only to cover existing differences, but to insure a five-cent fare within the city limits of Tacoma whenever and wherever the limits of the city might be extended; that the burden follows the benefits of the original franchise as well as the contract, and the added territory being now a part of the city of Tacoma, the company is bound to carry all passengers within the present city limits for a flat five-cent fare. Thus disputing, the parties came to the superior court of Pierce county, where it was decided that the company could charge a five-cent fare and no more.

Certainty is the strength of the law, and it is proper to look to our own decisions, as well as those of other states, for guidance in our interpretation of the contract. But one case has been decided by this court involving a like principle: *Seattle Lighting Co. v. Seattle*, 54 Wash. 9, 102 Pac. 767, 18 Ann. Cas. 1117. In that case the franchise was a general grant to lay pipes "throughout the city of Seattle and throughout any addition thereof," and "as the boundaries thereof are or may be extended." It was held that the company could operate under its franchise in new territory beyond the old city limits, and that it was not confined by the terms quoted to unplatted area within the boundaries existing at the date of the franchise. The court followed the leading case upon this theory of the law: *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121, and other apt authority. The argument of the court was further sustained by the assertion of a rule deduced

from the following authorities: *Toledo v. Edens*, 59 Iowa, 352, 13 N. W. 313; *Indiana R. Co. v. Hoffman*, ⁴¹⁰ 161 Ind. 593, 69 N. E. 399; *McGurn v. Board of Education*, 133 Ill. 122, 24 N. E. 529. The court said: "It seems clear that, when new territory is brought into a city, general ordinances of the city immediately control the new as well as the old territory, and do not require express legislative action to give them such application. . . . An ordinance granting a franchise generally stands upon the same footing as any other ordinance of the city": *Seattle Lighting Co. v. Seattle*, 54 Wash. 9, 102 Pac. 767, 18 Ann. Cas. 1117.

The case of *Indiana R. Co. v. Hoffman*, 161 Ind. 593, 69 N. E. 399, is quite in point. A contract similar in terms, and designed to cover substantially the same disputes, was entered into between the company and the city. It was agreed that the company would "issue transfer tickets free of charge to all passengers requesting the same who boarded its cars at any point upon its line within the limits of the city of South Bend, and whose destination might be upon any point upon any other line of appellant within the said city limits; such transfer tickets to be valid only upon the next car leaving upon the line indicated thereon after the issuing of the same."

The limits of the city being thereafter extended, it was contended that the company was not bound to issue transfers except to such passengers as initiated their right within the boundaries of the city as they existed at the time of the franchise. The court held: "It is apparently insisted by counsel for appellant that the city of South Bend, by annexing the part of the territory in which appellant, under the grant from the board of commissioners, had previously operated its road, abrogated and destroyed its rights acquired by said grant, and therefore violated our fundamental laws. But whatever rights appellant had in said territory under its grant from the board of commissioners were not impaired or destroyed by the extension of the city boundary in question, but were changed by its agreement with the city to issue transfer tickets over its lines therein to all points within the city limits. Whatever rights it had to decline or refuse to issue transfers to persons carried over its road in said territory were merged in and controlled by the contract which it subsequently made with the city. If ⁴¹¹ appellant desired to stand upon and avail itself of the rights which it had acquired in the territory in question, it ought not to have entered into the agreement and contract with the city in regard to the rate of fare and the right of passengers to transfer. The regulation of the question of fare and the transfer tickets to be issued rests upon the contract in this case between appellant and the city of South Bend. It bound itself thereby not to exact of passengers transported over its lines within the city more than the max-

imum fare, and to issue, upon request, to such passengers, transfer tickets as provided. This agreement, as we have seen, cannot be held to apply only to passengers who are transported on appellant's cars within the old limits of the city, but must be held to apply to and include any and all passengers whose destination is within the limits of the city as they were extended by the annexation of the territory in controversy. This extension, as we have said, by the municipal authorities was the exercise of governmental powers. In a legal sense the city is a unit, although its boundaries may be changed from time to time by extension, and all persons within the limits thereof as extended become bound by, and must yield obedience to, its ordinances. It certainly in reason cannot be asserted that an ordinance adopted by a city must, in its operation, forever be confined to the limits of the municipality as they were at the time it was passed, and cannot become operative in territory thereafter annexed and made a part of the corporation."

In *People v. Detroit United R. Co.*, 162 Mich. 460, 139 Am. St. Rep. 582, 125 N. W. 700, 127 N. W. 748, it was held on the principle announced in the *Hoffman* case, that notwithstanding a franchise to build and operate within the city limits had been granted, a road running beyond the city limits, and acquired by purchase, and over which the limits of the city had thereafter been extended, came within the terms of the company's contract to carry passengers at a fixed rate, and that an increased fare could not be exacted. The court said: "We think it not unreasonable to hold that this mutual contract was made in view of the power of the legislature of the state to increase or diminish the territory within the city, ⁴¹² and that neither the city nor the company contemplated that in case of an extension of the lines of the company within the city, either by purchase or acquisition from another company, an increased fare should be demanded."

The spirit of the contract—and we do not have to repudiate any of its words to so hold—was to insure a fixed fare within the limits of the city of Tacoma at all times; for we cannot assume, in the absence of controlling words, that either the railway company or the city intended to settle merely existing disputes and leave the way open for a continual recurrence of the same troubles; for it is within the knowledge of all men that the municipalities of this state are growing rapidly, and the same difficulties would necessarily and within a short time beset the participants. It was a contract for continuing peace. As was said in *Truesdale v. Newport*, 28 Ky. Law Rep. 840, 90 S. W. 589: "The contract is to supply the city of Newport and its inhabitants with gas. The limits of the city year by year determine the limits of the contract."

In *People v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E. 245, it is said: "The words of the ordinance are clear and not ambiguous, and apply to all the territory within the city of Chicago during the period of the grant. The ordinance, having been accepted by the defendant, became a contract by which both parties are bound, and the territory which has since been annexed to the city is within the city of Chicago. If there had been an intention to restrict the limitations to the existing city limits, such an intention would naturally have been expressed in the ordinance or the acceptance."

It will be seen under this authority that, if we found the contract to be doubtful, it would be our duty to resolve it in favor of the city, for franchises are to be construed in favor of the public, unless controlled by law or the saving clauses of the contract: *McQuillan on Municipal Ordinances*, sec. 578; 9 Cyc. 588. It is unnecessary to quote from other cases. The ⁴¹³ principle we have adopted is sustained by the following cases: *Des Moines Waterworks Co. v. Des Moines*, 95 Iowa, 348, 64 N. W. 269; *St. Louis etc. R. Co. v. Houck*, 120 Mo. App. 634, 97 S. W. 963; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 20 Sup. Ct. Rep. 509, 44 L. ed. 622.

As against this array of authority, appellant cites and relies upon the case of *Turners Falls Fire Dist. v. Millers Falls Water Supply Dist.*, 189 Mass. 263, 75 N. E. 630. It may be that this case sustains the contention of appellant, but no authority is cited outside of the supreme court of Massachusetts. It is opposed to our notion of the law, and we are not willing to follow it. The case of *Chope v. Detroit & Howell Plank Road Co.*, 37 Mich. 195, 26 Am. Rep. 512, is also relied upon. We believe this case to be controlled, if not positively overruled, by the later case of *People v. Detroit United R. Co.*, 162 Mich. 460, 139 Am. St. Rep. 582, 125 N. W. 700, 127 N. W. 748, from which we have quoted. Counsel for appellant seeks to distinguish the Michigan cases, asserting that the court in the later case erroneously assumed as a matter of fact that the boundary of the grant moved with the city limits as they changed from time to time. If this were an assumption of fact, counsel's theory would be correct, but we conceive it to be a legal conclusion. At any rate, we so held in the case of *Seattle Lighting Co. v. Seattle*, 54 Wash. 9, 102 Pac. 707, 18 Ann. Cas. 1117. The case of *Toronto R. Co. v. Toronto*, 37 Can. Sup. Ct. 430, 5 Can. R. Cas. 250, is also relied upon. The facts of this case distinguish it from the case at bar.

It is also contended that, to compel the company to accept a five-cent fare over its present line, would violate the right secured by the company under its contract, thus bringing the case within the contract clause of the federal constitution. Upon this point appellant cites *Minneapolis v. Minneapolis*

St. R. Co., 215 U. S. 417, 30 Sup. Ct. Rep. 118, 54 L. ed. 259. In that case the city undertook to compel the company to sell six tickets for twenty-five cents, whereas the franchise granted a right to charge a five-cent fare. The court properly held that the right to ⁴¹⁴ charge the fare provided in the franchise was of the essence of the contract, and that it could not be abridged by the city. No question of extension of city limits was involved; hence we conclude that the case is not here controlling.

This case depends upon the contract settling disputes and the legal effect of the words: "On and after the first day of April, 1903, the said party of the first part shall transport any person from any point or place within the corporate limits of the city of Tacoma, on any line or lines of street railway owned, operated or controlled by said party of the first part, to the terminus of its line in Point Defiance Park, for a single fare not exceeding five cents."

Some point is made by respondent of contemporaneous construction, or acquiescence in the contract as construed by the city. Being satisfied that the contract is broad enough to cover the position of the city, we shall not pursue this contention, except to say that, were we doubtful as to the law, it might be invoked to aid an interpretation of the contract.

It is strenuously contended that the construction we have put upon the contract would work an unwarranted hardship on the railway company, if, for instance, the boundaries of the city were so extended as to meet the boundaries of the city of Seattle. That is a condition that is not before us. We can only assume that, before the railway company extends its line to an unreasonable distance from the business centers of the city, it will enter into a contract with reference thereto, and take a franchise under such terms as may be satisfactory to it. Here we have an existing track over which cars have been and are being run without interruption and as a part of the city system. A trip initiated in one city and ending in another could not be held to be within the terms of a city franchise. Such roads are held to be inter-urban, and subject to other regulations. Furthermore, we are of the opinion that the right of the county to control the operation of appellant's Fern Hill line died with annexation, ⁴¹⁵ and the right to operate must be held to be amenable to the will of the constituted authorities of the city of Tacoma.

The judgment of the lower court is affirmed.

Rudkin, C. J., Dunbar, Crow and Morris, JJ., concur.

An Ordinance Granting Certain Privileges to a Street Railway Company, and requiring it to carry passengers within the city limits on certain terms, applies to the city limits as subsequently extended and to an extension of the line by purchase or otherwise: *People v. Detroit United Ry.*, 162 Mich. 460, 139 Am. St. Rep. 582.

A Line Acquired by Purchase is a Part of a Street Railway System, and included within a provision of an ordinance granting a franchise to the company to construct its road through a township, providing that the rate of fare from any point in the township to the city of Detroit, and vice versa, shall at no time exceed the rate fixed by the company from Pontiac to Detroit, and vice versa: Township of West Bloomfield v. Detroit United Ry., 146 Mich. 198, 117 Am. St. Rep. 628.

Existing Corporate Limits are not Alone Contemplated by a provision of the constitution that no railroad thereafter constructed shall pass within three miles of a county seat without passing through it, and the provision is satisfied by passing through the limits of a county seat as subsequently enlarged: State v. Mobile etc. Ry. Co., 86 Miss. 172, 122 Am. St. Rep. 277.

TRUMBULL v. JEFFERSON COUNTY.

[60 Wash. 479, 111 Pac. 569.]

APPEAL—Dismissal—Cause Subsequent to Judgment.—Matters outside of the record, occurring after judgment, which affect the right of an appellant to prosecute his appeal, may be shown to and considered by the appellate court on a motion to dismiss. (pp. 480, 481.)

APPEAL—Dismissal—Cause Prior to Judgment.—No showing of a cause for dismissal of an appeal, occurring prior to the judgment, should be allowed outside of the record. Such cause must be incorporated in the record by the proper procedure. (p. 481.)

LIS PENDENS—Transfer of Interest.—An Appeal will not be Dismissed upon a showing of a transfer of the appellant's interest in the property affected, subsequent to the filing of a lis pendens, where no claim was predicated upon the transfer in the court below, and during a trial upon the merits the movant treated the appellant as the party in interest. (pp. 481, 483.)

LIS PENDENS—Transfer of Interest.—An Action to Vacate a tax foreclosure sale, brought against a county, does not abate by a transfer of the interest of the county subsequent to the filing of a lis pendens. Under the doctrine of lis pendens the transferee, if he so elects, should be permitted to obtain, in the name of his grantor, by appeal if necessary, any benefit resulting from the litigation. (p. 482.)

A. W. Buddress and James W. B. Scott, for the appellants.

Trumbull & Trumbull, for the respondents.

479 CROW, J. This action was commenced by Thomas F. Trumbull and Lida P. Trumbull, his wife, against Jefferson county and Harry Hart, its treasurer, to vacate a tax foreclosure judgment and set aside a tax deed affecting real estate to which the plaintiffs claim title. From a decree in their favor, the defendants have appealed.

The present hearing is upon respondents' motion to dismiss the appeal. They contend that, since the commence-

ment of the action and prior to judgment, the county conveyed its interest in the real estate to one P. M. Coyne; that the appellants are not aggrieved by the final judgment, and cannot prosecute this appeal. In support of their motion ⁴⁸⁰ they have filed affidavits and certified copies of records showing that, when this action was commenced, they filed a notice of lis pendens with the auditor of Jefferson county, and that on the next day the appellant Harry Hart, as treasurer of Jefferson county, sold to P. M. Coyne all the right, title and interest of the county in and to the real estate. The transcript shows that the action was commenced on April 10, 1908. No suggestion of the sale to Coyne appears in any of the pleadings, although the issues were not completed until March 9, 1910, the date of the trial. From the statement of facts it appears that the cause was tried on the issues raised between the respondents and appellants; that no mention of the transfer to P. M. Coyne was made during the trial, and that no motion was made to substitute him as a defendant.

Respondents' contention is that, by reason of the transfer, the county has no further interest in the subject matter of the action, and that the controversy has ceased. In support of their contention they cite a number of cases from this court in which it appeared that some action such as a satisfaction of the judgment had occurred, which determined the controversy. Here nothing changing the situation of the parties has occurred since judgment. The deed upon which respondents now predicate their motion to dismiss was executed and recorded almost two years before the trial. Not a suggestion of the transfer was made prior to trial, judgment or appeal. The statement of facts has attached thereto the certificate of the trial judge, under date of June 13, 1910, that it contains all material facts, matters and proceedings theretofore occurring in the cause and not already a part of the record. The appellants now support their motion by a showing that the transfer was made prior to the framing of the issues, after the commencement of the action, and long prior to trial or judgment. Matters outside of the record occurring after judgment, which affect the right of an appellant to prosecute his appeal, may be shown to and considered by the appellate court on a motion to dismiss. But ⁴⁸¹ no such showing should be permitted as to matters occurring prior to judgment. They should be incorporated in the record by proper procedure at the instance of the litigant who intends to rely upon them. In *Merriam v. Victory Min. Co.*, 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997, discussing this rule of practice, the court well said: "It is quite well settled that evidence of facts outside of the record occurring after the rendition of the judgment in the court below, and which affect the proceedings of the

appellate court, when deemed necessary, will be received and considered by such court for the purpose of determining its action: *Ehrman v. Astoria R. Co.*, 26 Or. 377, 38 Pac. 306; *Dakota County v. Glidden*, 113 U. S. 222, 5 Sup. Ct. Rep. 428, 28 L. ed. 891; *Elwell v. Fosdick*, 134 U. S. 500, 10 Sup. Ct. Rep. 598, 33 L. ed. 998. But the record of the court below, upon which the appeal is based, cannot be contradicted or varied by an *ex parte* showing in the appellate court."

Notwithstanding the existence of the alleged transfer to Coyne, made two years prior to the trial, the respondents failed to plead or prove the same. They predicated no claim on the transfer in the court below, but during the trial upon the merits, at all times treated the county and its treasurer as the only necessary parties in interest. A *lis pendens* was filed, and anyone thereafter making a purchase of the land would be bound by the judgment against the appellants to the same extent as if he were a party to the action: *Rem. & Bal. Code*, secs. 243, 803, 806. Our code expressly provides that no action shall abate by the transfer of any interest therein. In *Box v. Kelso*, 5 Wash. 360, 31 Pac. 973, this court said: "At common law the death of the plaintiff, or the termination of his interest in the subject matter of the action, was good ground upon which to base a plea in abatement. But under our statute the rule is different. By section 134 (179, *Rem. & Bal.*) of the Code of Procedure, it is provided that 'every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law.' But this ⁴⁸² section must be taken in connection with section 147 (193, *Rem. & Bal.*), by which its operation is limited. The latter section provides that 'no action shall abate by the death, marriage or other disability of the party, or by the transfer of any interest therein, if the cause of action survive or continue; but the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his representatives or successors.' Under the provisions of section 147 this action did not abate, even if, as appellants claim, the interest of the respondents therein was transferred to their assignee *pendente lite*. And this being so, we think that the respondents were entitled to prosecute it, in their own names, to final judgment. If the assignee became entitled to the interest of the plaintiffs in the action, he was the proper party to move in the matter of substitution, and not the defendants: *Smith v. Harrington*, 3 Wyo. 503, 27 Pac. 803. As against the latter the plaintiffs had a right to remain in court until their case was tried: *Moss v. Shear*, 30 Cal. 467."

After the county transferred its interest to Coyne, he either could have been substituted as a party defendant on

his motion, or he could have consented to a continuation of the action in the name of his grantors for his benefit. The final judgment would adjudicate his rights. Under the doctrine of *lis pendens*, if he so elected, he should be permitted to obtain in the names of his grantors, by appeal if necessary, any benefit resulting from the litigation. Had the county obtained judgment, the present respondents could have prosecuted an appeal, and they cannot now insist that rights of the appellants' vendee cannot be protected by an appeal prosecuted by his grantors for his benefit.

In a footnote to *Stout v. Philippi Mfg. & Mercantile Co.* (41 W. Va. 339, 23 S. E. 571), 56 Am. St. Rep. 843, at page 857, Mr. Freeman, sustaining his position by numerous citations of authority, thus states the rule: "The rule of *lis pendens* is, as to persons and property within its operation, that a court having jurisdiction of a suit or action is entitled to proceed to the final exercise of that jurisdiction, and that it is beyond the power of either ⁴⁸³ of the parties to prevent its doing so, by any transfer or other act made or done after the service of the writ, or the happening of such other act as may be necessary to the commencement of *lis pendens*. If either of the parties assumes to make, after the law of *lis pendens* has become operative, any transfer of the subject matter of the litigation, or to create any encumbrance or charge against it, or to enter into any contract affecting it, or to deliver possession of it to another, the action or suit may proceed without taking any notice whatever of such transfer, encumbrance, or change in possession, and the final judgment or decree, when entered, may be carried into effect notwithstanding the attempted dealing with the subject matter thereof;"

The rule thus stated should be applied for the benefit of the vendee of either party, and we hold that the appellants, on the record before us, are entitled to prosecute this appeal for the benefit of their grantee who obtained his rights, subsequent to the commencement of this action and the filing of the notice of *lis pendens*. When a party makes a purchase of real estate the subject matter of a pending action, such action will be deemed as still pending until its final determination on appeal, and a motion to dismiss the appeal because of such purchase and transfer should be denied, as the appeal is for the benefit of the vendee: *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844.

In *Moore v. Jenks*, 173 Ill. 157, 50 N. E. 698, the court said: "It is well settled that, while a grantee or vendee or assignee *pendente lite* may not be a necessary party to the proceeding, yet his interests are represented by the vendor or grantee or assignor, who is a defendant to the proceeding. Thus, in *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233, 38

N. E. 762, we said: The purchaser pendente lite 'is not a necessary party, because his vendor or grantor continues as the representative of his interests, and the plaintiff or complainant may ignore his purchase and proceed to final decree against the original parties.' It follows that, under the circumstances of this case, appellant has a right to appeal as the representative of those holding under him, who are not parties to the suit. It would be a gross injustice ⁴⁸⁴ to hold that a purchaser pendente lite is not a necessary party to a proceeding, and yet to hold that he has no right to appeal, or right of review by writ of error, through the defendant under whom he holds."

The motion is denied.

Rudkin, C. J., Dunbar, Chadwick and Morris, JJ., concur.

The Law of Lis Pendens is the subject of an extended note to Stout v. Philippi, 56 Am. St. Rep. 853; and see the subsequent cases of Alexander v. Munroe, 54 Or. 500, 135 Am. St. Rep. 840; Chicago v. Northwestern Ry. Co. v. Garrett, 239 Ill. 297, 130 Am. St. Rep. 229; McVay v. Tousley, 20 S. D. 258, 129 Am. St. Rep. 927; Baker v. Baker, 108 Md. 269, 129 Am. St. Rep. 439; Tidball v. Schmeltz, 77 Kan. 440, 127 Am. St. Rep. 424; Young v. Davis, 50 Wash. 504, 126 Am. St. Rep. 910; Munger v. Beard & Bro., 79 Neb. 764, 126 Am. St. Rep. 688; Hulen v. Chilcoat, 79 Neb. 595, 126 Am. St. Rep. 681; Bannard v. Duncan, 79 Neb. 189, 126 Am. St. Rep. 661; Turner v. Edmonson, 210 Mo. 411, 124 Am. St. Rep. 739; Harrod v. Burke, 76 Kan. 909, 123 Am. St. Rep. 179; McCord v. Akeley, 132 Wis. 195, 122 Am. St. Rep. 956.

CASES

IN THE

SUPREME COURT

OF

WEST VIRGINIA.

KISER v. McLEAN.

[67 W. Va. 294, 67 S. E. 725.]

OIL AND GAS—Exception of in Grant of Land.—In a grant of land, an exception of the oil and gas and the right to go upon the land for the same is not defeated by covenants for quiet possession of the land and freedom from encumbrances thereon. Such covenants relate only to the thing conveyed—the land without the oil and gas—the land burdened with the right to operate thereon for the oil and gas retained. (p. 949.)

DEEDS.—Covenants in a Deed That are Plainly Intended to Defend that which has been granted must be construed to be only coextensive with the grant. (p. 950.)

OIL AND GAS.—Mere Possession of the Surface of Land as to which the title to the oil and gas in place thereunder has been severed is not possession of that oil and gas. (p. 950.)

OIL AND GAS—Possession by Owner of Surface.—Oil and gas severed in title from that of the land under which they lie are not in the possession of the owner of the surface, unless he takes actual physical possession of them, as by drilling wells into the same. (p. 950.)

OIL AND GAS—Forfeiture for Nonentry—Payment of Taxes. On a claim of forfeiture for nonentry of oil and gas which have been severed in title from that of the land under which they lie, it will be presumed that the land was assessed and taxed as a whole at the time of the severance, that it has since been carried on the land books in the same manner, and that the taxes have been paid on the land as a whole, when the contrary does not appear. (pp. 950, 951.)

(Syllabi by the court.)

Charles E. Hogg and Warren Miller, for the appellant.

Wm. O. Parsons, Jno. H. Riley, Brown, Jackson & Knight and Price, Smith, Spilman & Clay, for the appellees.

295 ROBINSON, P. The bill is one to remove cloud from title. Plaintiff seeks to annul an oil and gas lease which he asserts others without right have placed upon his land. The case was heard on a demurrer to the bill, the answers of the defendants, and an agreed statement of facts. The court dismissed the bill and plaintiff appealed.

Mary A. D. Bruen, trustee, conveyed the land to the plaintiff in 1882. The beneficiaries for whom she as trustee held

(948).

title joined in the deed. The granting clause contained the following exception: "Reserving and excepting however from the effects and operation of this conveyance all the petroleum and natural gas together with a right of way over and across the above described tract of land and whatever else may be necessary to a full and free enjoyment of this reservation." At the time of the conveyance an oil and gas lease covered the land. Later leases of this oil and gas were made by Bruen, trustee, or her successor in title. All of these prior leases expired. Then a lease to John H. Riley was made by McLean, trustee, successor to Bruen. It is this lease to Riley that the ²⁹⁶ bill seeks to have canceled as a cloud on plaintiff's title to the land.

The gist of plaintiff's case is that the exception of the oil and gas in the deed is of no avail because it is repugnant to the covenants contained in that deed. The clause containing these covenants is as follows: "The said parties of the first part hereby covenant that the said John P. Kiser shall have quiet possession of said land free from all encumbrances; and further that they, the said parties of the first part, will warrant generally the property hereby conveyed." Plaintiff maintains that the deed vested in him the title to the oil and gas, and, therefore, that McLean, trustee, had no title thereto which he could lease to Riley. In other words, it is insisted that these covenants enlarge the grant so that the exception does not retain title to the oil and gas in the grantors—that the exception cannot prevail because it would prevent quiet enjoyment and freedom from encumbrances.

The exception and the covenants are not repugnant. The covenants relate only to the property granted. That property is the land without the oil and gas. It is the land burdened with the right of the grantors to get the oil and gas which they have retained thereunder. The oil and gas and the right to go upon the land for them are not granted by the deed. The granting clause itself says that they are excepted from "the effect and operation of this conveyance." If the deed had no effect or operation upon the oil and gas and the right to go upon the land for them, then, of course, those things were not granted to plaintiff. They were retained. Title thereto remained in the grantors: *Preston v. White*, 57 W. Va. 278, 50 S. E. 236, and other cases. Is it reasonable to say that the grantors intended the covenants to refer to the things which were not conveyed? The covenants refer to "the said land" and to "the property hereby conveyed." Now, what is meant by "the said land"? Certainly, the land that is granted is meant, which land is that without the oil and gas and upon which is retained a right to produce the oil and gas. And what is meant by "the property hereby conveyed"? Exactly the same thing—the land

without the oil and gas and upon which land is a right to operate for those products. Let us observe the plain intention of the grantors disclosed by the deed as a ²⁹⁷ whole. That intention must control our construction: *Uhl v. Ohio River R. R. Co.*, 51 W. Va. 106, 41 S. E. 340. Did the grantors mean to defend in plaintiff that which they plainly did not intend to grant him? Did the grantors intend the exception which they made in the conveyance to be wholly defeated by the covenants they made therein? Surely not. If so, why insert the exception at all? Why retain the oil and gas and a right to go upon the land, and then covenant that they would never claim the retained property, nor exercise the right? The covenants are limited and restricted by the granting clause: *Brewster on Conveyancing*, secs. 207, 208. Their office is merely to defend that which has been granted. They are only coextensive with the grant: 8 Am. & Eng. Ency. of Law, 2d ed., 66. Clearly, they were never meant to defeat the exception in the grant. That exception left the oil and gas vested in the grantors as a separate corporeal property. The covenants do not affect such estate in the grantors or those who hold under them.

The admitted facts that defendants and those under whom they claim have never had actual physical possession of the oil and gas under plaintiff's land, that they have never had the same separately assessed, and have never paid taxes thereon, and that plaintiff has had exclusive possession of the tract of land since the date of the deed, do not destroy the title of defendants to the oil and gas and the right in relation thereto. Defendants and those under whom they hold have been the true owners of the severed estate in the oil and gas, and have been in constructive possession of the same since the making of the deed to plaintiff. Every owner of property has such possession if he is not actually possessed himself or ousted from possession by another. Certainly the plaintiff has not had actual possession so as to oust the owners of the oil and gas of their title. His possession of the land from which the title to the oil and gas thereunder has been severed by the exception does not give him possession of that underlying oil and gas. Though he own the surface and all other strata, he does not own the oil and gas. His possession of the surface cannot constructively extend to them: *Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A., N. S., 558. He can only take possession of them by drilling wells. This he has not done. While it appears that the owners of the oil and gas have not had the same separately assessed and have not paid ²⁹⁸ taxes thereon, yet it is not shown that the land has not been taxed as a whole. We must presume that the land was taxed as a whole at the time the oil and gas were severed in title by the exception in the deed, that the

land has since been carried on the land books in the same manner, and that all the taxes have been paid: *Sult v. A. Hochstetter Oil Co.*, 63 W. Va. 317, 61 S. E. 307. At any rate, if there had been a forfeiture of the title to the oil and gas, it could not have availed plaintiff. He has had no such possession of that oil and gas as would transfer title to him under the constitution, even if the state had acquired title by forfeiture.

Plaintiff failed to show any cloud on his title. That which he claimed as such is shown to be a distinct and valid title in nowise conflicting with the title which he holds in the land. His title does not extend to the oil and gas and the right to produce them. Therefore, the severed title to the oil and gas and the right on the land in relation to the same, existing as it does in defendants, cannot interfere with that which belongs to him. The decree is right and it is affirmed.

WHAT POSSESSION BY THE OWNER OF THE SURFACE ESTATE CONSTITUTES ADVERSE POSSESSION OF A SEVERED MINERAL ESTATE.*

- I. Nature of Surface and Mineral Estates When Severed, 951.
- II. Effect of Possession Under Conveyances of the Whole Estate.
 - a. General Rule, 953.
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 - a. Insufficiency of Mere Possession of the Surface, 956.
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- VI. Effect of Nonuse by Mineral Owner, 964.
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I. Nature of Surface and Mineral Estates When Severed.

In the consideration of the subject of this note it is quite essential that attention be paid to the nature and character of the estates which are created by a severance of the title to the minerals from

***REFERENCES TO MONOGRAPHIC NOTES.**

Gain or loss of title by abandonment, not including questions under statutes of limitation: 135 Am. St. Rep. 889.

Right of owner of surface as against owner of minerals thereunder: 135 Am. St. Rep. 131.

Possession of part as possession of the whole: 125 Am. St. Rep. 302.

Adverse possession of one tenant in common and creation of prescriptive title thereby: 109 Am. St. Rep. 609.

Adverse possession: 28 Am. St. Rep. 158.

Effect of bar of the statute of limitations: 95 Am. St. Rep. 656.

What constitutes color of title within the meaning of law of adverse possession: 88 Am. St. Rep. 701.

that of the surface, since any confusion which may exist in the minds of any of the profession relative to the general rules applicable to this subject is caused by a failure to properly distinguish the effect of such severances.

Minerals lying beneath the surface or on the surface, when not severed from the earth, are deemed part of the land: *Jennings v. Bloomfield*, 199 Pa. 638, 49 Atl. 135; *Murray v. Allred*, 100 Tenn. 100, 66 Am. St. Rep. 740, 43 S. W. 355, 39 L. R. A. 249; *Southern Oil Co. v. Colquitt*, 28 Tex. Civ. 292, 69 S. W. 169; *Wilson v. Youst*, 43 W. Va. 826, 28 S. W. 781, 39 L. R. A. 292. And the same is true of petroleum or mineral oil in place: *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317, 63 Am. St. Rep. 721, 49 N. E. 399, 39 L. R. A. 765; *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222.

Minerals in place, being deemed part of the land, may be severed in title from that of the surface. In other words, one person may own the surface and another the minerals in the same land, since there may be a cleavage of corporeal real estate horizontally as well as vertically: *Fairbanks v. San Francisco etc. Ry. Co.*, 115 Cal. 579, 47 Pac. 450; *Hartford etc. Ore Co. v. Miller*, 41 Conn. 112; *Brand v. Consolidated Coal Co.*, 219 Ill. 543, 76 N. E. 849; *Kincaid v. McGowan*, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289; *Jones v. American Assn.*, 120 Ky. 413, 86 S. W. 1111; *Arnold v. Stevens*, 24 Pick. (41 Mass.) 106, 35 Am. Dec. 305; *Wardell v. Watson*, 93 Mo. 107, 5 S. W. 605; *Canfield v. Ford*, 16 How. Pr. 473; *Smith v. Jones*, 21 Utah, 270, 60 Pac. 1104; *Interstate Coal etc. Co. v. Clintwood Coal etc. Co.*, 105 Va. 574, 54 S. E. 593; *Morison v. American Assn.*, 110 Va. 91, 65 S. E. 469; *Peterson v. Hall*, 57 W. Va. 535, 50 S. E. 603.

After severance, the surface and minerals are held by separate and distinct titles in severalty, and each is a freehold estate of inheritance. Each may be conveyed by deed or pass by inheritance and has all of the attributes and incidents peculiar to the ownership of land: *Ames v. Ames*, 160 Ill. 599, 43 N. E. 592; *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 322; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433; *Lillibridge v. Lackawanna etc. Co.*, 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035, 10 L. R. A. 627; *Hutchinson v. Kline*, 199 Pa. 564, 49 Atl. 312.

The severance of minerals from the surface of lands may be accomplished by a conveyance of the mines and minerals, or by a conveyance of the land with a reservation or exception of the mines and minerals: *Gordan v. Park*, 219 Mo. 600, 117 S. W. 1163; *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433. Where coal and minerals in place have been severed from the title to the surface, they are deemed to be land within the meaning of that word as used in the statute, which provides that when a person enters under color of title upon vacant and unoccupied land and pays the taxes thereon for seven successive years, he shall be adjudged to be the owner of such land: *Catlin Coal Co. v. Lloyd*, 176 Ill. 275, 52 N. E. 144.

Where the title to the mineral estate is separated from that of the surface estate, the right to either may, of course, be barred by the statute of limitations: *Kincaid v. McGowan*, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289.

Ordinarily, the right to own and take a mineral, the title to which has been severed from that of the surface, is confined to the owner

ship and taking alone, and cannot otherwise interfere with the rights of dominion and possession of the owner of the balance of the land. It is simply a right to enter and go upon the land and take therefrom the minerals conveyed, and when that is done the right is exhausted. The mineral owner ordinarily has only a right of possession to the extent of occupying so much of the land as may be necessary and proper for such taking. His possession for such purposes is not at all inconsistent with the other rights of possession and ownership of the balance of the land: *McBurney v. Glenmary Coal & C. Co.*, 121 Tenn. 198, 130 Am. St. Rep. 770, 118 S. W. 694.

II. Effect of Possession Under Conveyances of the Whole Estate.

a. **General Rule.**—The owner of the surface is *prima facie* the owner of the minerals underneath the surface. Hence a general conveyance of land without any exception or reservation of the minerals therein carries with it the minerals therein as well as the surface: *Stinchfield v. Gillis*, 107 Cal. 84, 40 Pac. 98; *Phillips v. Collinsville Granite Co.*, 123 Ga. 830, 51 S. E. 666; *Kincaid v. McGowan*, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289; *Richards v. Potter (Ky.)*, 124 S. W. 850; *Yellow Poplar Lumber Co. v. Thompson's Heirs*, 108 Va. 612, 62 S. E. 358; *Delaware etc. R. Co. v. Gleason*, 159 Fed. 383, 86 C. C. A. 383; *Montana Min. Co. v. St. Louis Min. etc. Co.*, 204 U. S. 204, 27 Sup. Ct. Rep. 254, 51 L. ed. 444; *Rowbotham v. Wilson*, 8 H. L. Cas. 348, 11 Eng. Reprint, 463.

"It is, no doubt, the general presumption," said the court in *Armstrong v. Caldwell*, 53 Pa. 284, "that a party who has possession of the surface of land has possession of the subsoil also, because, ordinarily, the right to the surface is not severed from the right to the strata below the surface. But this presumption does not exist when these rights are severed. Each then becomes a distinct possession. In such a case, the possession of the surface, following the right, is as distinct from the possession of the minerals or subsoil strata, which have been severed in right, as is the possession of one tract of land from that of another not in contact with it. Hence it is settled that when, by a conveyance or reservation, a separation has been made of the ownership of the surface from that of the underground minerals, the owner of the former can acquire no title by the statute of limitations to the minerals, by his exclusive and continued enjoyment of the surface: *Caldwell v. Copeland*, *Wright*, 427. Nor does the owner of the minerals lose his right or his possession by any length of nonuser: *Seaman v. Vawdrey*, 16 Ves. 390; *Smith v. Lloyd*, 9 Ex. 562. He must be disseised to lose his right; and there can be no disseisin by act that does not actually take the minerals out of his possession. There seems to be no reason why the statute of limitations should not be held applicable to all corporeal hereditaments, including those that are only subsurface rights. The British statute of 3 and 4 William IV, chapter 27, certainly is applicable to such rights, and it can hardly be said to be more comprehensive than ours. In *Caldwell v. Copeland* it was said that adverse possession of the mine, by the owners of the surface, for the statutory period would avail as title. But such possession must be distinct from that of the surface. It is unaided by surface rights or surface occupancy."

b. **Conveyances Subsequent to Severance Which Fail to Except or Reserve the Minerals.**—The fact that subsequent to the severance of

the minerals from the surface estate a conveyance of the land is made in which no reservations or exceptions of the minerals are set forth does not extinguish the rights of the mineral owner nor vest any of the mineral rights in the grantee of such a conveyance: *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216, 54 N. E. 214; *Moore v. Griffin*, 72 Kan. 164, 83 Pac. 395, 4 L. R. A., N. S., 477; *Marvin v. Brewster Iron M. Co.*, 55 N. Y. 538, 14 Am. Rep. 322; *Baker v. McDowell*, 3 Watts & S. 358; *Murray v. Allred*, 100 Tenn. 100, 66 Am. St. Rep. 740, 43 S. W. 355, 39 L. R. A. 249; *Seaman v. Vawdrey*, 16 Ves. Jr. 390, 33 Eng. Reprint, 1032.

Hence where the mineral estate has been severed from the surface estate, a mere constructive possession under color of recorded deeds, which convey the full title with no exceptions or reservations of the mineral estate theretofore severed, cannot operate as adverse possession nor as notice of an adverse claim. Such deeds which are silent as to mining rights which have been severed can only be construed as conveying only such title as the grantor had: *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433.

III. Effect of an Adverse Possession of Surface Commenced After the Severance.

Where a lease for nine hundred and ninety-nine years excepting the minerals with the right to mine without liability for injuries to the surface, was duly recorded, a person whose adverse possession of the surface commenced after the recording of the lease could acquire only rights as against the estate for years and not as against the rights of the owner of the minerals and mining rights: *St. Vincent's etc. Congregation v. Kingston Coal Co.*, 221 Pa. 349, 70 Atl. 838.

IV. Effect of an Adverse Possession of Land Commenced Before Severance of Mineral Estate.

Where a person is in the adverse possession of land at the time that the owners of the legal title sell the underlying coal to another, who records his deed but does not go into actual possession, the adverse possession of the person who was in such possession will nevertheless continue as against the owner of the severed mineral estate in the same manner as if no severance had taken place: *Finnegan v. Stineman*, 5 Pa. Super. Ct. 124. In the case cited, which was a very well-considered case by the intermediate court of appeals of Pennsylvania, the court, speaking through President Judge Rice, said: "But it is to be observed that there is no evidence, at least none was admitted on the trial, that E. W. Giddings ever took actual possession under his lease. We have, then, the simple question whether the mere recording of a conveyance of the coal stops the running of the statute of limitations in favor of one in the actual, adverse and exclusive possession of the land under color of title at the time the conveyance was made. If it were a conveyance of the surface, the question would be free from difficulty and would require no discussion. Why should it be held that the mere recording of a conveyance of the coal has a different effect upon the continuity of the possession of the holder of the adverse title? We can discover no satisfactory reason for so holding. The cases do, indeed, decide that where, by deed, there has been a severance of the right to the surface from the right to the underlying coal, the owner of the minerals

will not lose his right or his possession by any length of nonuser, and in such a case the owner or subsequent occupier of the surface can acquire no title by the statute of limitations to the minerals by his exclusive and continued occupancy and enjoyment of the surface merely: *Seaman v. Vawdrey*, 16 Ves. 390; *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436; *Armstrong v. Caldwell*, 53 Pa. 284; *Phoenix Iron Co. v. Lewis*, 7 Cent. Rep. 515; *Kingsley v. Hillside C. & I. Co.*, 144 Pa. 613, 23 Atl. 250; *Plummer v. Hillaide C. & I. Co.*, 160 Pa. 483, 28 Atl. 853; *Algonquin C. & I. Co. v. Northern C. & I. Co.*, 162 Pa. 114, 29 Atl. 402; *Ashman v. Wigton*, 9 Cent. Rep. 629. But in all of these cases the claim of title by possession of the surface had its inception after it and the underlying coal strata had been severed in title. They were then two distinct possessions, the possession of the holder of each estate being referable to his title, unless by unequivocal acts that would give title to a stranger he has extended it upward or downward as the case may be. Of such a case it is held: 'He (the owner of the coal) must be disseised to lose his right; and there can be no disseisin by act that does not actually take the minerals out of his possession': *Armstrong v. Caldwell*, 53 Pa. 284. But here disseisin of the coal as well as of the surface had actually taken place before their severance in title. One was as much out of the actual possession of the owner of the asserted legal title as the other. At the date of the lease, and for some years before, John Finnegan was in the actual, open, adverse, and exclusive possession of the land under a claim of right. His deed was on record, and, in connection with his possession, was notice to the world of the extent of his claim, which presumptively included not merely the surface but all beneath and above it, in accordance with the ancient common-law maxim. He claimed and was in possession of the land, which, says Blackstone, 'hath also, in its legal signification, an indefinite extent upward as well as downward': 2 Blackstone's Commentaries, 18. Neither he nor his successors in title ever did anything which could be construed as restricting their possession to the surface merely. Nor, as we have seen, did the purchaser of the coal attempt to oust them, unless the recording of his lease was an ouster—a proposition that we cannot agree to. They continued their possession after the lease as before, and, when the defendant in his mining operations (under an entirely different lease) crossed the line up to which they claimed, they brought this suit. Under the facts necessarily implied in the verdict of the jury, we are clear that they had a right to recover.

"As between the parties to the instrument and their privies, a conveyance of the underlying coal—the grantor retaining the surface—effects severance in title; under our statute the recording of the conveyance takes the place of livery of seisin, and the subsequent possession of the holder of each estate follows his right. But as between the grantee and a third party, who is in the actual, open, adverse, exclusive and peaceable possession of the land at the time, the recording of the instrument is not equivalent to an entry, and—there being no other interruption of his possession—when the full period of twenty-one years from its inception has elapsed, his title to the land becomes perfect."

V. What Acts on Part of Surface Owner Constitute Adverse Possession.

a. Insufficiency of Mere Possession of the Surface.—Inasmuch as the severance of the title of the mineral estate from the surface estate creates two distinct estates which are as distinct as if they constituted two different parcels of land, it naturally follows that the title to one cannot be acquired by adverse possession of the other: Delaware etc. Canal Co. v. Hughes, 183 Pa. 66, 63 Am. St. Rep. 743, 38 Atl. 568, 38 L. R. A. 826; Interstate Coal Co. v. Clintwood Coal etc. Co., 105 Va. 574, 54 S. E. 593; Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 S. E. 358; Morison v. American Assn., 110 Va. 91, 65 S. E. 469. Consequently, the rule is well settled that where the title to minerals is severed from the title to the surface of the land containing them, mere possession of the surface does not carry with it possession of the minerals in place. The possession of the surface owner does not constructively extend to the minerals. Where such a severance exists, the surface owner is in no better position than that of a stranger. The mere possession of the surface is insufficient to constitute adverse possession of the minerals contained in the land. In order to obtain adverse possession of the mineral estate he must show an actual, open and notorious, exclusive, adverse, and hostile possession of the minerals, independent of his possession of the surface: Louisville etc. R. Co. v. Massey, 136 Ala. 156, 96 Am. St. Rep. 17, 33 South. 896; Hooper v. Bankhead (Ala.), 54 South. 549; Houser v. Christian, 108 Ga. 469, 75 Am. St. Rep. 72, 34 S. E. 126; Catlin Coal Co. v. Lloyd, 176 Ill. 275, 52 N. E. 144, 180 Ill. 398, 72 Am. St. Rep. 216, 54 N. E. 214; Arnold v. Stevens, 24 Pick. (41 Mass.) 106, 35 Am. Dec. 305; Gordon v. Park, 202 Mo. 236, 119 Am. St. Rep. 802, 100 S. W. 621; Gill v. Fletcher, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433; Caldwell v. Copeland, 37 Pa. 427, 78 Am. Dec. 436; Armstrong v. Caldwell, 53 Pa. 284; Plummer v. Hillside Coal etc. Co., 160 Pa. 483, 28 Atl. 853; Algonquin Coal Co. v. Northern Coal etc. Co., 162 Pa. 114, 29 Atl. 402; Murray v. Allred, 100 Pa. 100, 66 Am. St. Rep. 740, 43 S. W. 355, 39 L. R. A. 249; Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 S. E. 358; Plant v. Humphries, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A., N. S., 558; Kiser v. McLean, 67 W. Va. 294, ante, p. 948, 67 S. E. 725; Plummer v. Hillside Coal etc. Co., 104 Fed. 208, 43 C. C. A. 490; Seaman v. Vawdrey, 16 Ves. Jr. 390, 33 Eng. Reprint, 1032.

The mere possession of the surface of land in which the title to the minerals has been previously severed will not constitute adverse possession of such minerals, even though the deed under which the possession is held makes no reservation of the minerals: Catlin Coal Co. v. Lloyd, 180 Ill. 398, 72 Am. St. Rep. 216, 54 N. E. 214.

b. Necessity for Actual and not Constructive Possession.—Adverse possession of a mineral estate must be actual as distinguished from constructive: Huss v. Jacobs, 210 Pa. 145, 59 Atl. 991. In other words, the surface owner must be in actual possession of the minerals, apart from his mere possession of the surface, as by operating the mines, in order to constitute adverse possession of the mineral estate: Plant v. Humphries, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A., N. S., 558. The possession must be actual, open, notorious, exclusive and adverse, shown by overt acts of unequivocal character clearly

indicating an assertion of ownership of the mineral estate to the exclusion of the real owner: *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433. Thus in the principal case it was held that oil and gas severed in title from that of the land under which they lie are not in the possession of the owner of the surface unless he takes actual physical possession of them, as by drilling a well into the same: *Kiser v. McLean*, 67 W. Va. 294, ante, p. 948, 67 S. E. 725.

In *Morison v. American Assn.*, 110 Va. 91, 65 S. E. 469, the court said: "Iron ore that is under the surface is not susceptible of actual possession. To have actual possession of iron ore it must be mined."

In *Armstrong v. Caldwell*, 53 Pa. 284, a leading case on this subject, the court, in discussing the question what possessory acts by the surface owner are sufficient to constitute adverse possession where the mineral rights have been severed, observed: "Such possession must be distinct from that of the surface. It is unaided by surface rights or surface occupancy. What, then, is adverse possession of the coal in a tract of land, in a case where the owner of the land has by deed severed the ownership of the coal from the ownership of the surface? Its nature cannot be changed by the fact that it is more difficult of enjoyment. Like adverse possession of every other corporeal hereditament, it must be actual (as distinguished from constructive), exclusive, continued, peaceable and hostile, for twenty-one years, in order to give title under the statute of limitations. There is no reason for adopting a less stringent rule. The owner of the surface can acquire title against the owner of the minerals underneath by no acts, or continuous series of acts, that would not give title to a stranger. If the owner of a coal mine is not in actual possession, and the owner of the surface, or any other person, digs pits or drives adits into the minerals and carries on mining operations there continuously for the statutory period, adversely to the right of any other, he may acquire a right. In such a case he takes actual possession of the entire body of minerals in the tract of land: *Barnes v. Manson*, 1 Maule & S. 77. He may therefore acquire a title to the whole. But inasmuch as there cannot be any residence upon the coal, or cultivation, without continual *pedis possessio*, or retention of the hold upon the mine, there can be no ouster of the owner, and consequently no acquisition of a right. If one digs turfs or cuts wood upon another's land for his own family use, and if he even sells some of the turfs he dug or the wood he cut to his neighbors, it is not pretended that he can acquire title to the land by such conduct, though repeated at intervals through the whole period of twenty-one years. Yet such acts are more notorious, and as much (if not more) a challenge of the owner's right than is taking coal from a coal deposit, by the owner of the surface, for his family use and for the use of his neighbors.

"The court below, therefore, erred in leaving to the jury to find that the plaintiff had acquired title to the coal, by having taken out some of it for family and neighborhood uses, at intervals during twenty-one years, without any evidence that the taking had been constant and continuous. The learned judge seems to have had the impression that a less stringent rule is to be applied to possession of an underground corporeal hereditament than the law demands when the question relates to possession of the surface. He therefore

intimated that there might be such a relaxation of the rule, and left it to the jury to say whether there had been such a possession in this case as is requisite to give title by the statute. This was erroneous for two reasons. One has already been mentioned; and the other is, that it is for the court, and not for the jury, to determine what kind of possession is necessary to give title by the statute. And we are unable to see any evidence of such adverse possession by the plaintiff, or by his father, as justified the submission to the jury of the question whether Armstrong had lost his right." In other words, the same general rules apply in determining what constitutes adverse possession of a mineral estate as apply to land before a severance of the minerals from the balance of the estate. The only difficulty lies in determining what particular acts tend to show a desire on the part of the surface owner to assert an adverse possession, in view of the fact that his mere occupation of the surface is not inconsistent with the rights of the mineral owner.

In *McBurney v. Glenmary Coal etc. Co.*, 121 Tenn. 198, 130 Am. St. Rep. 770, 118 S. W. 694, the court, in discussing this subject, said: "The next question presented is, What constitutes an adverse possession of the mineral strata or deposit, after the title thereto has been separated from the title to the surface? In *White on Mines and Mining*, page 32, the principle is thus stated: 'But where there has once been a severance of the title to the minerals from the title to the surface, the presumption of ownership in the minerals no longer exists in favor of the party in possession of the surface; but, on the contrary, the ownership of the minerals is supposed to follow the title to the same, and, in the absence of proof of the possession of the mineral strata, evidence of the possession of the surface will not avail to establish a title by adverse possession to the minerals.' Barringer & Adams thus state the rule at pages 59 and 69: 'Where the ownership of minerals in place is severed from the ownership of soil or surface, the mere possession of the latter is not such a possession of the minerals beneath as to be adverse. Nor will the non-user of the minerals, or the right to dig them, by the mine owner, convert the possession of the surface owner into an adverse possession of the minerals. The latter must perform some act adverse, hostile to the rights of the mine owner, which prevents him from exercising his rights. The surface owner, setting up the statute, must establish a possession of the mine as such, independently of his possession of the surface. Such a possession must be actual, notorious, exclusive, continuous, peaceable, and hostile for the statutory period; and in these respects the surface owner is in no better position than the stranger. No act or acts on his part will establish title in him which would not give title to a stranger. Actual possession is taken by the opening of mines and carrying on of mining operations.'"

c. **Necessity for Acts to be Hostile to Rights of Mineral Owner.**—It is, of course, elementary that the acts of the person claiming adverse possession must be hostile to the rights of the mineral owner and inconsistent with the legitimate enjoyment of the two estates as separate and distinct estates. Thus a grant of the right to enter on land for mining purposes only and to prospect and mine the same, not being exclusive, the grantor and his subsequent grantees also have the right to prospect and mine on the same land. Under such

circumstances the use of the premises by the grantor and his subsequent grantees for such purposes would not be adverse to the first grantee where he was not excluded from also exercising his rights: *Woodside v. Circeroni*, 93 Fed. 1, 35 C. C. A. 177.

The hostile acts relied on to constitute adverse possession of mineral rights must be such as carry with them a presumption that they would be observed by the owner if he were to visit the premises. Thus adverse possession of a mining claim is not initiated nor maintained by one who merely sinks a shaft of some depth, which already exists on the property deeper by some six or ten feet, and thereafter does no other act upon the property for seven years, since the addition of such a small quantity of ore and waste to a dump would not be likely to attract the attention of the owner should he visit the property: *Costello v. Muheim*, 9 Ariz. 422, 84 Pac. 906. The court in *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 14 Am. Rep. 322, in holding the acts shown in that case to be insufficient to show adverse possession, said: "To work such effect, the act must be hostile and adverse to the rights of the owner of the minerals. That cannot be predicated of the acts displayed in the findings or in the proof. Not an instance is given of any assumption of control over the ore by digging it, or preventing, interfering with or forbidding an attempt to dig it. The only acts shown are those of Downs and others in filling up, at times, and in places, the old cut to the vein, in changing, in places, the course of the old cartway, and putting fences across with bars and openings therein. These were not accompanied with any claim of sole and exclusive right to the entire estate, nor to the way over it. They were not done in avowed hostility and resistance of a claim of right by the grantors of defendant. They were not acts which were, of themselves, of necessity and natural results, hostile to other rights and exclusive of them. All that can be said of them is, that the owners of the surface lands had the use and enjoyment of them, and of the ways over them, but after such sort as was entirely consistent with the existence of a right of the owners of the minerals to use and enjoy them, and 'of way' to them. In fine, there is nothing shown but the suspension on the one side of the exercise of the right to mine, and on the other of acts, during such suspension, entirely consistent with the existence of such right, though suspended in its use. And this applies to all other rights reserved, as well as to the ownership of the minerals and the right to mine for them."

d. **Necessity for Acts to be Open and Continuous.**—A secret entry upon the mineral estate underlying the surface estate made through an opening from adjoining land is not sufficient to create title by adverse possession, even though the mining be done continuously. The entry in such a case is neither open, visible nor notorious, and, hence, is not of such a character as would suggest to the mineral owner that his possession of the minerals under the land was being invaded by an adverse and hostile claimant. The entry in such a case is covert and clandestine, and gives no notice of a hostile claim, nor does it serve to put the mineral owner upon inquiry as to whether his mineral estate is being mined by someone else: *Pierce v. Barney*, 209 Pa. 132, 58 Atl. 152. In the case just cited, the court said: "The character of his possession was not such as to sustain this contention. He had a scrambling, if any, possession of the surface.

He and his wife testify that he began to mine coal for his own use in the old Wadsworth coal-beds in the winter of 1874, and continued the mining for a short period each year till his suit was brought, except during the years of 1876 and 1879. There was no opening to this coal through the surface of the two acre tract, and Appleton obtained access to it for mining purposes, as he testifies, through a drift or tunnel, the mouth of which was a small opening on the side of a ravine more than three hundred feet distant and on the lands of other parties. There was coal on both sides of this drift from its mouth to the premises in dispute. He who successfully defends his title to land by adverse possession must show that the possession was actual, continued, visible, notorious, distinct and hostile for the space of twenty-one years: *Hawk v. Senseman*, 6 Serg. & R. 21; *Mercer v. Watson*, 1 Watts, 330. He must keep his flag flying in a visible and hostile manner: *Plummer v. Hillside Coal & Iron Co.*, 160 Pa. 483, 28 Atl. 853. Appleton's possession of this coal, according to his own testimony, was neither open, visible nor notorious, such as is required in adverse possession to establish a valid title to land. His access to the coal was obtained through a small opening into a mine on the adjacent premises and several hundred feet distant from the land of the appellees. The latter, therefore, had no reason to infer or believe he was entering upon their premises, or had any intention of mining or removing the coal under the two acres of land. On the contrary, the only reasonable inference from his action was that his purpose in entering the mine on the adjacent premises was to remove the coal from that mine, and that he confined his mining operations within the territorial limits of the mine which he entered. His manner of entering the appellee's premises was therefore neither open, visible nor notorious, and hence was not of such a character as would suggest to the appellees that their possession of the coal under the land was being invaded by an adverse and hostile claimant. Such entry was covert and clandestine, and gave no notice to the appellees of a hostile claim to their premises, nor put upon them inquiry as to whether their coal was being mined by Appleton. There was nothing in Appleton's conduct that would lead the appellees to believe that he intended to invade their premises and remove their coal."

Where one holds title under an instrument which expressly reserves the mineral rights and has admittedly "never mined any coal or other mineral or prospected for any coal or other mineral," he cannot be said to have claimed adversely to the owner of the minerals by reason of his possession of the surface: *Louisville etc. R. Co. v. Massey*, 136 Ala. 156, 96 Am. St. Rep. 17, 33 South. 896. Where lands are regularly assessed to the owner of the minerals, and he pays the taxes and makes open and notorious claim to them and the right to mine them, and knew of no adverse claim to them until a short time before suit, it cannot be said that they have been in the adverse possession of the claimant: *Steinman v. Jesse*, 108 Va. 567, 62 S. E. 275.

Adverse possession of mineral rights cannot be acquired by secret trespasses on the rights of the owner: *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433. Thus, occasional prospecting of the land by the surface owner is not sufficient, and especially so where the only mineral right conveyed was the right

on the part of the grantee to prospect and mine, which right, however, was not an exclusive one: *Woodside v. Cicconi*, 93 Fed. 1, 35 C. C. A. 177. The mere fact of sinking a shaft which already existed on the property some six or ten feet deeper is not sufficient in the absence of proof that the act would naturally attract the attention of the owner of the mining claim: *Costello v. Muheim*, 9 Ariz. 422, 84 Pac. 906. The adverse claimant must do some act showing a permanent occupation and use and an appropriation of the mineral rights in a manner which is hostile to that of the owner as distinguished from an occasional or desultory occupation, such as prospecting would be: *Hooper v. Bankhead* (Ala.), 54 South. 549.

A trespasser upon the surface of land from which the mineral estate has been severed cannot acquire any part of the minerals unless he makes his entry upon and maintains his position within the limits of the mineral estate for the required statutory period: *Delaware etc. Canal Co. v. Hughes*, 183 Pa. 66, 63 Am. St. Rep. 743, 38 Atl. 568, 38 L. R. A. 826. In the case just cited, Mr. Justice Williams said: "If a trespasser enters either estate and maintains possession, he can acquire title by the statute of limitations after twenty-one years to so much as he has actually held for that length of time; but his title will not extend above or below the estate on which he enters. If he would acquire any part of the mineral, he must make his entry upon, and maintain his position within, the limits of the mineral estate, for the requisite period of time in an open, notorious, exclusive and continuous manner: *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436; *Armstrong v. Caldwell*, 53 Pa. 284; *Kingsley v. Hillside Coal & Iron Co.*, 144 Pa. 613, 23 Atl. 250. A covert or clandestine entry will not do. Such an entry will confer no right to the wrongdoer until his entry is, or by the exercise of due diligence might be, discovered by the owner. Until then the owner cannot know that his possession has been invaded. Until he has, or ought to have, such knowledge he is not called upon to act, for he does not know that action in the premises is necessary, and the law does not require absurd or impossible things of anyone: *Lewey v. H. C. Fricke Coke Co.*, 166 Pa. 536, 45 Am. St. Rep. 684, 31 Atl. 261, 28 L. R. A. 283; *Scranton Gas etc. Co. v. Lackawanna Iron etc. Co.*, 167 Pa. 136, 31 Atl. 484. Possession to be adverse must be open as well as continuous. The intruder must keep his flag flying in a visible and hostile manner: *Plummer v. Hillside Coal & Iron Co.*, 160 Pa. 483, 28 Atl. 853."

Actual possession of mineral land severed from the surface is taken by the opening of mines and carrying on of mining operations. It is not, however, necessary that work in the mine should have been done every day or within the view of the public for the requisite period of the statute of limitations, but it is necessary that such surface owner should have continued to exercise acts of possession and ownership over it, as by keeping off trespassers, giving permission to persons to take coal therefrom, paying taxes thereon, mining the coal when practical or advantageous, or leasing the mines to others, from all of which the owner of the legal title must have known or inferred that the surface owner was claiming the coal as his own. Actual possession in such a case is deemed continuous if the operations are continuous or are carried on continuously at such seasons as the nature of the business and the customs of the country permit or require and cessation of operations in accordance with

the custom of the neighborhood or necessity occasioned by some natural agency. But there must be something evidencing the possession in the interval which connects the operations when resumed with those which have gone before and to distinguish such possession from a series of repeated acts of trespassers: *Gordon v. Park*, 202 Mo. 236, 119 Am. St. Rep. 802, 100 S. W. 621. In the above case, the court held that the possession of the coal in place which had been severed by grant from the surface had not been continuous for the period of ten successive years at any one time. It appears that some time between the purchase of the land in 1868 and 1874 the mine had been operated for two or three years, after which it was not operated until 1878, when a tenant of the surface owner got out a small quantity of coal upon which he paid the surface owner a small royalty. Then after the lapse of several years the mine was operated during a part of the years 1889, 1890 and 1891. But there were several breaks in the continuity of the possession, and at no time were there ten successive years of actual, adverse, open, hostile, exclusive and continuous possession of the mine before the commencement of the suit. And it was held immaterial that the evidence failed to show any claim or acts of ownership on the part of the plaintiffs to the coal, since they owned the legal title and could not have made it any stronger by exercising ownership over the coal.

A mere scrambling possession or sporadic attempt at mining is not sufficient to create title by adverse possession. Thus, in *Huss v. Jacobs*, 210 Pa. 145, 59 Atl. 991, the court said: "As to the plea of the statute, no inference of abandonment can be drawn in favor of defendants from the absence of Huss in Iowa. He removed to Iowa in 1875, bought property, and made his home there. It would be highly improbable that he would at that distance give his personal attention to one hundred and sixty-four acres of coal he owned in the state of Pennsylvania. Another landed estate, the surface, was on top of his; not any large part of the lower estate could be dug and hauled away by trespassers. His first act of ownership over it would probably be just what it was here—the sale of it. There was not in all these years, so far as we can find from the evidence, a distinct act by the surface owner hostile to his title under the reservation in his deed. Farmers and others at fitful intervals went upon the land, took away some wagon-loads of coal; some of these testified that they had verbal privilege from Huss to do so. The coal banks were scattered, some six or seven, over the tract. No one of them was continuously operated. Occasionally a surface owner or one not a surface owner dug and sold small quantities, but the quantity in no instance was large. Adverse possession of a coal estate must be actual, as distinguished from constructive. We have carefully perused the testimony and it wholly fails to show an open, visible, notorious, exclusive and hostile occupation of the coal land for a period of twenty-one years."

Where land was not fit for cultivation and only suitable for its timber and mines, an adverse possession of it may be acquired by the cutting of timber and the digging of gold thereon by one who claims a prescriptive right to the property, and it is not required that he show that such use and occupation was continuous—that is, from day to day, month to month and year to year: *Saterfield v.*

Randall, 44 Ga. 576. A continuous working of the mine is not required in order to obtain adverse possession of the mineral rights: **New Haven v. Hotchkiss**, 77 Conn. 168, 58 Atl. 753. Thus in **Gordon v. Park**, 202 Mo. 236, 119 Am. St. Rep. 802, 100 S. W. 621, the court said: "It was not necessary, however, that in order to give defendants the benefit of the statute of limitations, that work in the mine should have been done every day or that such work by defendants should have been done within view of the public. 'All the authorities agree that the acts of possession must be visible and continuous for the requisite period in order to create the bar: **Sedgwick & Wait on Trial of Title to Land**, secs. 735, 737. It is not required that an act of ownership shall be done every day or month or at any definite intervals, but they should be of such frequency and character as would at all times apprise the owner that his seisin was uninterrupted and that his title may be endangered': **Golterman v. Schiermeyer**, 125 Mo. 291, 28 S. W. 616.

"To prevent a break in the possession of those claiming possession of the mine, they should have continued to exercise acts of possession and ownership over it, as by keeping off trespassers, giving permission to persons to take coal therefrom, paying taxes thereon, mining the coal when practical or advantageous or leasing the mine to others, from all of which plaintiffs must have known or inferred that defendants would claim the coal as their own."

In **Stephenson v. Wilson**, 37 Wis. 482, the question of what acts of mining constituted adverse possession of the land arose. The mineral estate, however, had not been severed from the surface estate. It was urged by counsel that the carrying on of mining operations were not such acts of possession as would amount to adverse possession under the statute. The court, however, held that the actual occupation and possession of land for mining purposes would constitute adverse possession as much as the cultivation of the soil or raising of crops thereon. The mining was for lead ore and the operations were conducted annually during the winter season and by means of open cuts which were plainly visible. The court, in the course of its opinion, observed: "It may be difficult to lay down any precise rule as to the extent to which such mining operations should be carried on to have that effect [adverse possession]; but should the facts be established which it was proposed to show in **Wilson v. Henry** [35 Wis. 241], we should deem them sufficient for that purpose. In **Jones v. Collins**, 16 Wis. 594, where there was a constant conflict and contest for the possession, this court said the former owner was not dispossessed by the record of the tax deed. And therefore we think that acts of mining and digging for lead ore upon the land—acts which are not merely occasional, fugitive and desultory, but are as continuous and constant as the nature of the business and customs of the country permit or require—do amount to such an assertion of ownership and possession as will interrupt the running of the statute in favor of the tax deed."

The case of **Baker v. Clark**, 128 Cal. 181, 60 Pac. 677, bears in a general way on the question under consideration. In that case the conveyance was held by the court to convey merely a license to work a mine which was situated upon land of the grantor and not a title to the premises in fee simple. The court held that the grantor had become reinvested with the title by adverse possession. The

character of the acts constituting such adverse possession is not very clearly shown by the opinion in the case except that he was in the open, notorious, uninterrupted, adverse and exclusive possession of the premises, claiming the same in his own right, substantially inclosing and cultivating them and paying all taxes assessed thereon.

VI. Effect of Nonuse by Mineral Owner.

The rule is well settled that the owner of a mineral estate which has been severed from the surface estate does not lose his right of possession by any length of nonusage. He must be disseised to lose his right, and there can be no disseisin by any act which does not actually take the minerals out of his possession. Mere possession of the surface estate will not constitute adverse possession of the severed mineral estate, even though the owner of the latter estate has not used his estate for the statutory period which constitutes the statute of limitations applicable to land cases: *Hooper v. Bankhead* (Ala.), 54 South. 549; *Henderson v. Virden Coal Co.*, 78 Ill. App. 437; *Arnold v. Stevens*, 24 Pick. (41 Mass.) 106, 30 Am. Dec. 305; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 14 Am. Rep. 322; *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433; *Armstrong v. Caldwell*, 53 Pa. 284; *Kingsley v. Hillside Coal etc. Co.*, 144 Pa. 613, 23 Atl. 250; *Lulay v. Barnes*, 172 Pa. 331, 34 Atl. 52; *Yellow Poplar Lumber Co. v. Thompson's Heirs*, 108 Va. 612, 62 S. E. 358; *Wallace v. Elm Grove Coal Co.*, 58 W. Va. 449, 52 S. E. 485, 6 Ann. Cas. 140; *Seaman v. Vawdrey*, 16 Ves. Jr. 390, 33 Eng. Reprint, 1032.

The general rule in this respect was stated by the court in *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433, as follows: "It is not disputed that title to a mine which has been severed from the title to the surface may be acquired by adverse possession; but this can take place only when the possession is actual, continuous, open, notorious and hostile. It cannot be accomplished by secret trespass upon the owner's rights, and it has been held in many cases that, where there has been a severance of estates, neither the owner of the surface nor the owner of the mine can claim the other's estate merely by force of the possession of his own estate. Nor does the mine owner lose his rights by mere non-user. His title can be defeated only by acts which actually take the mineral out of his possession."

In *Arnold v. Stevens*, 24 Pick. (41 Mass.) 106, 30 Am. Dec. 305, the mineral estate was separated by a conveyance which excepted among other things from the grant "all the iron ore therein contained, together with the privilege of digging and carrying off in some convenient place." Although the court in its discussion of this subject seemed to regard the mineral estate as in the nature of an easement, it applied the rules which it doubtless would have applied had it regarded the mineral estate as one of equal dignity with the surface estate. It was maintained that the right to mine the minerals was lost by nonuser of the right, but the court said: "The exceptions contained in the several instruments, by which the title to this land was conveyed, apprised the owners of the extent of their rights, and their possession must be presumed to be under and according to their title. They did no act inconsistent with the easement claimed by the other party, or which indicated any claim on

their part to the ore on the land. Their estate was subject to this servitude. They made no attempt to throw it off. They did nothing adverse to the rights of the owners of the easement, nothing to which they could object, or which would apprise them of the existence of any hostile claim. No acquiescence, therefore, existed from which a conveyance could be presumed. If the lessors of the defendant have lost their right, it is merely on the ground of nonuser. They have produced good documentary evidence of ownership. No one else has shown any title, and there is no adverse possession. Will a mere omission to work the mine extinguish or transfer the right? In *Doe v. Butler*, 3 Wend. 149, the court, by Sutherland, J., say: 'The presumption of a grant against written evidence of title can never arise from the mere neglect of the owner to assert his rights.' The evidence of title to incorporeal hereditaments and of the transfers of it is governed by most of the same principles which apply to other real estate. If the title to land depended on the same ground, there could be no question. The omission to occupy a house or farm for any length of time, there being no adverse possession of it, would raise no presumption against the title of the owner. The legal possession will be in the owner; for the seisin follows the title. The same presumption applies to the case at bar, and the legal seisin of this incorporeal hereditament is in him who has the title until it is shown he has been ousted. If the omission to occupy raises a presumption against the one party, so it does against the other; for there was no actual occupation, and the legal possession is always presumed to be in the true owner. If the owner of an estate suffer another person to enjoy it and exclude him from it for a great length of time, the presumption is strong that the one has sold and the other has bought it. But if neither has possession, the law raises no presumption about it, but leaves it to rest upon the legal title. If the omission to dig the ore by those who had the title to it raises a presumption that they have parted with it, so the omission by the other party to take possession of the mine raises an equally strong presumption that they have not acquired it. And in the absence or balance of evidence, the legal presumption must prevail that the possession of both was according to their respective titles. . . . The rule is, that rights acquired by use may be lost by disuse. The exclusive enjoyment of certain portions of the common elements of nature, as light, air and water, which seem to be incapable of ownership or of conveyance, are the proper subjects of this rule. And to nothing does it more properly apply than to the right to the use of water for mill purposes. Water privileges are often acquired entirely by priority of occupancy, and, therefore, the continuance of the right should depend upon the continuance of the occupancy. But in the case at bar, the right was neither acquired nor evidenced by use, so we think it cannot be lost by disuse. And as there was no adverse enjoyment to raise the presumption of a conveyance or release of it, the right of those holding the written title remains unimpaired."

In *Seamans v. Vawdrey*, 16 Ves. Jr. 390, 33 Eng. Reprint, 1032, a much cited case, the mines were reserved in a conveyance made in 1704, but in 1761 the title to the whole property was conveyed without such a reservation and upon the usual covenants. It was contended that the fact that the mines had not been operated for many years gave rise to a strong presumption that they had been

released or in some way abandoned. The judgment in the case was rendered by the master of the rolls, who went into the reasons why the right was not lost by such nonuser. He said: "The deed of 1704 contains an express and unequivocal reservation of all mines and veins of salt that might be contained in the estate of Ravenscroft. It was for the purchaser to consider how far it was prudent to take an estate, subject to such a lien, but in fact by the terms of the agreement Mrs. Croxton became as much the owner of the mines as Mr. Yate became owner of the soil. The question is, how those who may now represent her have lost their property or their right to enter upon the enjoyment of it. Not by any actual grant or lease, for none is alleged; but it is said, at this distance of time, a release is to be presumed. I do not clearly see any circumstances from which that presumption is to arise. No adverse possession is alleged. The owner of the soil has had the enjoyment to which he was entitled by the contract, and which is perfectly consistent with the right of the owner of the mines. If it could be shown that he had wrought any mines himself, or had interrupted the other parties claiming as representing Mrs. Croxton, under the reservation of the mines, in working them, that would lay a ground upon which the presumption could stand; but nothing is alleged, except the mere absence of any evidence of the exercise of this reserved right; for I do not see how the circumstance that in the conveyance of 1761 no notice is taken of this reservation can weigh against the persons who represent Mrs. Croxton, if they should think proper to assert her right. There are many cases where from nonuser of a right the inference of abandonment may fairly be made; but that does not apply to such a case as this. It is not so generally true that the owner of mines does work every mine which he has a right to work; and therefore the relinquishment of the right cannot be presumed from the nonexercise of it. It is well known that mines remain unwrought for generations; that they are frequently purchased or reserved, not only without any view to immediate working, but for the express purpose of keeping them unwrought, until other mines shall be exhausted, which may not be for a long period of time. It is impossible, therefore, to infer that this right is extinguished, though there is no evidence of the exercise of it since the year 1704: 19 Ves. 156, 9.

"The case of *Lyddall v. Weston*, 2 Ark. 19, instead of being an authority for the defendant, appears to me to afford an argument by implication against him. The grounds upon which Lord Hardwicke's judgment goes are two: First, that upon examination the probability was great that there were no such mines; secondly, that the crown, having merely reserved the mines, without any right to entry, could not grant a license to enter upon another man's estate for the purpose of working them. That position is liable to considerable doubt, as being inconsistent with the resolutions of the judges in the case of mines in *Plowden* (Plowd. 310, sec. 336). Lord Hardwicke, however, thought it necessary to assume it before he could determine against the validity of the purchaser's objection. Here, first, it is not alleged that there is no probability of mines upon this estate; it is rather admitted that there were; secondly, here is a reservation of a right of entry, upon the want of which Lord Hardwicke laid stress in that case."

Some cases will, however, be found which apparently hold that a nonuser for a period of time analogous to that of the statute of limitations will forfeit certain mining rights, but an examination of such cases will disclose the fact that the mining rights at issue were mere licenses or rights in the nature of easements, or that the assertion of the mining estate was made dependent upon some condition subsequent which did not take place. Thus in *McBee v. Loftis*, 1 Strob. Eq. 90, the court stated that a right to mine in the lands of another was not lost by a nonuser of less than twenty years, but the right in that case was reserved to the grantor upon the condition that he give up or surrender the right if he was satisfied at the end of a year that the mines so to be reserved were not worth working.

The case of *Wilmore Coal Co. v. Brown*, 147 Fed. 931, is another illustration of nonuse or apparent abandonment of mining rights. The court, however, in that case draws a distinction between a case like it, as, for instance, a conveyance of the right upon condition of the payment of royalties, and one in which there has been an outright sale of the mineral rights, to the effect that a neglect in the former case to mine the minerals for a period analogous to the statute of limitations would constitute an abandonment of the mining rights, while it would not in an outright sale. The abandonment of the mineral rights under such circumstances can, however, be found to exist regardless of whether the so-called surface owner has done any acts in respect to the mineral rights which would be considered as showing an adverse possession. In those cases which we have observed of this class the mineral rights were either merely in the nature of a license or impressed with such condition that the neglect of the owner of the mineral rights to perform the conditions worked such a hardship upon the original owner that it was inequitable to allow the rights to further exist. In the case which we have last cited the court said: "Title to land is lost by twenty-one years' adverse possession, by virtue of the statute, and abandonment may well be presumed by analogy, with regard to mining rights and privileges, conditioned on the payment of royalties, where there has been an absolute neglect to mine or pay for a like period. No doubt the lessee here has had no idea of abandoning if he could help it, any more than of personally operating. He may also have made efforts to sell to or interest others, although nothing in this direction seems to have been done for a number of years. Within his legal rights, his purpose is immaterial; but speculative attempts of this kind amount to nothing on the question of abandonment: *Paine v. Griffiths*, 86 Fed. 452, 30 C. C. A. 182. It may be further true that, while in the market in this way from the start, there have been no takers, because of the coal in that section being underestimated, and for lack of full railroad facilities, until Mr. Berwind took hold of it. Taxes have also been paid, the few years they were assessed; and where it was found the coal was being mined, parties were sent to examine and report, and, finally, action was brought on account of it. But all this was *ex parte* and unrelated, and of no consequence. The fact remains that not a thing was done nor a right exercised under the leases for upward of twenty-four years, and looking at it from the standpoint of the lessors, who have waited in all conscience as long as could be expected, they are therefore to be regarded as thrown up—abandoned. It is said, however, that in

Plummer v. Hillside Coal Co., 160 Pa. 483, 28 Atl. 853, followed by the court of appeals of this circuit in a subsequent action between the same parties (104 Fed. 208, 43 C. C. A. 490), even the lapse of sixty years was held not to amount to this. But the distinction between that case and this is manifest. There there was a sale and conveyance of the coal outright for the price of two hundred dollars, which in that early day and place was evidently accepted as its full value, an extra one hundred dollars being provided for in case the coal proved to be abundant and of a certain thickness. Beyond this there was no obligation on the part of the lessee, except the nominal rent of one dollar a year, inserted probably to carry out the idea of a lease, which was the form of conveyance adopted. The consideration to the lessor was not thus the development of the mineral value of the land as here. The lessee bought the coal as it stood in place at a definite price in cash; the only restriction being that he should get it out within the term of the lease—one hundred years. This, as the court is careful to point out, is the controlling distinction, and the case affords no guide, therefore, where it does not appear. Nor, in adopting and following it, can the court of appeals be regarded as recalling or qualifying the law laid down in *Paine v. Griffiths*, 86 Fed. 452, 30 C. C. A. 182, where abandonment was found, under circumstances and with respect to leases closely similar to those in hand."

So, also, where a deed reserved to the grantor the exclusive privilege of working the mines in the land on a condition that he test the land for gold within eighteen months and have the right of digging if it should prove profitable, but if he should fail to test it within that time, his right should cease and be void, it was held that the grantee would have a statutory right to such mines where the grantor had done nothing in the matter and the grantee had been for more than seven years in the notorious, peaceable and adverse use and occupation of the mines: *House v. Palmer*, 9 Ga. 497.

VII. Whether Failure of Mineral Owner to Pay Taxes will Aid Surface Owner.

Where the minerals are severed from the surface estate so as to constitute a separate freehold, the two estates should be assessed separately for taxation purposes: *Consolidated Coal Co. v. Baker*, 135 Ill. 550, 26 N. E. 651, 12 L. R. A. 247; *Sholl v. People*, 194 Ill. 24, 61 N. E. 1122; *Stuart v. Commonwealth*, 94 Ky. 595, 23 S. W. 367; *Wolfe County v. Beckett*, 127 Ky. 252, 105 S. W. 447, 17 L. R. A., N. S., 688; *Powell v. Lantzy*, 173 Pa. 543, 34 Atl. 450; *Waterman v. Davis*, 66 Vt. 83, 28 Atl. 664; *United States Coal etc. Co. v. Randolph County Court*, 38 W. Va. 201, 18 S. E. 566. The same is held true of oil and gas leases where they convey a freehold: *People v. Bell*, 237 Ill. 332, 86 N. E. 593, 19 L. R. A., N. S., 746, 15 Ann. Cas. 511. Sometimes rights under oil leases are separately assessed for taxation under statutes which define such rights as real estate: *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140, 99 Pac. 483, 20 L. R. A., N. S., 211.

But the fact that the owner of the mineral estate, who did not personally operate or mine the minerals, did not pay taxes on his mineral estate, nor have it separately assessed for taxation, and whatever taxes were assessed against the land were paid by the

surface owner, will not avail such surface owner where he only at intervals took out some of the minerals and did not otherwise show an open, visible, notorious, exclusive and hostile occupation of the mineral estate: *Huss v. Jacobs*, 210 Pa. 145, 59 Atl. 991. In the case just cited the court said: "As to neglect to pay taxes by the owner, that has never been held to give title to a trespasser; if there be color of title in a hostile claimant, that fact, in connection with others, will aid in establishing his claim. But there was no color of title in the surface owner; his very deed under which he claimed negatived any title to the coal. Besides, the presumption is the taxes were paid. The law authorizes the assessment and taxation of the mineral separately from the surface; the taxes were assessed against the land alone as a whole, and the owners of the two estates might have adjusted with each other their respective shares; but they did not. If they did not, the county officers neglected their duty in not separating the assessment and collection of the taxes."

Although, under the constitution of West Virginia, lands become forfeited to the state for a failure to enter them for assessment for purposes of taxation, the fact that the owner of oil and gas which have been severed from the ownership of the surface has not had such mineral estate separately assessed, and has not paid the taxes thereon, will not avail the surface owner who has not taken actual physical possession of the oil and gas. It will, however, be presumed under such circumstances that the land was taxed as a whole at the time the oil and gas were severed in title, and that the land has since been carried on the land books in the same manner and that all of the taxes have been paid: *Kiser v. McLean*, 67 W. Va. 294, ante, p. 948, 67 S. E. 725.

Of course, the failure on the part of the owner of the mineral estate to pay the taxes assessed against it, and the payment of such taxes by the surface owner is a circumstance which may be taken into consideration in connection with other facts as tending to show his hostile and notorious possession, where it is done under a color of title.

FULTON v. RAMSEY.

[67 W. Va. 321, 68 S. E. 381.]

APPEARANCE—Waiver of Defects in Service of Process.—Though an appearance in a cause, for any purpose other than to take advantage of defective execution or nonexecution of process, constitutes a waiver of defects in the service of process, the purpose of such appearance must bear some substantial relation to the cause. In other words, it must be a purpose within the cause, not merely collateral thereto. (p. 974.)

APPEARANCE—When not General.—A Mere Inquiry as to whether a continuance can be taken, without waiver of service or offer to move for a continuance, provided it can be done without such waiver, does not amount to a general appearance. (p. 973.)

APPEARANCE.—A General Appearance must be Express or Arise by implication from the defendant's seeking, taking or agreeing to some step or proceeding in the cause, beneficial to himself or detrimental to the plaintiff, other than one contesting the jurisdiction only. (p. 975.)

(Syllabi by the court.)

W. E. Haymond, for the appellant.

Morrison & Rider, Lawrence Greer, Appleton D. Palmer, Benj. A. Richmond and F. C. Nicodemus, Jr., for the appellees.

321 **POFFENBARGER, J.** The sole question in this cause, namely, whether Joseph Ramsey, Jr., George J. Gould and William E. Guy, nonresident defendants, proceeded against by order of publication, appeared herein, in the court below, by attorneys, so as to enable that court to render a personal decree against them, grows out of the operations of what is styled in an agreement, and popularly known, as "The Little Kanawha Syndicate," which agreement **322** is dated December 2, 1901, and was signed by said Ramsey, Gould, Guy and others.

That syndicate seems to have been formed for the purpose of purchasing the Little Kanawha Railroad, large areas of coal lands and other properties in this state, and extending said railroad eastward to Elkins, for connection with the West Virginia Central Railroad, owned by Mr. Gould and his associates, and westward so as to connect with the Wabash Railroad, also owned by them; all with the view of giving said last-mentioned road an outlet to the Atlantic seaboard, developing the coal and timber lands along the connecting lines, and securing traffic for said railroad properties.

By the terms of that contract, Ramsey, Gould and Guy were made syndicate managers, with power to take the title to all syndicate property in their names and make binding contracts concerning the same, all other parties thereto being mere subscribers, without power of management or control.

In anticipation of the launching of this enterprise, Mr. Edward D. Fulton had acquired an option on the Little Kanawha Railroad as well as the title to, and options upon, large areas of coal and coal lands and other property in the counties of Braxton, Gilmer and Lewis. Under certain agreements, and with intent to dispose of the same to the syndicate, he assigned the option on the railroad, at the option price, and assigned his coal and coal land options and conveyed his coal and coal lands, at certain prices, named in the assignments and deeds, to the St. Louis Union Trust Company, to hold as trustee for the syndicate. For some reason, the syndicate concluded to abandon its plan and sell all its property. Accordingly, it failed to carry out its contem-

plated arrangements with Fulton, and he brought this suit, in the circuit court of Braxton county, to compel specific performance of his alleged contract with the syndicate, claiming the right to compel its managers to accept a conveyance of 17,256.19 acres of land and a large purchase money liability in his favor. An attachment was sued out on the ground of nonresidence of the defendants and levied on the land so conveyed to the St. Louis Union Trust Company.

On the first day of December, 1908, the following order, relied upon by Fulton as showing a general appearance, was entered: ³²³ "This day R. W. McMichael and John B. Morrison, attorneys practicing in this court, appeared and asked the court to permit them to appear specially for Joseph Ramsey, Jr., George J. Gould and William E. Guy, as managers of the Little Kanawha Syndicate, and ask a continuance of this cause for thirty or sixty days to enable them to prepare their defense, or to determine whether they would desire to appear generally, and stating that they did not desire to appear generally for said parties at this time, but that they desired to move the court to continue the cause without appearance other than specially for the purposes of the continuance. The plaintiff, by his counsel, resisted the said motion to continue the hearing, and thereupon said counsel for said defendants, Ramsey, Gould and Guy, announced that it was their desire to withdraw and not appear to the case, and thereupon counsel for plaintiff, and while said counsel for defendants were present, asked that the cause be submitted for hearing, and accordingly the said cause was submitted for hearing."

On the next day a decree was entered, reciting service of process upon certain defendants and orders of publication as to Ramsey, Gould, Guy and others, nonresidents, and the order of attachment and orders of publication thereon. By it, the amount of the plaintiff's claim and the lands and other property were ascertained, and it was ordered that, unless Ramsey, Gould and Guy, or someone for them, should pay the plaintiff the sum, \$367,266.18, within sixty days, a special commissioner appointed for the purpose should sell all of the attached coal and coal lands, or enough thereof to pay said debt, interest and cost. This was not a personal decree. On the eighteenth day of March, 1909, the plaintiff again appeared and filed a deed, executed by himself and his wife, conveying the lands in question to the St. Louis Union Trust Company, as and for a tender of conveyance to the Little Kanawha Syndicate and its managers, and, deeming the order entered on the first day of December, 1908, sufficient to establish submission of Ramsey, Gould and Guy to the jurisdiction of the court, by appearance, he asked for a personal decree against them for the sum of \$371,922.86, the amount

formerly ascertained and interest thereon, and the court entered it. On the eighteenth day of May, 1909, said defendants filed a petition, praying vacation ³²⁴ of this decree, as one entered upon a bill taken for confessed, which petition was accompanied by affidavits, showing that McMichael and Morrison had never been authorized to enter a general appearance for them and that said attorneys had had no intention of doing so. On reconsideration of the order of December 1, 1908, the court set aside said decree of March 18, 1909, and from this decree Fulton has appealed.

No plea, demurrer or answer having been filed, nor any resistance made by the defendants to the entry of the decree, nor any facts introduced by them, not alleged in the bill, the decree of March 18, 1909, was, in fact and law, as well as by profession, a decree upon the bill taken for confessed, if there was an appearance; and the court could correct any error in it, upon motion, under section 5 of chapter 134 of the Code of 1906, notwithstanding the expiration of the term at which it had been entered: *Watson v. Wigginton*, 28 W. Va. 533; *Steenrod's Admr. v. Wheeling etc. R. R. Co.*, 25 W. Va. 133; *Bock v. Bock*, 24 W. Va. 586; *Hunter v. Kennedy*, 20 W. Va. 343.

This being true, the inquiries are whether there was an appearance in the cause, not merely in the court, for any purpose, and, if so, a general appearance, or one that must be deemed and regarded as a general appearance, notwithstanding the expressed desire that it be treated and held to be special, or one for a certain limited purpose and no other, and if an appearance in the cause, whether it bound the defendants. The petition sought vacation of the decree upon the following grounds: (1) That the order entered on December 1, 1908, does not show a general appearance; and (2) that the attorneys McMichael and Morrison had no authority to enter such an appearance. It is accompanied by affidavits, showing not only want of authority in the attorneys to enter the appearance, but also the details of the transaction of December 1, 1908, substantially recorded in the order. Counter-affidavits were filed by the plaintiff, somewhat variant as to these details, from the statements in the affidavits filed by the defendant.

Under the impression that a false recital of appearance can be reached only by bill in equity or a similar proceeding, the court below disregarded the affidavits and dealt only with interpretation of the order, reaching the conclusion that it did not show an appearance in the cause. As we concur in that ³²⁵ conclusion, we deem it unnecessary to enter upon any inquiry as to whether the affidavits, in so far as they show details of the transaction of December 1, 1908, not entered upon the record, might have been considered. If

the recitals of the order can be contradicted or added to, we suggest, but do not decide, that a motion, under section 1 of chapter 134 of the Code of 1906, might be as available as a bill in equity. If such an error is one of fact, correction thereof is within the letter and spirit of said section, and the remedy there given has been successfully invoked and suggested under somewhat similar circumstances: *Carlton's Admr. v. Ruffner*, 12 W. Va. 297; *Watt v. Bookover*, 35 W. Va. 323, 29 Am. St. Rep. 811, 13 S. E. 1007; *Chilhowie Lumber Co. v. Lance*, 50 W. Va. 636, 41 S. E. 128; *Gunn v. Turner's Admr.*, 21 Gratt. 382; 4 *Minor's Institutes*, 848; 2 *Tuck. Com.* 328; *Powell App. Pro.*, sec. 116.

We think the order was nothing more than an inquiry, addressed to the court, for information as to what could be done by way of obtaining a postponement of action in the cause, without submitting to the jurisdiction of the court for all purposes, or a conditional, not an absolute and unqualified, motion for a continuance. The motion, as recorded, if it can be regarded as a motion, signified a desire for a continuance, if it could be had without a waiver of service of process upon the defendants, but distinctly declared unwillingness to ask or take a continuance if it involved such a waiver. It does not say in express terms that a motion to continue was made. On the contrary, it says McMichael and Morrison asked the court to permit them to appear specially for their clients and ask a continuance, to enable them to determine whether they would desire to appear generally, and stated that they did not desire to appear generally at that time. It then says counsel for plaintiff resisted "said motion to continue." That means the motion or request made. It was not in terms a motion, and, read in the light of the protest, submitted along with it, it cannot be regarded as anything more, in substance and effect, than an offer to move for a continuance, if it could be done without waiving process, accompanied by a declaration of intent not to move at all, if such action involved waiver, and an immediate declaration of determination not to say or do anything more, after having been informed that a motion ³²⁶ for a continuance, so made and described upon the record, would be in law a submission to the jurisdiction of the court.

We apprehend no dissent from the proposition that the establishment of the jurisdiction of a court, whether over the person or the subject matter, must be affirmatively shown by the record: *Groves v. County Court*, 42 W. Va. 587, 26 S. E. 460. Something must be done to confer it. Jurisdiction of the person may be acquired by implication arising out of some act done, or by direct and positive acknowledgment thereof; but in either event, it should clearly appear. It ought to be reasonably free from uncertainty and doubt.

A favorite statement of the rule, respecting the acquisition of jurisdiction by implication or waiver, is this: "By appearance to the action in any case, for any other purpose than to take advantage of the defective execution or nonexecution of process, a defendant places himself precisely in the situation in which he would be if process were executed upon him, and he thereby waives all objection to the defective execution or nonexecution of process upon him": *State v. Coal Co.*, 49 W. Va. 143; *Chilhowie Lumber Co. v. Lance*, 50 W. Va. 636, 41 S. E. 128; *Layne v. Ohio River R. R. Co.*, 35 W. Va. 438; *Blankenship v. Kanawha & M. Ry. Co.*, 43 W. Va. 135, 27 S. E. 355; *Mahany v. Kephart*, 15 W. Va. 609; *Bank of Valley v. Bank of Berkeley*, 3 W. Va. 386. This is a declaration of a general principle, to be read in the light of the facts and circumstances under which it is applied, in seeking its true meaning. Some attention must also be paid to its terms. It must be an appearance for a purpose in the cause, not one merely collateral to it. In this state, litigants have put themselves within this rule, for the most part, by asking or accepting some sort of relief in the cause, consistent with the hypothesis of a submission and inconsistent with any other view, such as a continuance. No instance can be found in which a party has been held to have impliedly bound himself to submission, without having asked or received some relief in the cause or participated in some step taken therein. Mere presence in the courtroom, when the case is called, or examination of the papers in it, filed in the clerk's office, is not enough. Nor could a conversation with plaintiff's counsel or the judge of the court about the case be regarded as an appearance. No decision goes that far. Under this text in 3 Cyc. 504: "Any action on the part of defendant, except to object to the jurisdiction,"³²⁷ which recognizes the case as in court, will amount to a general appearance," a long list of decisions is cited, but in every one of them something was done in the cause—some affirmative act was done to delay, speed or defend the cause. In every instance the conduct, deemed a waiver, amounted to more than a mere inquiry or conversation about it. The test, according to a late decision of the federal supreme court, *Merchants' Heat & Light Co. v. Clow & Sons*, 204 U. S. 286, 27 Sup. Ct. Rep. 285, 51 L. ed. 488, is whether the defendant became an actor in the cause. The instances of the assumption of the role of actor in a suit, disclosed by the federal decisions, are such as the taking of a continuance; filing a demurrer to plaintiff's pleadings, without limiting it to the question of jurisdiction; filing a plea of intervention; pleading to issue or to the merits in the first instance; or filing setoffs, counterclaims or notices of recoupment. Broad as is this doctrine of waiver, it does not cover all acts done by a defendant. He may talk even

to the court about the merits of the cause without subjecting himself to it. In *Citizens' Saving & Trust Co. v. Illinois Cent. R. R. Co.*, 205 U. S. 46, 27 Sup. Ct. Rep. 425, 51 L. ed. 703, argument upon the merits of the cause was indulged in at the hearing upon the sufficiency of the pleas to the jurisdiction, and this was relied upon as constituting a general appearance; but Mr. Justice Harlan, speaking for the court, said: "This is too harsh an interpretation of what occurred in the court below. There was no motion for the dismissal of the bill for want of equity. The discussion of the merits was permitted or invited by the court in order that it might be informed on that question in the event it concluded to consider the merits along with the question of the sufficiency of the pleas to the jurisdiction. We are satisfied that the defendants did not intend to waive the benefit of their qualified appearance at the time of filing the pleas to the jurisdiction." In *Pendleton v. Russell*, 144 U. S. 640, 12 Sup. Ct. Rep. 743, 36 L. ed. 574, a receiver of a dissolved life insurance company appeared in the supreme court of the United States and prosecuted a writ of error to obtain a release of property, pledged to indemnify the sureties in a supersedeas bond, given upon a writ of error to a judgment against the company. That judgment was reversed and the case remanded to the circuit court, where, without summoning the receiver and without any appearance by him, another judgment was recovered in the action, ³²⁸ which was filed as a claim against the assets of the company in the hands of the receiver and disallowed, on the ground that the court which rendered it had no jurisdiction of the receiver. From this judgment of disallowance an appeal was taken to the supreme court of the United States, and it was there held that the prosecution of the writ of error by the receiver and the remanding of the case, at his instance, did not give the court below jurisdiction over him, and that the judgment did not bind the assets in his hands. In *Fairbank & Co. v. Cincinnati etc. Ry. Co.*, 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271, the court held as follows: "Where a defendant appears specially for the purpose of moving to quash the return on the summons, the fact that, in such motion, it also prays judgment whether it should be compelled to plead, for the reason that it is a nonresident corporation, does not constitute a waiver of the objection to the service." These precedents amply sustain the view that something substantially beneficial to the defendant or detrimental to the plaintiff, relating to or affecting the progress of the cause, asked, done or accepted by the former, is essential to the establishment of a waiver of process or service thereof. There must be something more than a mere pretext for the claim of jurisdiction over him. He must either enter an appearance, ask

some relief in the cause, accept some benefit as a step therein, or do something from which the necessary implication of submission to the jurisdiction of the court over his person arises. "The principle to be extracted from the decisions on the subject as to when a special appearance is converted into a general one is, that where the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance, by its terms, be limited to a special purpose or not": 2 Ency. of Pl. & Pr. 625. "The expression 'for any purpose connected with the cause,' however, is not to be taken as wholly unrestricted in meaning. The appearance must have some relation to the merits of the controversy, and the purpose must be to invoke some action on the part of the court having direct bearing in some way upon the question of the judgment or decree proper to be entered": Bank of Horton v. Knox, 133 Iowa, 443, 109 N. W. 201. ³²⁹ The general principle upon which we rely was applied by the supreme court of Massachusetts in Lowrie v. Castle, 198 Mass. 82, 83 N. E. 1118, under circumstances even more unfavorable to the defendant than those presented here. The non-resident defendant in that case, within ten days after the return day of the writ, applied to the court for an extension of the time within which he could appear, in order that he might decide whether to waive the lack of proper service and voluntarily appear or to insist upon his rights as a non-resident, and the court allowed such extension. After the expiration of the ten days, but within the period of the extension allowed, he moved to dismiss the action, stating in his motion that he appeared only for the purpose of moving a dismissal, and the motion was sustained. The appellate court held it to be within the inherent power of the trial court to grant such an extension, without prejudice to the right to except to the jurisdiction, and affirmed the judgment of dismissal. In delivering the opinion of the court, Hammond, Judge, said: "It is to be borne in mind that this is not a case where a defendant, upon whom process has been duly served and who therefore is within the jurisdiction of the court and liable to default if he does not seasonably appear, asks for delay. It is a case where a nonresident defendant who, for lack of service upon him, is not within the jurisdiction and cannot be brought within it, fearing lest the court may regard the service sufficient and default him, comes into court and says in substance that he is in doubt whether to waive proper service and voluntarily appear, or to insist upon his rights as a nonresident, and ask for time to decide. Certainly, it is a part of the inherent power in a

court to set a time within which the nonresident must make up his mind and act accordingly. And that was all the court did. The motions for dismissal were properly before the court." Against this express decision of a reputable and able court, under a state of facts less favorable to the defendant than those presented here, and other decisions, showing that something substantial must be asked or done by the defendant relating to or affecting the merits of the cause, we have nothing but a generalization, founded upon, and therefore to be interpreted by, facts falling far short of those disclosed here, for the proposition that a mere offer by a defendant to move for a continuance, provided it can be done without a ³³⁰ waiver of service, accompanied by his declaration of intention not to appear generally nor to ask or take such continuance, if it involved such waiver, and signification of his desire and determination to withdraw the request, for nothing but a request had been made, on being informed that such a motion would be a general appearance, is bound thereby. We feel amply justified, upon authority as well as upon reason and principle, in withholding our assent to it, and saying such action did not constitute a general appearance. If we could notice the fact shown by the affidavits, but not by the order, that the court, with the assent of counsel for the plaintiff, agreed to take the request under advisement until the next morning, it would not alter our conclusion. That did not make it a motion for a continuance nor constitute a continuance. It was only an agreement to further consider the conditional offer to move for a continuance.

In view of this conclusion, power to inquire whether McMichael and Morrison had authority to enter a general appearance, and whether the decree could be avoided for lack thereof, by motion or otherwise, becomes an immaterial question, and we refrain from discussion thereof.

Perceiving no error in the decree appealed from, we affirm it.

Judges Brannon and Williams dissent.

What Constitutes a General Appearance: State v. District Court, 40 Mont. 359, 135 Am. St. Rep. 622, and cases cited in the cross-reference note thereto; Foster-Milburn Co. v. Chinn, 134 Ky. 424, 135 Am. St. Rep. 417. As to its effect, see Bowler v. First Nat. Bank, 21 S. D. 449, 130 Am. St. Rep. 725. If a defendant claims that the court has no jurisdiction over his person, by reason of defects or irregularities in the process or service thereof, his remedy is by special appearance and objection to the jurisdiction; but if he goes further, and appears for another purpose than quashing the pretended process, or service thereof, such appearance is general, constitutes a waiver of the defects, and is an acknowledgment of the complete jurisdiction of the court in the action: Baker v. Union Stockyards Nat. Bank, 63 Neb. 801, 93 Am. St. Rep. 484; Linton v. Heye, 69 Neb. 450, 111 Am. St. Rep. 556.

STATE v. YOES.

[67 W. Va. 546, 68 S. E. 181.]

CRIMINAL TRIAL—Presence of Accused, What Sufficient to Show.—An order in a criminal case, reciting an appearance by the prisoner in discharge of his recognizance and an announcement of his readiness for trial, suffices to show his presence in court in his own proper person at the trial. (p. 978.)

CRIMINAL TRIAL—Right of Accused to Assistance of Counsel.—The clause of section 14 of article 3 of the constitution providing that, in the trial of criminal cases, the accused "shall have the assistance of counsel," is permissive and conditional upon the pleasure of the accused, in its application to the conduct of the trial; and, to make a conviction valid, the record need not affirmatively show the prisoner had the assistance of counsel. (pp. 978, 979.)

APPEAL—Bill of Exceptions—Record.—Though bills of exception be settled and signed in due time, they are not parts of the record unless made so by a certificate or an order entered upon the record. (p. 979.)

(Syllabi by the court.)

Lawson Worrell, for the plaintiff in error.

William G. Conley, attorney general, for the state.

546 **POFFENBARGER, J.** A writ of error was awarded Annie Yoes to a judgment on a verdict convicting her of grand larceny in the criminal court of McDowell county.

The first assignment of error is based upon the contention that the record fails to show the prisoner was in court in her own proper person during the trial. The order says: "The defendant appeared in discharge of her recognizance entered into herein and both parties announced themselves ready for trial." The issue had been made up at a former term. Her appearance in discharge of her recognizance was necessarily a **547** personal appearance. The recognizance could not otherwise have been discharged. The order shows no appearance by attorney, and yet it says both parties announced themselves ready for trial. Hence it is clear, not only that she appeared in her own proper person, but also that she appeared for the purposes of the trial. This exception is not well taken.

The next assignment is based upon the failure of the record to show that the prisoner was assisted by counsel. The right to have counsel is a mere privilege guaranteed by the constitution. The provision of the constitution relating to the right of a prisoner to have the assistance of counsel was inserted for the purpose of abrogating the common-law practice under which prisoners accused of felony were denied such right and to restrain the legislature from denying it by statute. It differs in nature as well as form from the guaranty of trial by jury. The latter is prohibitory in form,

while the other is permissive, and conditional upon the pleasure of the accused. Preferring the protection of the court or choosing to rely upon his own skill and ability, he may not desire the assistance of counsel. No invasion of this guaranty is disclosed, therefore, unless a request for the assistance of counsel appears by the record to have been denied by the court: *Barnes v. Commonwealth*, 92 Va. 794, 23 S. E. 784; *State v. Ramsey*, 63 N. J. L. 363; *Schlenger v. People*, 102 Ill. 241; 12 Cyc. 533; *Cooley on Constitutional Limitations*, 474, 475.

The other assignments of error involve the consideration of the evidence and other matters not disclosed by the record, unless the bills of exception found in the printed record are legally parts of the record. As there is no order making them such, they cannot be so considered: *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547; *Ketterman v. Dry Fork R. R. Co.*, 48 W. Va. 606, 37 S. E. 683; *Craft v. Mann*, 46 W. Va. 478, 33 S. E. 260.

For the reasons stated, the judgment will be affirmed.

Right of Prisoner to Counsel: *McDonald v. Commonwealth*, 173 Mass. 322, 73 Am. St. Rep. 293; *State v. Atkinson*, 40 S. C. 363, 42 Am. St. Rep. 877.

Where Bill of Exceptions does not Become Part of the Record, it cannot properly be embodied in the transcript, or be considered on appeal: *Prudential Ins. Co. v. Young*, 14 Ind. App. 560, 56 Am. St. Rep. 319.

TENNANT v. FRETTS.

[67 W. Va. 569, 68 S. E. 387.]

QUIETING TITLE.—Equity has Jurisdiction, at the Suit of an Owner of land who is in possession thereof under a good legal title, to remove a cloud from his title by a decree canceling and expunging from the records of the county in which the land is situate a void deed or writing constituting a cloud upon, or menace to, his title. (p. 982.)

QUIETING TITLE.—The Power of a Court of Equity to Grant Relief in such case is independent of any statute conferring jurisdiction, and rests on general equity principles and practice. (p. 982.)

QUIETING TITLE—Venue.—A Suit to Remove Cloud and Quiet Title is local in its nature, and the jurisdiction of the court is determined by the situs of the land. (p. 983.)

QUIETING TITLE—Operation of Decree in Rem or in Personam.—The decree for relief in such suit operates generally, if not always, in rem, and need not be in personam. (p. 983.)

PROCESS—Service by Publication—Judgment in Rem.—The statute (sections 11, 12 and 13, chapter 124, Code of 1906) providing for service of process on a nonresident by publication, or

by personal service out of the state, cannot authorize the rendition of a personal judgment or decree against a nonresident so served; but it does authorize any court, whether of law or of equity, to pronounce a judgment or decree binding in rem in any case in which such court would otherwise be competent to do so if the defendant were personally served within the state. (p. 983.)

QUIETING TITLE—Service on Nonresident by Publication.—Equity may, upon service of process on a nonresident by publication, remove cloud from title to land within its jurisdiction by a decree, binding only in rem. (p. 988.)

(Syllabi by the court.)

W. G. Bennett and Goodwin & Reay, for the appellant.

Terence D. Stewart and Charles E. Hogg, for the appellees.

570 WILLIAMS, J. This is an appeal by A. E. Fretts from a decree of the circuit court of Monongalia county, made on the 19th of May, 1908, granting relief to plaintiffs upon a bill to remove cloud from title to land.

The following are the facts: On May 2, 1900, Peter Tennant executed to A. E. Fretts a writing under seal, which plaintiffs call an option, but which defendants insist is a contract of sale, agreeing to sell to him the "Pittsburg or River vein of coal" underlying one hundred and sixty-three acres of land in Monongalia county, at twenty-five dollars per acre. This writing was signed by both Tennant and Fretts, but was not acknowledged by Tennant. On the 4th of May, 1900, Fretts acknowledged it before a notary public in Pennsylvania, and on the same day, by writing indorsed on the back of the instrument, assigned his interest therein to Wm. Allison of Uniontown, Pennsylvania. He acknowledged this assignment also before a notary public in Pennsylvania. On the 22d of May, 1900, both the original contract and the assignment were recorded in Monongalia county, West Virginia. Nothing was ever paid to Tennant on the contract except the one dollar consideration recited in it. Peter Tennant died in August, 1904. On the 3d of November, 1905, his heirs sold the same vein of coal to Smith Hood, Jr., and Homer C. Price for ninety-five dollars per acre, to be paid, one-third upon approval of title and acceptance of deed and the balance in one and two years from acceptance of deed. Hood and Price discovered the Fretts contract on record, and refused to make payment until the rights of Fretts and Allison in the coal were determined. Thereupon the heirs of Peter Tennant brought this suit, praying to have the Fretts contract canceled as constituting a cloud upon their title. Fretts and Allison are both residents of Pennsylvania, and were both personally served with original process in that state. Allison did not appear, but Fretts appeared by counsel and ⁵⁷¹ demurred, answered

and filed a cross-bill praying for specific execution of the contract.

The first question presented is one of jurisdiction. Counsel for Fretts insist that the court is without jurisdiction to grant relief upon personal service of process upon defendants in Pennsylvania, which has no more effect than an order of publication published in a newspaper. This question has never before been presented to this court for adjudication. If relief in such case cannot be decreed, it might often happen that a party would be without remedy. It is not within the sovereign power of a state to give extraterritorial effect to the decrees and processes of its courts, nor is there any means by which a resident of one state can be compelled to submit himself to the civil jurisdiction of the courts of another. Consequently, it follows that, unless the circuit court of Monongalia county had jurisdiction to grant relief by means of an in rem decree, plaintiffs are practically remediless. The courts of Pennsylvania cannot give them relief, because a decree of the court of that state could not affect title to land in this state: *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367; *Poindexter v. Burwell*, 82 Va. 507; *Gibson v. Burgess*, 82 Va. 650; *Vaught v. Meador*, 99 Va. 569, 86 Am. St. Rep. 908, 39 S. E. 225; *Cooley v. Scarlet*, 38 Ill. 316, 87 Am. Dec. 298; *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. Rep. 3, 54 L. ed. 65, 23 L. R. A., N. S., 924. The relief in this case must come through the direct operation of the decree upon the subject matter or not at all. It is not a case where the relief depends upon an act which a court of equity may compel a defendant to perform, such, for instance, as the execution of a deed in completion of a contract, or the surrender of title to land acquired in violation of trust or by some species of mala fides. In cases of that character the court having jurisdiction of the person of defendant may grant relief by compelling the defendant to perform the act essential to accomplish it. The decree in such cases would be purely in personam, and while they could not directly affect real estate in another state, yet the relief could be obtained through the act of the party, even to the extent of conveying land in another state. In such case it is the act of the party that affects the land, not the court's decree: *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181; *Guerrant v. Fowler*, 1 H. & M. 5; *Farley v. Shippen*, Wythe (Va.), 254; *Dickinson v. Hoomes' Admr.*, 8 Gratt. 353; *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367; *Western Union Tel. Co. v. Western etc. R. R.* ⁵⁷² Co., 8 Baxt. (Tenn.) 54; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Wood v. Warner*, 15 N. J. Eq. 81. But in the present case the suit is to cancel and expunge from the records of Monongalia county a writing which constitutes a cloud upon plaintiffs' title to land in

this state, and unless the decree of the West Virginia court can operate directly upon the subject matter—in other words, unless the court can pronounce an in rem decree, plaintiffs are without means of relief. They are in possession of the land and have the legal title; there is nothing that a Pennsylvania court can compel defendants to do that will afford them relief. But counsel for appellant insist that a court of equity cannot pronounce an in rem decree in the absence of a statute authorizing it to do so and that we have no such statute. We must admit that there is no statute conferring jurisdiction on courts of equity to make an in rem decree in suits to quiet title, and the action of the lower court must be sustained, if sustained at all, upon principles of general equity practice. But can it be possible that a court of equity is powerless to grant relief by way of canceling a recorded writing which affects title to land within its jurisdiction, without it can obtain jurisdiction of the defendant also? Is this the state of our law? Does equity never act except upon the person? Is a statute necessary to give equity jurisdiction to quiet title where it cannot get jurisdiction of the person of defendant? We do not think so. Equity has exercised jurisdiction to grant such relief, independent of statute, both in England and in this country, for more than a century: *Hayward v. Dimsdale*, 17 Ves. 111; *Grover v. Hugell*, 3 Russ. (Eng. Ch.) 428; *Ward v. Ward*, 2 Hayw. 226; *Petit v. Shepherd*, 5 Paige, 493, 28 Am. Dec. 437; *Apthorp v. Comstock*, 2 Paige, 482; *Shattuck v. Carson*, 2 Cal. 588; *Norton v. Beaver*, 5 Ohio, 178; *Groves v. Webber*, 72 Ill. 606; *O'Hare v. Downing*, 130 Mass. 16; *Ambler v. Leach*, 15 W. Va. 677; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959, 46 S. E. 603; *Smith v. O'Keefe*, 43 W. Va. 172, 27 S. E. 353. This power is inherent in courts of equity. It needs no statute to confer jurisdiction on courts of equity to quiet title any more than to set aside a fraudulent conveyance or specifically enforce a contract for sale of land. It was the rigid rules of the common law and strict adherence to former decisions, simply as precedents, that made courts of equity necessary, and ever since their formation it has been the ⁵⁷³ boast of the chancellor that there is no right which has not a corresponding remedy: 1 *Pomeroy's Equity*, sec. 108. One of the principal grounds of original equity jurisdiction rests on the fact that courts of law are not always adequate to afford relief, and in any case where, according to the principles of natural justice, there is a right to be protected or enforced, and the law has not provided an adequate remedy, equity takes jurisdiction: *Bowyer v. Creigh*, 3 Rand. 25. We cannot say that equity is impotent in the present case to grant relief, simply because defendants are beyond the jurisdiction of the court and cannot be com-

pelled to obey its process. Equity can remove a cloud from title to land within the court's jurisdiction without having before it the person of defendant. It has power to make a decree which may operate upon the subject matter of the suit, notwithstanding such a decree is, in its nature, in rem. It would indeed be a deplorable condition if our law afforded no relief to a land owner who is in possession of his land under good and sufficient title, but which happens to be encumbered by some adverse claim or lien of record which had been discharged but not released. Such claims might never disturb his possession, but they are a menace to his title, and may greatly affect the selling value of his land. No citizen whose lands are thus affected can enjoy his rights of property to the full extent so long as the *jus disponendi* is thus interfered with. Every state owes to its citizens the duty to protect the rights of property as well as the persons of its citizens, and we think the laws of this state are ample to authorize the court to give relief in the present case.

The land is situated in Monongalia county, and this gave the court of that county jurisdiction. The subject matter of the suit is local: *Cooley v. Scarlet*, 38 Ill. 316, 87 Am. Dec. 298. The suit could not have been brought in any other court. It is local in its nature, like the abating of a nuisance (*Mississippi etc. R. R. Co. v. Ward*, 2 Black (U. S.), 485, 17 L. ed. 311), or the enjoining of an act which affects real estate (*Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co.*, 15 How. 233, 14 L. ed. 674).

The next question is, Is the court authorized to grant relief in this case upon an order of publication against a nonresident? We think it is. Of course a court cannot pronounce a judgment or decree that will be binding on the person of the ⁵⁷⁴ nonresident defendant, or that can have any force or effect whatever beyond the territorial jurisdiction of the court, upon other than personal service of process. The leading case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, settles this principle. But where the proceeding is in rem, as upon attachment of property, or where the judgment or decree is to settle and determine the title to real estate within the court's jurisdiction, it is competent for the legislature to provide for service of process by publication against a nonresident defendant: *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 577, 33 L. ed. 918; *Witten v. St. Clair*, 27 W. Va. 762. But counsel for defendant insists that the legislature of West Virginia has not made any provision for an order of publication to be had in a suit in equity to remove cloud from title. This depends upon the construction to be given to sections 11, 12 and 13 of chapter 124, Code (1906). This chapter deals with process of the court and the manner of

service thereof; its scope is not confined to processes to be issued by any particular courts or in any special suits or actions. Section 2 of this chapter begins by saying, "Process from any court," etc. This applied to courts in chancery as well as courts of law. Sections 11, 12 and 13 provide for order of publication against nonresident defendants and how the same shall be published. Section 13 provides that personal service on a defendant outside of the state shall have the same effect as an order of publication duly posted and published against him. These provisions must be considered as applying to a nonresident defendant in any action at law or suit in equity, where the court has jurisdiction of the subject matter of the action or suit, and can render a judgment or decree in rem. Section 13 closes as follows: "Upon any trial or hearing under this section, such judgment, decree or order shall be entered as may appear just." While these provisions are not intended to confer equity jurisdiction in cases not otherwise cognizable in equity, it clearly warrants the service of process by publication in any case where equity has jurisdiction of the subject matter, and is not obliged to have the defendant personally in court in order to give the proper relief. If it be true that a statute is necessary to give equity jurisdiction to quiet title to land, or if it be true that equity can grant relief only by means of a personal decree, except when it is ⁵⁷⁵ otherwise expressly authorized by statute, the above provisions for service of process by publication can have no application in the present suit. But we do not understand that equity jurisdiction to pronounce a decree in rem is dependent upon statute. Pomeroy, in his work (*Equity Jurisprudence*), says, "the decrees of a court of equity may be made to operate in rem to the same extent and in the same manner as judgments at law": Vol. 1, sec. 135. It depends upon the character of the wrong and the nature of the relief which the court is asked to grant whether or not the decree must be in rem or in personam. The most usual method of procedure in equity is by decrees which directly affect the person. But it seems to be an established rule that if the subject matter of the suit is local, and the relief sought is such that it requires the performance of no act by the defendant to give effect to the court's decree, it can make a decree which will operate directly upon the subject matter.

The case of *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 577, 33 L. ed. 918, bears on this subject, and is cited in the briefs of counsel for both plaintiffs and defendant as authority for their respective contentions. That was an action in the circuit court for the district of Nebraska to recover possession of land and quiet title. The plaintiff obtained judgment and the defendant carried the case to the

supreme court of the United States. As we understand the decision in that case, it settles no other principle than that a state has authority to provide, by statute, for the settlement of title to real estate within the state, in which a non-resident defendant may claim title or interest, and that such nonresident may be served by publication. It does not decide that a nonresident may not also be brought in, by publication, to answer a suit brought to quiet title to land, where the court has jurisdiction of such suit on principles of general equity practice, independent of a statute conferring such jurisdiction. There had been a decree or judgment in favor of Charles L. Flint against Michael Hurley and another in the state court of Nebraska, adjudicating title to land as against the defendants, who had been proceeded against by publication as nonresidents. The question was whether the judgment of the state court was *res judicata* upon privies to the original parties in the ejectment suit subsequently brought to recover the same land in the ⁵⁷⁶ United States court, and the supreme court held that the judgment of the state court was binding on the nonresident. It is true that there was a statute of Nebraska authorizing suits to try title to land upon publication, but that fact does not make that case decisive of the point in the present case. A number of cases are cited by Mr. Justice Brewer, who delivered the opinion of the court, both from the state courts and from the supreme court of the United States, all of which go no further than to support the general doctrine that the states have power to provide for the settlement of title to lands within their territorial limits, and that the title or interest of a nonresident therein may be settled and determined against him upon publication. The most of the cases on this point are from states which have, by statute, greatly enlarged the jurisdiction of equity, which was originally exercised only for the purpose of quieting title in favor of the owner of the legal title who was in possession. In many states the statutes have so enlarged the original equity jurisdiction as to enable the court to determine any question of title, whether legal or equitable, between conflicting claimants, and whether the plaintiff be in or out of possession. These statutes have been uniformly upheld by the supreme court of appeals of the United States. But we find no decision which denies the doctrine that equity has original jurisdiction to remove a cloud and quiet title to land in a suit brought by the legal owner who is in possession. Equity, unless aided by statute, will not entertain such a suit under any other conditions, and when such conditions do exist, no statute is needed to confer jurisdiction.

It is true that in the case of *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. Rep. 586, 28 L. ed. 101, it was held that a judg-

ment of the state court of Texas, rendered upon a petition to recover land and quiet title, wherein Hart had been proceeded against by publication, was not binding on him. But the court did not so hold because the state court was not authorized to render a binding judgment in such case upon publication, but because the allegations of the petition did not sufficiently set forth and describe the claim or interest of Hart in the land. The court in its opinion, by Justice Gray (page 154), says: "The petition alleged that Wilkerson was in possession, and that the other defendants, except Hart, held recorded deeds, which were fraudulent and void, and cast a cloud ⁵⁷⁷ upon the plaintiffs' title. But as to Hart, it did not allege that he was in possession or was in privity with the other defendants, or that he held any deed, but only that he set up some pretended claim and title. And the verdict finds that he claimed the land, but had no title of record or otherwise therein. The judgment is that the plaintiffs recover the land of the defendants, and that the deeds mentioned in the petition be and are annulled and canceled and the cloud thereby removed, and for costs; and execution is awarded for costs only, and not for any writ or process in the nature of a writ of possession or habere facias.

"It is difficult to see how any part of that judgment (except for costs) is applicable to Hart; for that part which is for recovery of possession certainly cannot apply to Hart, who was not in possession; and that part which removed the cloud upon plaintiffs' title appears to be limited to the cloud created by the deeds mentioned in the petition, and the petition does not allege, and the verdict negatives, that Hart held any deed."

The court did not even intimate that Hart would not have been bound if the claim which he afterward asserted in another suit had been sufficiently pleaded in the first suit involving the same land.

The case of *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. Rep. 410, 44 L. ed. 520, is more directly in point than either of the other cases above cited. In that case two points arose: (1) Whether or not process from a court of Texas served upon a defendant residing in Virginia on December 30, 1890, to appear in Limestone county, Texas, on January 5, 1891, "was due process" of law under the fourteenth amendment, such service being given the effect of publication; (2) Whether or not the court of Texas had jurisdiction to proceed against a nonresident to enforce a lien on land for purchase money, there being no statute of that state authorizing such proceeding, and there having been no seizure in rem of the lands, nor any notice to the vendees in possession claiming under the nonresident. In regard to the first point, the court did not undertake to say what length of time would

be reasonable notice, so as to constitute due process of law, but held that, on account of the long distance between the place of service and the place of return, five days was not sufficient time, and that judgment on such short notice was not binding. Concerning the second point, after discussing the questions decided ⁵⁷⁸ in the two cases of *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. Rep. 586, 28 L. ed. 101, and *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 577, 33 L. ed. 918, the court, in its opinion by Justice Brown, says: "It is true there is no statute of Texas specially authorizing a suit against a nonresident to enforce an equitable lien for purchase money, but article 1230 of the Code of Texas, herein-after cited, contains a general provision for the institution of suits against absent and nonresident defendants, and lays down a method of procedure applicable to all such cases. Obviously, this article has no application to suits in personam, as was held by the supreme court of Texas in *York v. State*, 73 Tex. 651, 11 S. W. 869; *Kimmarle v. Houston etc. Ry. Co.*, 76 Tex. 686, 12 S. W. 698; *Maddox v. Craig*, 80 Tex. 600, 16 S. W. 328; and by this court in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. The article must then be restricted to actions in rem; but to what class of actions, since none is mentioned specially in the article? We are bound to give it some effect. We cannot treat it as wholly nugatory, and as it is impossible to say that it contemplates a procedure in one class of cases and not in another, we think the only reasonable construction is to hold that it applies to all cases where, under recognized principle of law, suits may be instituted against nonresident defendants."

The statute in West Virginia, authorizing service of process upon a nonresident by publication, does not specify in what particular class of cases such service is authorized. In this respect the statutes of the two states are similar. There was no statute in Texas expressly authorizing a court to proceed by publication to enforce a vendor's lien against a nonresident, yet the United States court held that the right to proceed by publication applied to such a suit, because under the recognized principles of law obtaining in that state the court had jurisdiction of such a suit. There is no statute in this state expressly authorizing a suit to remove a cloud from title, but under the well-recognized principles of law which obtain in this state, a court of equity has jurisdiction of such a suit brought by one who has both the legal title and possession of the land. Therefore, the analogy between the two cases is perfect, and the same principle may be properly applied to both. We do not understand any decision, state or federal, to hold that equity is dependent upon statute for jurisdiction to remove a cloud from title in a case where the plaintiff is in possession, claiming ⁵⁷⁹ under a

valid legal title. These are the requisites for original equity jurisdiction in suits to quiet title, and equity has always exercised it, for the reason that the law, in such a case, afforded no remedy. But many of the states have, by statutes, provided that suits in equity may be brought to settle and determine title to, and interest in, land, whether the title or claim be legal or equitable, and without regard to possession. And it is upon the construction of these statutes that nearly all of the cases involving the question of the right of a court to make a binding decree upon service by publication have been reviewed by the supreme court of the United States. We have no statute in West Virginia enlarging the jurisdiction of equity in such matters, nor do we assert that equity has authority in this state to give relief in a proceeding to quiet title, otherwise than is derived from the general equity practice. But inasmuch as it has jurisdiction to grant relief in the present case, and could under the principles of original equity practice do so, without the aid of statute, provided the defendant was before the court, by a decree operating directly upon the subject matter, the statute above cited, sections 11, 12 and 13 of chapter 124, steps in, and empowers it to pronounce such a decree upon process served by publication against a nonresident, which will be as conclusive of his right in the land as if he had been personally before the court: 4 Pomeroy's Equity, secs. 1396-1399.

The next question relates to the merits of the case. Is the writing a contract of sale or is it only an option? This depends upon its proper construction. The writing is under seal, and after describing the land under which the vein of coal lies, it proceeds as follows, viz.: "The coal to be paid for as follows, at the rate of Twenty-five \$25.00/100 Dollars per acre; One Dollar on the signing of this agreement and the balance on payment as the party of the first part elects. The deed to be made for the above described tract of coal by the party of the first part, their heirs or assigns, on 15 days notice in writing by the party of the second part, his heirs or assigns. A good deed with general warranty to be made whenever the unpaid purchase money is secured by bond with mortgage on the premises. A failure of the party of the second part to make the first payment within 30 days from the above date shall render this agreement null and void. The full amount for the above ⁵⁸⁰ described coal is to be paid when Deed is made as above stated. It is further agreed that the second party has the right to enter in and under the above described tract of land to mine and convey away the coal in this as well as other coal that he now owns or may here after secure with the undisputed right of road ways and not be responsible for any damage to the surface nor anything therein nor thereon by the removal of said coal. The

first party has the right to drill, mine or bore for oil, gas and water. The second party agrees to pay for surveying & abstract of title when same is accepted. First party agrees to sell the Pittsburg vein of coal in and under the Kings Run Farm bounded on the North by H. & J. Brock, East by Devine, South by R. E. Stephens, West by lands of Ruth E. Stephens, containing 63 acres more or less, at the same rate, terms and conditions as set forth in this agreement for the purchase of coal."

It is impossible to construe the agreement so as to give effect to all of its provisions. Some of them irreconcilably conflict with others. It first says, after reciting that one dollar is to be paid at the signing of the agreement, that the balance is to be paid as Tennant may elect. Relying on this clause, counsel for appellant insist that Fretts was not bound to make any payment, or tender of payment, until Tennant should elect how much and when it should be paid. But it also contains the further provision that Tennant was to make deed upon fifteen days' notice in writing by Fretts, or his assignee, and that deed was to be made whenever the unpaid purchase money was secured by bond with mortgage on the premises. A mortgage, of course, could not be executed until Fretts, who was to become the mortgagor, had obtained title, and title was not to be conveyed until after Fretts had given fifteen days' notice to Tennant. No notice was ever given and nothing was ever paid except the one dollar. The foregoing provisions contradict each other, and both cannot be given effect. But the clause providing for a forfeiture of the contract in the event Fretts did not make the cash payment within thirty days from its date, we think, clearly indicates that the writing was considered by the parties as an option, and not as a sale, and that Fretts had thirty days in which to elect whether or not he would accept. It is true the writing does not specify the amount of the cash payment to be made in thirty days. The cash payment cannot ⁵⁸¹ refer to the one dollar, because that was expressly provided to be paid at the signing of the agreement. It must, therefore, necessarily refer either to a certain portion of the purchase money, the amount of which was agreed on by the parties but not expressed in writing, or it must refer to and include the whole purchase price. It is unnecessary, for the purposes of this case, for us to decide whether it referred to the whole or only to a part of the price; because it follows that the failure of Fretts to make a tender of it, whether it was all or a part, within the thirty days, rendered the contract void. If no certain amount in fact was agreed on to be paid within thirty days, Fretts should have elected to pay the whole purchase price, if he would avoid the effect of this forfeiture clause; and not having done so, all his rights under the agreement

ended. Courts of equity do not, as a rule, enforce a forfeiture, where there has been a vested right. But this rule does not apply to a case where the contract itself, under which the parties claim, contains an express provision forfeiting a right upon the happening of a certain contingency: *Carney v. Barnes*, 56 W. Va. 581, 49 S. E. 423.

After this suit was brought, Allison assigned back to Fretts a one-half interest in the aforesaid agreement. Fretts appeared to the suit by counsel and demurred to the bill; Allison made no appearance. The demurrer was overruled and Fretts filed an answer in the nature of a cross-bill praying for specific execution of the contract. Plaintiff demurred to the cross-bill and the court sustained it. This is right. It is evident that Fretts could not obtain relief without making Allison a party, even assuming that his cross-bill was meritorious. The cross-bill, on its face, showed that Fretts and Allison were jointly interested in whatever rights were conferred by the contract, and Allison should have joined in the application to the court for specific execution, or, if he refused to join, he should have been made party defendant. In a suit to enforce a contract, all persons interested in it should generally be made parties: *Waterman on Specific Performance*, sec. 55; *Wilcox v. Pratt*, 125 N. Y. 688, 25 N. E. 1091; *Woodward v. Clark*, 15 Mich. 104. It was also proper to sustain the demurrer to the cross-bill, because its averments did not entitle defendant to any relief.

The decree of the lower court holds the writing to be an ⁵⁸² option which expired at the end of thirty days from its date, and canceled it as constituting a cloud upon plaintiffs' title. This was a quasi in rem decree, and one which the court had jurisdiction to pronounce. Fretts having appeared in the cause by counsel, the court could render a personal decree against him for costs. His appearance, not having been limited to the one special purpose of objecting to the process or to the manner of its service, was a general appearance: *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761; *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 38 S. E. 539.

Fretts, having voluntarily appeared by counsel and demurred to and answered plaintiffs' bill, is estopped from denying the court's jurisdiction of his person: *Hunter's Exrs. v. Stewart*, 23 W. Va. 549; *State v. Rawson*, 25 W. Va. 23; *Giboney v. Cooper & Cooper*, 57 W. Va. 74, 49 S. E. 939.

There is no error in the decree, and it will be affirmed.

Equity will Prevent a Cloud on Title as Well as Remove One: Note to *Scott v. Onderdonk*, 67 Am. Dec. 112. The equitable jurisdiction to remove a cloud on title is preventive as well as remedial: *Sneathen v. Sneathen*, 104 Mo. 201. The right to remove a cloud from title is, in the absence of statute, purely equitable in its nature, and peculiarly within the jurisdiction of courts of chancery. Hence,

relief must be sought in equity. The jurisdiction of equity to remove clouds from title is an independent source or head of equity jurisdiction, not requiring any accompaniment of fraud, accident, mistake, trust or account, or any other basis of equitable intervention: *Note to Helden v. Hellen*, 45 Am. St. Rep. 374.

Courts of Chancery may by Statute be Authorized to Quiet Title to property in the state without the personal service of process therein: Title etc. Restoration Co. v. Kerrigan, 150 Cal. 286, 119 Am. St. Rep. 199. See, also, *Emery v. Kipp*, 154 Cal. 83, 129 Am. St. Rep. 141; *Fenton v. Insurance Co.*, 15 N. D. 365, 125 Am. St. Rep. 599; note to *McClymond v. Noble*, 87 Am. St. Rep. 358. The action to determine conflicting claims of title to realty, authorized by the statutes of Minnesota, though statutory, is substantially an equitable action, and, except as otherwise provided, is governed by the ordinary rules applicable to suits in equity to quiet title: *Mathews v. Lightner*, 85 Minn. 333, 89 Am. St. Rep. 558. As to equity jurisdiction over nonresidents, see the note to *Alley v. Caspari*, 6 Am. St. Rep. 189.

No Personal Jurisdiction can be had on Process Served Out of the State, whether personal or by publication, or whether the defendant has been a resident of the state whence the process issued or not: *Moss v. Fitch*, 212 Mo. 484, 126 Am. St. Rep. 568. There can be no valid personal service of process from the tribunals of one state outside of its own territory: *Hinton v. Penn Mut. Life Ins. Co.*, 126 N. C. 18, 78 Am. St. Rep. 636; note to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 179.

Service of Process by Publication may be had on a Nonresident where his property is within the jurisdiction of the court: *Hinton v. Penn Mut. Life Ins. Co.*, 126 N. C. 18, 78 Am. St. Rep. 636; and this applies to actions to determine conflicting claims to real property situated within this state: *Perkins v. Wakeham*, 86 Cal. 580, 21 Am. St. Rep. 67.

A Decree Quieting Title, While not Strictly in Rem, partakes of the nature of a judgment in rem, and may, therefore, be supported by the service of process on a nonresident defendant by publication: *Perkins v. Wakeham*, 86 Cal. 580, 21 Am. St. Rep. 67. A judgment quieting title, founded on the service of summons by publication, will be respected and enforced in Kansas as a complete divestiture of the title of the judgment defendant: *Venable v. Dutch*, 37 Kan. 515, 1 Am. St. Rep. 260.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

STATE v. FREAR.

[144 Wis. 79, 128 N. W. 1068.]

ELECTIONS—Construction of Primary Law.—The Word “Person,” as used in the primary election law providing that the person receiving the greatest number of votes at a primary as the candidate of a party for office shall be the candidate of that party for such office, etc., does not include a dead man. It is used in its ordinary meaning, “a living human being.” (p. 997.)

ELECTIONS.—A Dead Man cannot Become a Candidate for office, although a plurality of the votes cast at a primary election were cast in his name, the law providing that the “person” receiving the greatest number of votes shall be the candidate. (p. 998.)

ELECTIONS.—Where Electors Vote for an Ineligible Candidate, without knowledge of his disqualification, and he receives a plurality of the vote cast, his disqualification does not result in electing the candidate receiving the next highest number of votes. (p. 998.)

ELECTIONS—Vacancy.—Where Electors Vote for an Ineligible Candidate, without knowledge of his disqualification, and he receives a plurality of the votes cast, such votes must be counted, and there is a vacancy in the office instead of an election of the candidate receiving less than a plurality of the votes. (p. 998.)

ELECTIONS—Votes for Deceased or Ineligible Candidate.—Votes cast for a candidate known to be dead or disqualified, or for a fictitious person, are ineffectual for any person, and cannot be counted in determining the result of the election. (p. 999.)

ELECTIONS.—Votes Knowingly Cast for an Ineligible Candidate, who cannot possibly exercise the functions of the office if elected, are thrown away and cannot be counted. (p. 1000.)

ELECTIONS.—The Function of the Voter at an Election is to express an affirmative choice of some person, not to content himself with merely expressing his disapproval of certain candidates; and while the majority rules it should not pursue a policy of mere negation. (p. 1000.)

ELECTIONS—Death of Candidate—Knowledge of Voters Presumed.—Where it appears that the candidate for nomination to an important state office—attorney general—at a primary election in a more or less acrimonious campaign, where factional lines were closely drawn, died after the printing of the ballots and prior to the day of the election; that the fact of his death was generally stated and published in the newspapers throughout the state, with the statement that if he received the greatest number of votes at the primary the

state central committee could fill the vacancy; that such statements were repeated in circular letters addressed to many parts of the state; and that telegrams were sent out by a prominent supporter of one of the factions to one hundred and sixty-nine different prominent supporters of such faction in different parts of the state, calling upon them to urge voters to vote for the deceased candidate, and advising them that the committee could fill the vacancy,—the court is justified in assuming that a great majority of the electors read one or more newspapers and that enough of the vote cast which gave to the deceased candidate a plurality was cast by electors who knew the candidate was dead, to reduce the vote below that required for a plurality. (pp. 1001, 1002.)

STATUTES—Incorporating Parts of One Law in Another.—In order to have as little confusion as possible in statutes, where an attempt is made to incorporate parts of a former law into one that is being presently made, the language used should be such as to indicate with a reasonable degree of certainty what was in the legislative mind. A careful and intelligent reading of the two acts should be sufficient to indicate to the reader what parts of the old law were applicable to and were incorporated in the new. (p. 1003.)

ELECTIONS—General and Primary Election Laws.—The provisions of section 34 of the general election laws of 1898, relating to the filling of vacancies caused by declination, death, or other disability of a nominated candidate, are not imported into the primary election law of 1903, as by section 13 of the latter law a special provision is made for the filling of vacancies and fully covers the same subject matter as that of section 34. (p. 1004.)

ELECTIONS.—The Death of a Candidate for Nomination by a party at a primary election held to enable the electors to select one of the few or many candidates to represent the party for some particular office cannot be said to create a vacancy where there are other patriots willing to secure the prize. (pp. 1005, 1006.)

This suit is brought originally in this court to compel the defendant to certify the name of the relator to the different county clerks of the state as the candidate to be placed upon the official ballot of the Republican party for the office of attorney general, to be voted for at the general election to be held in November, 1910. The complaint alleges that a primary election was held in Wisconsin on September 6, 1910; that more than thirty days prior to the holding of such election, the relator and Frank T. Tucker and Henry A. Gunderson each duly filed in the office of the Secretary of State his nomination papers as a candidate for the office of attorney general; that thereafter and within the time required by law the Secretary of State transmitted to each county clerk a list containing the name and postoffice address of each person whose nomination papers had been filed in his office and was entitled to be voted for at the primary, together with the designation of the office for which he was a candidate and the party or principle which he represented; that among the names so transmitted were those of the relator and of said Tucker and Gunderson; that thereafter and ten days before the holding of the

primary election the county clerks of the respective counties caused the names so certified to be printed upon the official ballot and distributed; that thereafter, on September 1, 1910, said Frank T. Tucker died.

"That notwithstanding the death of said Frank T. Tucker, one C. H. Crownhart, a prominent supporter of one of the factions in the Republican party, of which faction said Tucker, when in life, was a member, sent one hundred and sixty-nine different telegrams, addressed to one hundred and sixty-nine different prominent supporters of said faction in different parts of the state of Wisconsin, of which the following is a sample:

" 'Madison, Wis., 9—3—'10.

" 'Fred E. Olen,
Florence, Wis.

" 'Fine steam ahead. Few days more and La Follette will sweep state. Fight hard for legislature and state officers. We can win complete victory. Urge votes for Tucker. Committee can fill vacancy. Get evidence of any corruption for use later. Reports are fine. Telegraph this message to active workers every precinct. C. H. CROWNHART.'

"That before the holding of said primary, and especially and particularly on September 2 and 3, 1910, it was generally stated and published in the different newspapers throughout the state that said Tucker was dead and that in case that he received the greatest number of votes at said primary, the Republican state central committee could fill the vacancy, and that such statements were, in substance, also recited in circular letters, which circular letters were addressed to many parts of the state, and a true and correct copy of said circular letters is in the words and figures following, to wit:

" 'PROGRESSIVE REPUBLICAN.

" 'La Crosse, Wis., Sept. 2nd, 1910.

" 'Dear Sir: Every progressive certainly earnestly desires to see Progressive principles triumph in this campaign. To accomplish this Progressive men must be nominated to make our laws in nation and state and to enforce them as state officers.

" 'Herewith will be found a sample ballot on which an X is printed after the names of candidates whom we believe to be thoroughly progressive. No attempt has been made to indicate a choice among the candidates for county offices, all of whom are well known in the county.

" 'Frank T. Tucker, candidate for attorney general, is dead, apparently driven to his death by a political conspiracy against him. His name will be on the official ballot and every friend of good government should put an X after it. No true Progressive can vote for either of his opponents.

“ ‘Let nothing keep you from the polls on Tuesday next. Go without fail and see that your neighbor goes. You may be certain that every Tory voter will be out and that every influence which money can exert will be at work against Progressive candidates and principles.

“ ‘It is for *you* to decide which shall triumph, men or money.

“ ‘PROGRESSIVE REPUBLICAN COMMITTEE.’ ”

That on September 26, 1910, the said canvassing board canvassed the returns certified to them, and that as to the office of attorney general said board certified that the whole number of votes cast for the office of attorney general was 168,925, of which the relator received 58,196, said Gunderson received 47,187, and said Tucker received 63,482, and that the scattering votes for such office amounted to 60; that it appeared from the returns that said Tucker received the greatest number of votes cast for the office; that it further appeared from an affidavit on file that said Tucker died on September 1, 1910, and that the death of said Tucker occurred after the ballots used at said primary were printed and after the time for filing nomination papers had expired. The canvassing board then certified that there was a vacancy in the nomination for the office of attorney general, to be filled as provided by law.

The complaint further sets forth that on the fourth Tuesday in September the candidates for the various state offices and for the Senate and assembly, nominated by the Republican party at said primary, together with the senators of said party whose term of office extended beyond the first Monday in January, 1911, met and formulated the state platform of said party, and that the members of said platform convention passed a resolution indorsing and recommending C. H. Crownhart as the candidate for the office of attorney general to fill the alleged vacancy; that the state central committee of the Republican party at a meeting held on October 3, 1910, nominated said C. H. Crownhart as a candidate for the office of attorney general on the Republican ticket to be voted for at the general election to be held on the first Tuesday in November, and certified said nomination to the Secretary of State; that it is the duty of the said Secretary of State to certify to the county clerks of the different counties of the state, not less than fourteen nor more than twenty days before the general election to be held in November, the name of each person nominated for any office; that said Secretary of State claims that there was a vacancy in the candidacy for the office of attorney general and that it was within the power and was the duty of the state central committee to nominate some person to fill such vacancy; and that said secretary has given out that he will certify to the

county clerks of the different counties of the state the name of C. H. Crownhart as the person to be placed upon the Republican ticket to be voted for at the general election.

The relief prayed for is that the Secretary of State be enjoined from certifying to the several county clerks of the state the name of C. H. Crownhart, or any person other than the relator, as the candidate of the Republican party in Wisconsin for the office of attorney general, and that said Secretary of State be commanded to certify the name of the relator as the candidate for said office.

To this complaint the defendant interposed a demurrer on the following grounds: (1) Because the court had no jurisdiction of the subject of the action; (2) because the plaintiff had not legal capacity to sue; (3) because it appears on the face of the complaint that it does not state facts sufficient to constitute a cause of action.

Olin & Butler, for the plaintiff.

Frank L. Gilbert, attorney general, Russell Jackson, deputy attorney general, and Walter D. Corrigan, for the defendant.

84 PER CURIAM. The following propositions are decided in this case:

(1) The provisions of the general election law contained in section 34, Statutes of 1898, relating to the filling of vacancies caused by the declination, death, or other disability of a nominated candidate, are not imported into the primary election law and hence do not apply to primary elections.

(2) Under the allegations of the complaint it must be held that the fact of the death of Mr. Tucker was brought home to the knowledge of the great mass of the electors of the state before the holding of the primary, and that the great majority of the electors who placed a cross opposite his name upon the primary ballot did so with such knowledge.

(3) Votes which are in form cast for a deceased person by voters who know the fact of his decease cannot be considered as votes for or against any person, but must be regarded as so much blank paper.

(4) It follows that under the allegations of the complaint the relator received the greatest number of votes cast at the primary as a Republican candidate for the office of attorney general, and under subdivision 1 of section 18 of the primary law is entitled to have his name placed upon the official ballot as such candidate.

Demurrer overruled, and judgment ordered for relator for relief by injunction as prayed in the complaint.

Siebecke, Kerwin and Timlin, JJ., dissented.

The following opinion was filed December 6, 1910:

⁸⁵ BARNES, J. The exigencies of this case called for a speedy decision thereof, so the mandate of the court was filed in advance of the time at which the decision would have been announced had the ordinary course been pursued. Before the opinion of the court was prepared, a motion for a rehearing was made, and thereafter, and within the time prescribed by ⁸⁶ the rules of the court, a brief was filed in support of such motion. The delay in filing this opinion was due largely to the fact that such motion was pending and undetermined. Nothing was said in the brief filed on the motion for rehearing which changed the conviction of the court that its former judgment was correct. With these explanatory remarks by way of introduction, we proceed to state the reasons which impelled the court to reach the conclusion which it did.

The first and second grounds of demurrer were not urged upon this court. The action was brought by the relator after the attorney general refused to institute the same and after leave was granted by this court, and there is no want of capacity to sue on the part of the relator and no lack of jurisdiction in this court to hear and decide the cause on its merits.

The defendant contends (1) that at common law the votes cast for Mr. Tucker were not nullities, but should be counted, and that he having received a plurality of the votes cast, and being dead, there was a vacancy which should be filled in some lawful manner; and (2) that by virtue of section 25 chapter 451, Laws of 1903, being the primary election law, the provisions of section 34, Statutes of 1898, pertaining to the conduct of general elections were incorporated into the primary law, and that under the terms of said section 34 the votes cast for Mr. Tucker should be counted, and a vacancy resulted if he received more votes than any other candidate.

1. Assuming that section 34, Statutes of 1898, has no application to the case, we think there was no vacancy for two reasons: (a) Because of a provision in the primary election law itself, and (b) because under the common law votes knowingly cast for a dead man cannot be counted.

(a) Section 18 of the primary law provides: "The person receiving the greatest number of votes at a primary as the candidate of a party for an office, shall be the candidate of that party for such office, and his name as such ⁸⁷ candidate shall be placed on the official ballot at the following election": Stats., sec. 11—18 (Supp. 1906: Laws 1903, c. 451, sec. 18).

We do not think that a dead man is a "person" within the meaning of this statute. The word "person," as it is ordinarily used, means a living human being. It is so defined in

Webster's and in Johnson's and in the Century dictionaries. It is so defined by the courts: *Sawyer v. Mackie*, 149 Mass. 269, 21 N. E. 307; *United States v. Crook*, 5 Dill. 453. 25 Fed. Cas. 695, 697; *Morton v. Western Union Tel. Co.*, 130 N. C. 299, 41 S. E. 484; *Caldwell v. Wallace*, 4 Stew. & P. (Ala.) 282; *Morrill v. Lovett*, 95 Me. 165, 49 Atl. 666, 56 L. R. A. 634. In the latter case it is said: "The natural and obvious signification of the word 'person' in a statute is a living human being." Both the Maine and Massachusetts courts significantly say that when statutes refer to one who is dead they speak of him as a "deceased person" or a "person deceased."

It would seem ridiculous to place any other interpretation on the statute under consideration, because it expressly provides that the person receiving the greatest number of votes at the primary shall be the candidate, and that his name shall be placed on the election ballot. The legislature did not intend that if a dead man received a plurality of the votes cast he became the candidate of the party and that his name must go upon the ballot, to be voted for at the ensuing general election. If the word "person" as used in the statute means a living human being, then the relator satisfies the call of the statute in every particular. He is the person who received the greatest number of votes at the primary.

(b) It is well settled that where electors vote for an ineligible candidate without knowledge of his disqualification, and such candidate receives a plurality of the votes cast, his disqualification does not result in electing the candidate receiving the next highest number of votes. In such a case the votes cast for the ineligible candidate must be counted, and ^{ss} there is a vacancy in the office instead of an election of the candidate receiving less than a plurality of the votes: *State v. Giles*, 2 Pinn. 166, 52 Am. Dec. 149; *State v. Smith*, 14 Wis. 497; *State v. Tierney*, 23 Wis. 430; 1 Dillon on Municipal Corporations, 4th ed., sec. 196; Cooley's Constitutional Limitations, 7th ed., 931; Naar on Suffrage and Elections, 163; *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375; *Opinion of Justices*, 38 Me. 598; *People v. Molitor*, 23 Mich. 341; *Saunders v. Haynes*, 13 Cal. 145; *People v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508; *State v. Swearingen*, 12 Ga. 23; *State v. McGeary*, 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446; *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538; *Commonwealth v. Cluley*, 56 Pa. 270; *Dryden v. Swinburne*, 20 W. Va. 89.

The cases where the death of the candidate voted for took place before the polls closed on election day are not numerous. The courts that have passed upon the question hold that, where the electors cast their ballots for a dead man, in good

faith and in ignorance of his death, the votes should be counted, and that if the decedent received a plurality of the votes cast there was no election. So held in *State v. Speidel*, 62 Ohio St. 156, 56 N. E. 871, and in *Howes v. Perry*, 92 Ky. 260, 36 Am. St. Rep. 591, 17 S. W. 575. In each of these cases the candidate died on election day before the polls closed, and there was no way in which it could be ascertained how many votes for him were cast before his death and how many afterward.

There is a third class of cases in which the votes were cast for a candidate known to be dead or disqualified or for a fictitious person. The great current of authority is to the effect that such ballots are ineffectual for any person and cannot be counted in determining the result of the election. The English cases almost uniformly so hold: *King v. Hawkins*, 10 East, 211; *King v. Parry*, 14 East, 549; *Gosling v. Veley*, ⁸⁹ 7 Q. B. 406; *Trench v. Nolan*, 2 Moak's Notes, 711; *Regina v. Coaks*, 3 El. & Bl. 249; *Rex v. Monday*, 2 Cowp. 530; *Rex v. Foxcroft*, 2 Burr. 1017. Our own court, in *State v. Tierney*, 23 Wis. 430, said that if the "person voted for had been a fictitious person, and this appeared on the face of the ballot, it might be said that the canvassers could reject it, and consider the ballot as being only for the real persons whose names were on it. This might have been done if one of the persons had been, as Lord Campbell suggested in *Regina v. Coaks*, 3 El. & Bl. 249, 'the man in the moon.'" The foregoing excerpt cannot be regarded as passing upon the question even inferentially. The New York court holds that the "knowledge [i. e. of the disqualification] must be such, or the notice brought so home, as to imply a willfulness in acting, when action is in opposition to the natural impulse to save the vote and make it effectual. He [the voter] must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied": *People v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508. Approved in *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375, and in *People v. State Board of Canvassers*, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646.

It is held in Indiana that, where voters at an election either know as a matter of fact, or are bound to know in law, of the ineligibility of a candidate, the election does not result in failure, but the eligible candidate receiving the highest number of votes is legally elected. So it was decided that voters were chargeable with knowledge that the office of mayor was a judicial one, and that therefore under the constitution such officer during his term was not eligible to hold any office other than a judicial one: *Gulick v. New*, 14

Ind. 93, 77 Am. Dec. 49. It is said in this case that the main purpose of elections is to elect candidates to office, and that where ⁹⁰ votes are knowingly cast in such a way that this end cannot be effected, the votes are powerless to prevent the election of any other person. Other Indiana cases to the effect that votes cast for a candidate who is ineligible cannot be counted are *State v. Johnson*, 100 Ind. 489, and *Copeland v. State*, 126 Ind. 51, 25 N. E. 866. These cases, however, have been modified by later decisions, and it is now held that, unless there is knowledge of the ineligibility on the part of the voter at the time he casts his ballot, the candidate receiving less than a plurality of the votes cast is not elected: *State v. Bell*, 169 Ind. 61, 124 Am. St. Rep. 203, 82 N. E. 69, 13 L. R. A., N. S., 1013; *Hoy v. State*, 168 Ind. 506, 81 N. E. 509, 11 Ann. Cas. 944; *State v. Ross*, 170 Ind. 704, 84 N. E. 150. The Maryland court at an early day decided that votes cast for an ineligible candidate were thrown away even though the voters were ignorant of the disqualification, and that the eligible candidate receiving the greatest number of votes was elected: *Hatcheson v. Tilden*, 4 Har. & McH. 279.

Cases intimating that votes cast with knowledge of the ineligibility of the candidate for whom they are cast should not be counted are *Commonwealth v. Cluley*, 56 Pa. 270, 94 Am. Dec. 75, *Howes v. Perry*, 92 Ky. 260, 36 Am. St. Rep. 591, 17 S. W. 575, *Gill v. Mayor*, etc., 18 R. I. 281, 27 Atl. 506, and *Saunders v. Haynes*, 13 Cal. 145.

The contrary rule was adopted by the St. Louis court of appeals in *State v. Walsh*, 7 Mo. App. 142, where it is held that votes cast for a candidate with knowledge of his death should be counted against the other candidates. This case is approved in *Sheridan v. St. Louis*, 183 Mo. 25, 81 S. W. 1082, 2 Ann. Cas. 480, although there was no question of knowledge involved in that case. As far as we can discover, the Missouri court stands alone on the question.

The great weight of authority, English and American, is to the effect that votes knowingly cast for a candidate who cannot ⁹¹ possibly exercise the functions of the office if elected, are thrown away, and it seems to us that this should be so. Elections are held for the purpose of selecting officers, not for the purpose of creating a vacancy to the end that the place may be filled by appointment or even by a new election. The function of the voter is to express an affirmative choice of some person; not to content himself with merely expressing his disapproval of certain candidates. If a vote for a man known by the voter to be dead can be counted, then a vote for a stick or a stone or for "the man in the moon," as is said in the English cases, should be counted. It is true that in this country the majority rules,

but the majority should not pursue a policy of mere negation. If the majority should contumaciously persist in voting for candidates notoriously ineligible, it might not be possible to fill the office at all. The illustration may be somewhat far-fetched, but instances have occurred in England where an ineligible candidate for member of parliament received a majority of the votes cast at election after election, and such occurrences are by no means impossible in this country. Besides, there can be no affirmative choice by the electors unless a new election is provided for and held. Either the Republican state central committee or the governor must select the new candidate, if there is a vacancy in the instant case. It may be that a single officer or a committee consisting of a couple of dozen members could make a selection that would be more acceptable to the majority in the present instance than would be the candidate for whom over 56,000 votes were cast, but conditions might easily change so that the contrary would be true.

It is argued that the court cannot assume that any considerable vote, or in fact any vote, was cast for Mr. Tucker by electors who knew of his death at the time they voted, and that therefore the rule as to votes cast for an ineligible candidate with knowledge of the fact of ineligibility does not apply. The complaint does not aver actual knowledge of ⁹² Mr. Tucker's death on the part of a sufficient number of electors to give him a plurality of the votes cast. It sets up the facts from which knowledge is to be inferred, if inferred at all. The facts are admitted by the demurrer. It is only by proving such facts as are alleged that the relator could show knowledge at all on the part of the electors, because it would be impossible to subpoena several thousand voters to testify as to how they voted and as to whether or not they knew of Mr. Tucker's death if they voted for him. Before such an inquiry could be concluded another primary election would have come and gone, and the delay and expense attendant on it would work a denial of justice. Mr. Tucker was a candidate for an important office in a more or less acrimonious campaign where factional lines were closely drawn. The complaint shows that the fact of his death was generally stated and published in newspapers throughout the state, as well as the fact that if he received the greatest number of votes at the primary the state central committee could fill the vacancy, and that such statements were repeated in circular letters addressed to many parts of the state, a sample copy of which will be found in the statement of facts. In addition to this one hundred and sixty-nine telegrams were sent out by a prominent supporter of one of the factions in the Republican party to one hundred and sixty-nine different prominent supporters of said

faction, in different parts of the state, calling upon them to urge voters to vote for Tucker, and advising them that the committee could fill the vacancy. Thus, through the medium of the press and by means of telegrams and circular letters, the members of the faction in the party to which Tucker in his lifetime belonged were advised to vote for him notwithstanding his death. We think the court would be justified in assuming that a great majority of the electors of Wisconsin read one or more newspapers. Since the advent of rural free delivery the daily newspaper finds its way into the country districts with very little loss of ⁹³ time in transmission. News is disseminated rapidly. With the newspapers publishing the fact of Mr. Tucker's death, and the well-known tragic circumstances under which it occurred, and the members of the wing of the party with which he affiliated vigorously calling on its supporters to vote for him regardless of that fact, it may fairly be assumed that the electorate of Wisconsin was very generally informed of his death on election day. Certainly we think a court should find on the admitted facts that enough votes were cast for Mr. Tucker by electors who knew he was dead when they cast them to give him a plurality over the relator; or, in other words, that at least 5,287 of the 63,482 persons who voted for him knew he was dead when they so voted.

2. It remains to be determined whether what we find to be the common-law rule has been modified by statute. The following provisions are the only ones which have any material bearing upon the subject: Section 13 of the primary election law reads: "Vacancies occurring after the holding of any primary shall be filled by the party committee of the city, district, county or state, as the case may be": Stats., sec. 11—13 (Supp. 1906: Laws 1903, c. 451, sec. 13).

Section 25 of the primary election law reads: "The provisions of the statutes now in force in relation to the holding of elections, the solicitation of voters at the polls, the challenging of voters, the manner of conducting elections, of counting the ballots and making return thereof, and all other kindred subjects, shall apply to all primaries in so far as they are consistent with this act, the intent of this act being to place the primary under the regulation and protection of the laws now in force as to elections": Stats., sec. 11—25 (Supp. 1906: Laws 1903, c. 451, sec. 25).

Section 34, Statutes of 1898, relates to holding general elections and provides that any person nominated for an office may decline in the manner therein prescribed. The statute then ⁹⁴ provides how a new candidate may be nominated in case of the death or declination of a nominee before the ballots are distributed. The statute further provides: "If such declination, death or the permanent removal of a nominee

ake place after the ballots are printed and before election, the proper chairman of the committee of the political organization of which such candidate was the nominee may make a nomination to fill the vacancy and provide the election boards with pasters containing the name of such nominee only, which shall be pasted upon each of the official ballots by the ballot clerks, before signing their initials thereon and delivering them to voters. If the nominee die after the ballots are printed, and no nomination shall be made as herein provided, the votes cast for him shall be counted and returned, and if he shall receive a plurality the vacancy shall be filled as in case of vacancies occurring by death after election."

As will be observed, section 25 of the primary law makes the provisions of law in force when it was enacted, in relation to the holding of elections, the solicitation of voters at the polls, the challenging of voters, the manner of conducting elections, of counting ballots and making return thereof, and all other kindred subjects, applicable to all primaries in so far as they are consistent with the primary election law. The section then recites that it is its intention to place the primary under the protection and regulation of the laws in force pertaining to elections. It is argued that this provision incorporates section 34, Statutes of 1898, into the primary law, and that, inasmuch as Mr. Tucker died after the ballots were printed, the votes cast for him should be counted and there is a vacancy by reason of his death, he having received a plurality of the votes cast. There are a number of reasons why we think section 34 is no part of the primary election law.

We should have as little confusion as possible in our statute law. Where the attempt is made to incorporate parts of a former law into one that is being presently made, the language used should be such as to indicate with a reasonable degree of ⁹⁵ certainty what was in the legislative mind. A careful and intelligent reading of the two acts should be sufficient to indicate to the reader what parts of the old law were applicable to and were incorporated in the new. People are obliged to obey the laws, and in order that they may do so they should be put in a position where they can ascertain what they are. A study of the two sections convinces us that the legislature never intended that section 34 should have any application to a primary election.

In the first place the legislature made a special provision in the primary election statute (section 13) pertaining to the filling of vacancies. It is reasonable to suppose that when it undertook to specifically legislate on the subject of vacancies it did so fully. The legislature also had in mind the general provisions of the election law, because such law is referred to and its provisions are adopted so far as consistent

with the primary law. The special provision found in the primary law in reference to the filling of vacancies is wholly redundant if it was intended to incorporate section 34 into the primary law. Section 34 deals specifically with matters arising after party nominations are made, and section 13 deals with matters arising after the primary election to nominate candidates is held. Section 34 of the general statute fully covers the subject that is covered by section 13 of the primary election law.

Again, section 34 relates in terms only to a person already nominated by a party, and it provides for the filling of a vacancy when one happens, by giving the party committee of that party power to fill it. This is logical, because the party committee is the executive arm of the party and very properly should represent it in such an emergency. But before the primary there is no party nominee. True, there may be several persons whose names have been properly put forward by nomination papers and who are thus entitled to have their names on the primary ballot, but these nominating signers have no executive committee recognized by law to act for ^{or} them. It must frequently happen that these persons nominated before a primary represent factions in the party, and, in all probability, one at least represents a faction whose object it is to overthrow the faction which has control of the party and is represented by the party committee. Now, if section 34 be imported into the primary law, the party committee, under its terms, would be authorized to fill a vacancy occurring in the leadership of the party faction which was endeavoring to defeat and supplant the faction to which the committee belonged. This seems absurd. It is logical and sensible to enact that the party committee shall act for the party as a whole, because it represents the party. It is neither logical nor sensible to enact that a party committee shall act for a faction of the party or a mere group of party members, because it does not represent the faction or group. Indeed, it may be fighting such faction or group with all its power.

Another inherent difficulty in the way of holding that section 34 is a part of the primary law is the fact that we must supply words therein and eliminate words therefrom in order to make it applicable, which it is the function of the legislature to eliminate or supply rather than of the courts. The last sentence of section 34 is the only one that can have any application to the facts presently before us: "If the nominee die after the ballots are printed, and no nomination shall be made as herein provided, the votes cast for him shall be counted and returned, and if he shall receive a plurality the vacancy shall be filled as in case of vacancies occurring by death after election."

The "nominee" referred to in section 34 is the person who has received the party nomination for an office. If the section is part of the primary law we shall have to substitute for the word "nominee" the words "candidate for the nomination." The clause "and no nomination shall be made as herein provided," found in said sentence, can have no possible application to a primary election. The provision quoted recites that the vacancy is to be filled as in case of vacancies occurring by death after election. It would be absurd to say that this part of the law could apply to primary elections, unless we interpolate words therein that wholly change its meaning. A vacancy in the office of attorney general occurring after election is filled by appointment by the governor. Now, the legislature could not have intended that the governor should fill a vacant place on a party ticket. That would enable him to name candidates for parties with which he was not affiliated and in whose success he had no interest and whose defeat he earnestly desired. This interpretation of the law would place him in a position where he might have the naming of a rival candidate if he were himself seeking a re-election. So we must either lop off this part of the sentence or supply words from some other statute so as to place the appointing power elsewhere. It should be just as permissible to amputate the first part of the sentence as it is the last, and if either can be eliminated we see no good reason why a combination of words found in the middle that make a complete sentence when standing alone may not be lifted out of section 34, or any part of the general election law for that matter, and be transported into the primary law. The possibilities of adding to the primary law in this way, as occasion arises, are boundless, but this method of lawmaking is too indefinite and uncertain to receive judicial sanction.

Again, section 34 provides for filling a vacancy caused by the death or declination or permanent removal of the party candidate. The death of Mr. Tucker created no vacancy. In the event of the death of a nominee of a political party there is a hiatus in the election ticket of the party nominating him, which very properly should be filled. The word "vacancy" conveys to the mind the idea of a place once filled but not so any longer. The primary election is held to enable the electors to select one of the few or many candidates who may invite the favorable consideration of the electors as a fit representative of the party for some particular office. To say that, if there are ten candidates of a party for one office, and one of them dies before the primary is held, there is a vacancy, seems illogical. So long as there is presented to the electors one or more eligible candidates for their suffrage, how can it be said that there is any vacancy in the primary ballot? The primary election presents a very different situation from the

general election. At the latter each party presents one, and only one, candidate for each office, and if he dies after nomination his place must be filled or the party can have no candidate. The primary is a free-for-all, where any member of a party, by getting the requisite number of signers to his nomination papers, may do his best to convince his fellow party men that he is the logical candidate who should be selected by the party for a place on the election ballot. But if death overtakes him before the primary is held, and there are other patriots who are not only willing but anxious to secure the prize, we fail to see where there is any vacancy.

Indeed, the defendant, in the brief filed on the motion for a rehearing, frankly makes concessions which coincide with the view above expressed. His counsel say: "It is perhaps true that a 'declination' or 'death' before the primary may or may not create a vacancy; for instance, where there are several candidates for the 'office of Republican nominee,' the declination or death of one would perhaps create no such vacancy as is contemplated by this provision. The legislature had no such situation in mind as more than one candidate of a single party for an office. It had the general election in mind where there is but one party candidate. It had in mind a vacancy occurring at or during a convention, or thereafter when there was an organized party committee. Before the primary, it is possible there is no vacancy by the declination or death of one of several candidates. There is no party committee representing a particular candidate among the several. Hence there is force to the argument that the vacancy which can be filled under this provision by party committee is one occurring or found to exist when the primary is over."

⁹⁹ Counsel seek to avoid the apparent difficulty by proceeding to read or construe the troublesome provision as not being applicable to the primary law. Counsel have not favored us with their views as to how section 34 should be reconstructed so as to meet the case in hand. By generously carrying out the algebraic processes of elimination, by substitution and by addition and subtraction, it is possible to so remold section 34 as to make it fit this case; but we do not think the legislature intended that we should do so or that the citizen should be obliged to go through such a process to determine what the statute law of the state is. We fail to see how the word "vacancy" can be stricken from the statute, if it is to retain any life that would be helpful to the defendant, because it is only where a vacancy occurs that action can be taken by the party committee.

It may be said that section 13 of the primary law authorized the Republican state central committee to make a nomination under the facts before the court, although it was not seriously contended in the briefs of counsel or on the oral argument

that such was the case. Unless a vacancy occurred after the primary was held, section 13 has no application. Mr. Tucker died and his supporters voted for him before the primary election was over. If the death of or the casting of votes for the deceased, or both, caused a vacancy, it did not occur "after the holding of any primary." If a vacancy occurred after the primary was held, it must have been because the votes were counted after the election. It is not apparent how the counting of votes can create a vacancy. If there was one, it was because the electors voted for a dead candidate. We have already given our reasons why the electors cannot create a vacancy by voting for a man known to be dead when the votes are cast.

Timlin, Liebecker and Kerwin, JJ., dissented.

The Effect of an Election Where an Ineligible Candidate Receives a Majority of the Votes, is the subject of a note to *State v. Bell*, 124 Am. St. Rep. 211.

A Primary Election is an Election Within a Constitutional Provision Which Prescribes the Qualifications of Voters at "any election": *Johnson v. Grand Forks County*, 16 N. D. 363, 125 Am. St. Rep. 662.

SENTINEL COMPANY v. A. D. MEISELBACH MOTOR WAGON COMPANY.

[144 Wis. 224, 128 N. W. 861.]

CORPORATIONS—Commencement of Existence.—Under the statutes of Wisconsin a corporation comes into existence at the time of the filing of its articles with the register of deeds, and is capable from that time to bind itself by contract, and the signers of its articles have then lawful authority to manage its affairs. (p. 1009.)

CORPORATIONS—Authority of Incorporators and Officers to Bind.—Where it appears that one of the signers of articles of incorporation, immediately after the filing thereof, assumed the management of the business, and contracted indebtedness on behalf of the corporation and held himself out as acting for the corporation; that with the consent of the other signers of the articles he acted as secretary and manager of the sales department of the corporation upon salary, made contracts for it and represented it in the management of its business, the evidence is sufficient to support a verdict against the corporation upon a contract made by such officer. (p. 1010.)

SUNDAY LAWS—Recovery for Advertisement in Sunday Paper.—In an action on the quantum meruit to recover what the publication of advertising articles in a Sunday newspaper was reasonably worth, a recovery is barred by a statute which prohibits "labor, business or work, except only works of necessity and charity," on a Sunday. (pp. 1010, 1011.)

SUNDAY LAWS—Work Done on Sundays—Judicial Notice.—In an action to recover on a quantum meruit for advertising in a newspaper upon certain dates, the court will take judicial notice that such dates were Sundays, if that is the fact. (p. 1010.)

Perry, Morton & Kroesing, for the appellant.

Quarles, Spence & Quarles, for the respondent.

225 KERWIN, J. This action was brought on quantum meruit to recover upon two causes of action. The first cause of action was for advertising done for the defendant by the plaintiff between the first day of January and August, 1906, alleged to be reasonably worth \$248.67. An exhibit is attached to the complaint showing the items and dates of publication. The second cause of action is based upon a claim for the manufacture and delivery to the defendant, at its special instance and request, by the Clark Engraving and Printing Company, a corporation, of engravings, plates, cuts, and drawings alleged to be reasonably worth \$60.10, which it is alleged the defendant agreed to pay for, and that the claim of said Clark Engraving and Printing Company was assigned to the plaintiff prior to the commencement of this action. The exhibit attached to the complaint under the first cause of action is as follows:

A. D. Meiselbach Motor Wagon Company,			Dr.
In account with Sentinel Company,			
1906.			
May 13.	To advertising.....	\$32	34
20.	" ".....	40	18
27.	" ".....	33	32
28.	" ".....		57
31.	" ".....	78	10
June 30.	" ".....	64	16
			<hr/>
			\$248 67

226 The date of the last item, "June 30," was corrected on the trial without objection to read "June 3."

The complaint also alleges that the defendant is a corporation. The answer denies the corporate existence of the defendant, and denies generally the allegations of the complaint. It was, however, admitted on the trial that the Clark Engraving and Printing Company was a corporation at the times stated in the complaint, and that the work alleged to have been performed by said company was in fact performed and the prices charged therefor reasonable. The material controverted issues upon the trial, briefly stated, were: (1) The incorporation of the defendant at the time in question, and its power to incur the obligation; (2) the authority of one Charles Rohde to bind the defendant, and whether said Rohde individually, or the defendant through him, authorized the advertisements published by the plaintiff and the work done by the Clark Engraving and Printing Company; (3) whether the defendant ever adopted the acts of Rohde in the

matters in question; (4) the validity of the Sentinel Sunday advertising as a basis for legal liability against the defendant; and (5) the reasonable value of the Sentinel advertising.

The jury returned a general verdict in favor of the plaintiff upon both causes of action for the sum of \$308.77, with interest from the thirtieth day of June, 1906. The defendant moved that the verdict be set aside and for judgment dismissing the complaint with costs, and in case of the denial of such motion that the verdict be set aside and a new trial granted for several alleged reasons. Defendant's motions were denied and judgment ordered for the plaintiff in accordance with the verdict, from which the defendant appealed.

²²⁷ The first three propositions referred to in the statement of facts, namely, the power of the defendant to incur the obligation which is the basis of plaintiff's claim, the authority of Rohde to bind the defendant and whether he in fact did so, and whether defendant adopted the acts of Rohde, may be considered together. The articles of incorporation of the defendant were filed with the register of deeds on May 8, 1906. They were signed by A. D. Meiselbach, B. R. Godfrey, and Chas. Rohde, incorporators. Section 1772, Statutes of 1898, provides for the filing of the articles of incorporation or a true copy thereof with the Secretary of State and register of deeds of the county in which the corporation is located, and further provides that "no corporation shall, until such articles be so left for record, have legal existence." Section 1773 provides that "until the directors or trustees shall be elected the signers of the articles of organization shall have direction of the affairs of the corporation," and that "no such corporation shall transact business with any others than its members until at least one-half of its capital stock shall have been duly subscribed and at least twenty per centum thereof actually paid in; and if any obligation shall be contracted in violation hereof the corporation offending shall have no right of action thereon; but the signer or signers of the articles and the subscriber or subscribers for stock transacting such business or authorizing the same, or having knowledge thereof, consenting to the incurring of any debt or liability, as well as the stockholders then existing, shall be personally liable upon the same."

Under our statutes the defendant became a corporation at the time of the filing of its articles with the register of deeds, namely, May 8, 1906, and was capable from that time to bind itself by contract, and the signers of the articles had lawful authority to manage its affairs: *Badger P. Co. v. Rose*, 95 Wis. 145, 70 N. W. 302, 37 L. R. A. 162. There is evidence tending to show that immediately after the articles of incorporation of the defendant ²²⁸ were filed with the register

of deeds, Chas. Rohde, one of the signers, assumed the management of the business and contracted the indebtedness in question on behalf of the corporation and held himself out as acting for the corporation. There is also evidence that early in May, 1906, Rohde, with the knowledge and consent of the other signers of the articles, acted as secretary and manager of the sales department of the defendant at a salary of \$1,200 per year, made contracts for the defendant, and represented it in the management of the business. The jury in finding for the plaintiff necessarily found the facts in its favor, and, without further reciting the evidence, it is sufficient to say that there is ample evidence to support the verdict on the points of Rohde's authority to bind the defendant and that he did in fact contract with the plaintiff and the Clark Engraving and Printing Company on defendant's behalf. All the services performed by the plaintiff and the Clark Engraving and Printing Company and material furnished were done, performed, and furnished for defendant after the filing of the articles of incorporation of the defendant, therefore after the defendant had existence as a corporation.

The only serious question on this appeal is the right of the plaintiff to recover for charges made for Sunday publications. It appears from the record that four of the items recovered for, namely, May 13, \$32.34; May 20, \$40.18; May 27, \$33.32; and June 3, \$64.10, were for Sunday publications, and the question arises whether the recovery for these items can be sustained. The main answer of respondent's counsel to the contention of appellant's counsel on this point is that the objection to these items as being Sunday publications was not sufficiently brought to the attention of the trial court, the only objection made to proof of these items being that the evidence was incompetent, irrelevant, and immaterial, while on the part of appellant it is contended that, the dates appearing, the court was bound to take judicial notice that such publications ²²⁰ were on Sunday. The action being on quantum meruit to recover what the publication of the articles was reasonably worth, and the dates of publication appearing, we think the court was bound to take judicial notice of the Sunday publications and that no recovery could be had therefor: *McIntosh v. Lee*, 57 Iowa, 356, 10 N. W. 895; *Wilson v. Van Leer*, 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl. 1097; *Louisville & N. R. Co. v. Brinkerhoff*, 119 Ala. 606, 24 South. 892; 1 Ency. of Ev. 768. Moreover, it appears from the record that at least three of the Sunday publications were brought to the attention of the court as Sunday publications. The question is not free from difficulty. It is a matter of common knowledge that Sunday newspapers are published throughout the country and that they contain in their columns much valuable advertising matter, and it seems a harsh rule to hold

that such publications made on Sunday cannot be recovered for, although perhaps much of the work in preparing the matter for publication is done on secular days. However, in the case before us, we are not dealing with a situation of agreement made on a secular day for work to be done generally, nor a case of agreement made on Sunday for work afterward done on a secular day and supported by a subsequent promise, under the rule laid down in *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605; *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77; *Schmidt v. Thomas*, 75 Wis. 529, 44 N. W. 771; *King v. Graef*, 136 Wis. 548, 128 Am. St. Rep. 1101, 117 N. W. 1058, 20 L. R. A., N. S., 86; and *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787. In the case at bar the respondent placed itself squarely upon the right to recover for what the services performed on Sunday were reasonably worth. Section 4595, Statutes of 1898, prohibits "labor, business or work, except only works of necessity and charity," and no attempt was made by respondent to bring itself within the exception, if it were possible for it to do so. Under a similar statute in New York a contract for the publication of an advertisement in a newspaper printed Saturday night and issued Sunday was held ²³⁰ void: *Smith v. Wilcox*, 24 N. Y. 353, 82 Am. Dec. 302. This court has held to a strict rule against the enforcement of Sunday contracts: *Troewert v. Decker*, 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26; *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787; *Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. 638; *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77; *Howe v. Ballard*, 113 Wis. 375, 89 N. W. 136. In *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77, the last materials in a mechanic's lien case were furnished on Sunday, and, although actually used in the work, it was held that no recovery could be had therefor, since no subsequent promise was made to pay and none could be implied. In *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095, it was held that, where a contract is void because executed on Sunday, acts of subsequent recognition do not constitute ratification of the original contract, such contract being absolutely void and incapable of ratification. In face of the statute and repeated decisions of this court, we see no escape from the conclusion that the plaintiff cannot recover for the Sunday items. If the rule of the statute be wrong, it is for the legislature, not the courts, to afford relief.

It is also insisted by appellant that there is an entire failure of proof on the item May 31, 1906, \$78.10. We cannot agree with counsel for appellant on this point. A prima facie case was made on the whole bill for advertising, namely, \$248.67, and no attempt was made to contradict it. The evidence was sufficient, especially in connection with the admissions made on the trial. It is also urged by counsel

for appellant that the reasonableness of the charge for advertising in plaintiff's paper was not proven. We think there was sufficient evidence to support the finding of the jury on this point.

Error is assigned respecting rulings on evidence, denying motions for nonsuit and directed verdict, refusal to charge as requested, in instructing the jury, and denial of motion for new trial. We do not regard these alleged errors of sufficient gravity to warrant treatment in the view we take of the case. ²³¹ It is sufficient to say that, with the exception of allowing recovery for the Sunday items, we find no prejudicial error in the record. It follows that the judgment of the court below must be modified in accordance with this opinion.

By the COURT. The judgment of the court below is modified by deducting therefrom \$170, the amount of the Sunday advertising, and as so modified is affirmed as of the date of the judgment.

The Constitutionality of "Sunday Laws" is considered in the note to *Booth v. People*, 78 Am. St. Rep. 264, and the recent case of *Stratman v. Commonwealth*, 137 Ky. 500, 136 Am. St. Rep. 299. "Sunday contracts" are considered in the note to *Henry Christian Building etc. Assn. v. Walton*, 59 Am. St. Rep. 641; and what work may be done on Sunday is considered in the note to *Western Union Tel. Co. v. Wilson*, 30 Am. St. Rep. 27.

The Issuing, Publishing and Circulating a Newspaper on Sunday is not a work of necessity or charity, and a contract regarding advertisements in such newspaper is invalid under a statute prohibiting all works except those of necessity or charity: *Handy v. St. Paul Globe Publishing Co.*, 41 Minn. 188, 16 Am. St. Rep. 695.

A Contract Illegal Because Made on Sunday cannot be Validated by subsequent ratification: *Burr v. Nivison*, 75 N. J. Eq. 241, 138 Am. St. Rep. 554; but see *Orr v. Kenworthy*, 143 Iowa, 6, 136 Am. St. Rep. 728, holding the delivery and acceptance of the consideration on Monday, in pursuance of an arrangement for the transfer of personal property on Sunday, is a ratification removing the taint of illegality, if any, from the transaction; and see, also, *King v. Graef*, 136 Wis. 548, 128 Am. St. Rep. 1101, and the cases cited in the cross-reference note thereto.

HOUG v. GIRARD LUMBER COMPANY.

[144 Wis. 337, 129 N. W. 633.]

APPEAL—Verdict Contrary to Evidence.—The supreme court will not condemn the verdict of a jury as contrary to the evidence, if there is any evidence which, in any reasonable view, will sustain it; and in case a trial court on motion to set aside a verdict as contrary to the evidence approves it, its judgment should not be overruled unless clearly wrong. (p. 1018.)

EVIDENCE.—Physical Situations and Impossibilities sometimes speak much more weightily than the vocal utterances of any witness, or number of witnesses. The former cannot falsify. The latter can and often do. The one is indisputable—the other never is. (p. 1018.)

MASTER AND SERVANT—Duty to Guard Machinery.—Neither the common law nor the statutory rule requiring the master to guard machinery so located as to be dangerous to employees in the discharge of their duties applies to a situation where the employee must necessarily go out of any way which he would be reasonably expected to take in order to reach it. (p. 1019.)

MASTER AND SERVANT—Dangerous Machinery—Contributory Negligence.—Where a workman is injured while oiling machinery, he having taken a position dangerously near the wheel which caused the injury, which position it was unnecessary to take and different from the one prepared by the master and ordinarily taken, it cannot be held that the master was liable by reason of a failure to furnish a safe place to work, and it must be held that the servant was guilty of contributory negligence in so unnecessarily exposing himself to danger. (pp. 1019, 1020.)

NEGLIGENCE.—Mere Conjecture or Weight of Mere Possibility cannot support a verdict in an action for damages suffered through negligence. Reasonable certainty, at least, must be established in the plaintiff's favor in such a case as well as in any other. (p. 1020.)

Eastman & Martineau, for the appellant.

Martin, Martin & Martin, for the respondent.

³³⁸ **MARSHALL, J.** Action to recover for a personal injury. Plaintiff pleaded that, while in the due performance of his duty as an employee of defendant, he was severely injured in his right foot by reason of its being caught by a revolving shaft, armed with a sprocket-wheel, collar, and projecting set-screw, so located as to be dangerous to employees in discharge of their duties, unless securely guarded, and that no guard whatever was provided.

All material allegations respecting the circumstances of the injury were put in issue by answer.

On the evidence the main controversy was as to whether the injury occurred by reason of plaintiff's foot having come in contact with the unguarded set-screw or it being carried by the sprocket-chain against the sprocket-wheel and caught between them; whether such set-screw was so located as to be dangerous, unless securely guarded or fenced, to employees in the discharge of their duties; and whether plaintiff was guilty of fatal contributory negligence.

The evidence was to this effect: Plaintiff was forty-two years of age. He had worked in and around the sawmill ³³⁹ where he was injured for years and was familiar with all parts of it, particularly the part where the accident occurred. He had been oiler for some months before he received the injury and had been many times in the place where he made the fatal movement. The particular work preceding such accident was oiling journals at the tightener

frame. In doing this he had to ascend from the basement floor of the mill about eleven feet. The usual way was from the south side of the frames by a pair of stairs. Then there was a platform to step out upon, which reached nearly to the frame. In going that way one did not approach the region of the sprocket-wheel. There were no interferences except what was caused, from time to time, by escape of sawdust and pieces of wood from a break in the east sawdust spout. Such a break happened from time to time, but was easily repaired by nailing on two or three small pieces of boards. It was but the operation of a few moments to do that. It was not particularly plaintiff's business to repair such breaks, but he was allowed to do it, as he saw fit, and on occasions did do it. Whenever repairs were needed the fact came specially to his attention, and he was particularly interested in the matter, unless he chose to approach the tighteners from the north side. Some pieces of boards were off the side of the sawdust spout at this time. He gave as a reason for not replacing them that he did not think of it, and said, in effect, that he chose to do his work by going up on the north side of the frames, though had it not been for the interferences coming from the hole in the sawdust spout he would have gone up on the other side. For a long time before he commenced doing the oiling, the only way in use of approach to the frames was from the south side. He was instructed in that regard. He used that way for a considerable length of time and then discovered and adopted the way he was using immediately before the injury.

The situation was this: There were two tightener frames in the basement story of the mill hung from the floor above and ³⁴⁰ reaching down several feet. They were in a line east and west and about five feet apart. A little north thereof, parallel therewith, and a little below them, there was an eight-inch square timber. Projecting directly down from the main floor, just north of the timber and a little west of a line drawn at right angles with the west side of the east tightener frame, there was a sawdust spout. East of the west tightener frame there was a similar spout. About midway between the two spouts on the eight-inch square timber the journal-box of the sprocket-wheel was located. It was eight inches long with and reached nearly across the timber, was about five inches high, and had an oil cup in the top. Plaintiff was accustomed to oil at that point about once a week. The sprocket-wheel was slow moving, the revolutions being about twenty-four per minute. The journal did not need oiling on the occasion in question. Plaintiff did not approach it for that purpose. The shaft was two inches in diameter, was short, and ran north and south. It projected through the box to the north, somewhat. On the inner side of the box there

was a two-inch wide collar kept in place close to the inner end of the box by a set-screw projecting outward to within about two inches of the rim of the wheel. There was a little space between the inner edge of the timber and the south end of the box, which was cut out, thus making room for the collar to operate. It was inclosed, largely, in the south side of the timber. The sprocket-wheel was fastened to the shaft about one and one-half inches from the collar, so the wheel was about three and one-half inches from the box, but only about two or two and one-half inches from the timber. It was seven or eight inches in diameter and one and one-half inches wide at the rim. It carried a sprocket-chain made of links about three inches long and two inches wide. The projections on the wheel were about one and one-half inches long. They extended beyond the outer side of the links, as the latter engaged the wheel, and were rounded on the ends. The sprocket-chain ³⁴¹ ran at an angle somewhat upward from the plane of the timber and to the east, so that at a point opposite the east tightener frame, the lower chain was a little above the lower cross-timber thereof, and the upper chain, by reason of weight and slack, was practically on the lower one. The power was exerted on the latter which moved to the right, passing under the sprocket-wheel a little below the level of the top of the timber. A ladder was provided for ascending to the place for oiling the journal, which was some eleven feet from the basement floor. Plaintiff, in order to construct for himself a way of reaching the tightener frames and journal-box, placed, securely, a plank of sufficient width to enable him to walk on it, in a somewhat stooping position, on account of the floor above, about fourteen inches north of the timber and on a level therewith. This plank spanned the space north of both tightener frames and the journal-box, and was near enough thereto so that plaintiff, when standing upon it in front of either, could reach and grasp the side of the frame with his left hand, and, holding his oil can in the right, step, and partially raise himself to a standing position, on the lower cross-piece of the frame, in which position he would do the oiling. In the particular instance he placed his ladder against the timber at the east end of the plank. He then ascended to and stepped onto the plank and walked west to a point north of the east tightener frame. The sprocket-chain was in operation. He passed his left foot over the chain to the lower cross-piece of the frame, taking a pretty long step in doing so, southward and upward. Grasping the east side of the tightener frame with the left hand he raised up so as to stand on the cross-piece, resting his whole weight on the left foot. He then put his left arm around the east side of the tightener frame, and there stood with his right foot backward and outward—the limb being outside of and near the moving sprocket-chain—and did

the oiling. That over, he endeavored to retreat by first placing his right foot on the timber just outside of and a little ³⁴² lower down than the chain. That not being feasible, as he thought, because of a frozen accumulation of sawdust on the timber, he passed his foot under the sprocket-chain sufficiently to locate the toe thereof securely on the cross-timber of the tightener frame. Then he lifted the left foot over the chain and gave it a location similar to that of the right foot. Thus he secured himself in place with the toes of his shoes resting on the tightener frame and the sprocket-chain in motion a few inches above his feet and just in front of his lower limbs, maintaining his equilibrium by leaning slightly forward and keeping a secure hold on the tightener frame. The next duty he had in mind to do was to oil the journals at the west tightener frame, located, as indicated, on the other side of the sprocket-wheel. He could as readily have stepped back to the plank as he stepped from it, and proceeded to and down the ladder and then moved that west to the vicinity of the other tightener and thereby reached it without going near the sprocket-wheel. That was the way he had ordinarily performed the work since he had chosen to approach the tighteners from the north, instead of the south side. As he stood in the position aforesaid, there was a floor timber at his back which came down sufficiently to render it necessary for one, in reaching a tightener frame from the plank or the plank from a tightener frame, to bend down somewhat. He knew all the conditions surrounding him, particularly the fact that frozen sawdust was irregularly located on top of the timber near the sprocket-wheel journal. He concluded not to return to the floor and reach the west tightener frame by means of the ladder, but to go along the plank, passing by the end of the sprocket-wheel shaft, or along the timber and over the sprocket-wheel box. Instead of stepping to the plank as he had stepped from it, he supported himself on the right by placing his hand or arm on the side of the sawdust spout, then—with his left hand grasping or left arm placed around the west side of the tightener frame, and so maintaining a substantially upright ³⁴³ position—he reached his right foot quite a good step outward and around the sawdust spout, for the purpose of locating it on the timber between the spout and the bearing of the sprocket-wheel shaft. In doing so his foot encountered the uneven surface at the top of the timber, slipped inward, on top of the lower sprocket-chain, and was quickly carried west to and caught between the chain and wheel and severely injured. When his foot, or some part of its covering at least, was carried between the wheel and chain, it stopped the machinery. Motion was transmitted to the sprocket-wheel shaft by a friction, allowing the interference of plaintiff's foot, as aforesaid, to overcome the contact and bring the sprocket-

wheel to a stop. It was so located that no employee in the discharge of his duties was liable to get in dangerous proximity thereto, as the work had been done prior to plaintiff's choice of the particular way described.

There was some conflict in the evidence from the mouths of witnesses as to whether plaintiff's foot came into contact with the set-screw. Here is the evidence of plaintiff, substantially: "The shaft was turning at a slow rate, about thirty revolutions per minute. The under chain was in motion toward the sprocket-wheel. In trying to place my foot on the timber it slipped in on top of the chain and was caught between it and the sprocket-wheel. The foot was dragged in between the chain and the wheel till the wheel stopped against the inside of my foot, and then the set-screw commenced to work, gouging piece by piece. The set-screw dug into my foot on the top and side down to the toes as it went around and around. The chain drew my foot right into the sprocket-wheel. That stopped the wheel from running. Otherwise it would have wound my leg around the wheel. Everything stopped and that was the position I was found in. They had to take the top off the box and pry up the shaft to get me out. I then got out by crowding my foot down between the timber and the sprocket-wheel."

³⁴⁴ That was the way plaintiff left the case at first. Then he testified about like this: "My foot was in on top of the bottom chain and was drawn under and against the set-screw. The big toe and toe of my rubber went under the sprocket-wheel. The wheel revolved some time after my foot was caught. My foot was caught on the right side in the sprocket-wheel. My foot slipped right ahead. The wheel caught my leg and dragged my foot in. My big toe was not hurt. My foot stopped the sprocket-wheel when it got in tight enough. The wheel went clear around after my foot was caught. It did not have power to drag my foot clear around and break my leg, so when my foot was dragged in the wheel stopped. The wheel did not go around after the shaft stopped. It was going around when it dragged my foot in close. It went around several times. It did not have power enough to carry my leg under so the wheel stopped."

Again the matter was taken up and plaintiff gave about this: "I do not think my big toe came under the sprocket-wheel. There was room for the toe of my rubber to be caught without catching my toe. I was too scared and excited to know just how it was, but my foot was held there in some way."

Axel Peterson, who helped release the plaintiff, testified that the latter's foot was not caught in the sprocket-wheel at all; that his foot was fast under the collar, and that the set-screw pointed up; that the top of the box was not taken off in order

to release him; but that they sprung the shaft a little with a handspike, "sprung her—gave it a little slack," and then worked plaintiff's foot out without turning the wheel back.

The doctor, who testified in plaintiff's behalf, described the injury as a lacerated wound on top and across the instep. He said there was no injury to the toes or the foot other than the wound across the top where the tissue had been torn away with probably some injury to the bones; that adhesions had formed binding the three bones connecting the three middle toe joints with their instep bones together and causing contractions ³⁴⁵ of the tendons of such toes so as to draw them upward.

The cause was submitted to the jury, resulting in a verdict substantially as follows: There was an unguarded set-screw in the collar on the sprocket-wheel shaft. It was so located as to be dangerous to employees of the defendant in the discharge of their duties. Plaintiff's foot was injured by the set-screw. No want of ordinary care on his part contributed to the injury. It will take four thousand six hundred and fifty-one dollars to compensate him for his injury.

Judgment was rendered for plaintiff on the verdict.

The judgment must be reversed for three reasons. Each involves the sufficiency of the evidence to support some vital part of the verdict. In condemning the result as to each such feature, we keep in mind that this court should not disturb the verdict of a jury as contrary to the evidence, if there is any evidence which, in any reasonable view, will sustain it; and also appreciating the force which should be given to this other rule: in case a trial court, on motion to set aside a verdict as contrary to the evidence, approves it, his judgment should not be overruled unless clearly wrong. But in reaching our conclusion we have also to appreciate that the manner of an occurrence as testified to from the mouths of witnesses is not necessarily to be taken as matter of fact even if not in like manner contradicted. Sometimes physical situations and impossibilities speak much more weightily than the vocal utterances of any witness, or number of witnesses. The former cannot falsify. The latter can and often do. The one is indisputable. The other never is.

The jury found that the shaft with the unguarded set-screw was so located as to be dangerous to employees of the defendant ³⁴⁶ in the discharge of their duties. Why so? It was entirely out of reach of any of the employees in the discharge of their duties. It will be seen by the statement that the way of reaching it was by ascending eleven feet from the basement floor. There was no occasion for going near it except to oil the bearing of the sprocket-wheel shaft. In that, there was no occasion for any part of an employee's person or clothing coming in contact with the shaft where it was armed with the

set-screw. Really, it was not possible to do so without actually invading the region some six inches beyond the oil cup on the journal-box, which no one, it seems, could reasonably be expected to do. An operator had, actually, to go outside any course which anyone would reasonably be expected to take, as respondent in fact did, in order to reach the uncovered set-screw. The evidence leaves no doubt but what no one would have supposed an employee would attempt what respondent did—climb around on the narrow timber supporting the end of the sprocket-wheel shaft, cling by one hand-hold and one foot-hold to the tightener frame, with his person hanging, as it were, out over the sprocket-chain; then climb down over the chain, placing the feet on the cross-piece of the tightener frame, the rapidly moving chain coming just over the top of the feet, making it necessary to keep hold of some support with both hands to avoid danger of severe injury; then work along by the aid of hand-holds, in an endeavor to pass around the sawdust spout and get a footing on the uneven surface of the timber in the vicinity of the uncovered set-screw, or gain such footing as a prelude to stepping back to the plank with the idea of groping along it by the end of the sprocket-wheel shaft to the other tightener frame. If there be anything in the evidence suggesting, reasonably, that appellant was chargeable with knowledge of any likelihood that an employee would do so, or get into dangerous proximity to the set-screw, we are unable to find it. He got there, as said before, by going out of the ordinary way, choosing to do his work in a different ³⁴⁷ way from the customary one; a way which he discovered and arranged to suit himself.

The case is ruled, as counsel for appellant contend, by the doctrine that the statute and the common-law rule as well, respecting the guarding of machinery so located as to be dangerous to employees in the discharge of their duties, do not apply to a situation where the employee must, necessarily, go out of any way which he would be reasonably expected to take in order to reach it: *Powalske v. Cream City B. Co.*, 110 Wis. 461, 86 N. W. 153; *Miller v. Kimberly & Clark Co.*, 137 Wis. 138, 118 N. W. 536.

The foregoing, while condemning the finding of negligence in not guarding the set-screw region of the shaft, logically also condemns the finding that plaintiff was not guilty of any want of ordinary care contributing to his injury. It seems that his conduct invited the disaster which happened to him. He subjected himself to many serious dangers, from the time he made the first step from the plank to the tightener frame till he put his foot, or caused it to go, between the jaws formed by the sprocket-wheel and chain. His conduct was specially negligent in that he departed from his previously used but dangerous way of reaching the west tightener frame by trying

to contend with the sprocket-wheel shaft and its connections, the timber loaded with frozen sawdust, the interfering sawdust spouts, and the narrow plank suspended high above the basement floor—in attempting to go by a short cut from the east to the west tightener frame. Can one, without feeling a sense of shock at the very temerity of it, contemplate the picture found in the statement of facts of respondent for a moment before and at the instant of the accident? See him partly hanging to the east tightener frame by one hand and to the sawdust spout with the other, his left foot just under, and leg close up to, the moving sprocket chain, just the toe of one foot reaching under the chain far enough to obtain a rest on the cross-piece of the tightener frame, his right foot out and ³⁴⁸ around the sawdust spout; out to the top of the timber beyond the spout, his line of vision naturally directed away from that foot, and his dependency being upon sense of touch to obtain a safe lodgment for the foot on the sawdust covered timber. See him as, half clinging by his hands and arms, he feels for a footing at his right till his foot slips in on the sprocket-chain close to the sprocket-wheel and is instantly caught between the two. Does not the whole proceeding appear to have been almost foolhardy, when we consider that the ordinary way of approaching the tightener frames was from the opposite side, thus avoiding all the dangers which caused the injury, and that respondent chose to depart from his own customary and dangerous way to one very much more hazardous? Was he not negligent to the point of rashness, in view of the fact that he had been instructed to approach the tighteners from the south side and would have done so had it not been for the interference from the sawdust spout, which he could easily have remedied himself.

Quite as difficult, as in the respects we have treated, we find it to justify the finding that the set-screw did the injury to respondent's foot. At the best the evidence does not more than warrant the merest conjecture that the set-screw reached the foot which was injured. No amount of conjecture or weight of mere possibility can support a verdict in a plaintiff's favor. It must not be forgotten that reasonable certainty, at least, must be established in plaintiff's favor in a case of this sort, as well as in any other, to warrant a recovery.

First, we have the fact that respondent's foot blocked the sprocket-wheel so it stopped. Therefore, the testimony that the set-screw continued to revolve after the foot engaged the wheel must be false. Motion of the wheel necessarily ceased, and that of the set-screw too, as soon as the man's foot was caught between the wheel and the chain, otherwise his leg would have been wound around it and crushed, as he admitted in his testimony. So the injury to the foot must have been done by the time the wheel ceased to revolve. The idea of the

349 set-screw going around thereafter is too preposterous to be worthy of a moment's consideration. Again, respondent said the set-screw gouged his foot down from the instep to his toes. Opposed to that is not only the fact that the wheel and the set-screw must have ceased to revolve as soon as the foot was caught, since otherwise the leg would have been crushed, but the location of the wound was not from the instep downward to the toes, but across the instep, just where it would naturally be if the foot were caught between the sprocket-wheel and the chain and rolled partly under it and thereby crushed and wounded. Again, with the foot between the sprocket-wheel and the chain, as the evidence strongly tends to, if it does not conclusively, show, and we are not prepared to say it does not, and as respondent insisted it was to some extent at least—it was not possible for the screw to reach the foot. There was no room for the foot to get under the collar because it was revolving in a cut-out place in the timber. It was also physically impossible for the foot to have been under the shaft, between the timber and the sprocket-wheel. The foot, as it slipped in between the sprocket-wheel and chain, must have gone in substantially at right angles, as respondent several times substantially testified. In no other way could it have gotten into the machinery and stopped it. Any other theory would be worse than speculation as to mere possibility. In no other way could the wound have been made across the instep, since the set-screw did not go in reach of the foot. Moreover, when he was found by those who released him, the set-screw was pointing upward. That must have been its position when the sprocket-wheel was blocked by the foot because all motion, as stated, must have ceased at that instant. In the position respondent's body was, his foot could not have been turned lengthways of the south edge of the timber and just over such edge so as to have been drawn under the collar or shaft, if there was a place there, which would have permitted it to have been drawn in.

The testimony of the witness called to corroborate plaintiff 350 was self-destructive so far as it was to the effect that the foot was caught under the shaft. He contradicted respondent as to taking the top off the journal-box and lifting up the end of the shaft, and the incredible story of respondent as to his having reached and pushed his foot down and out. The witness and others, as he said, we must remember, put a lever under the shaft and "sprung her up a little," "gave it a little slack," then worked the foot out while respondent "hung to the frame or something." When we think of the short two-inch shaft running in a box, which we must assume was in fair condition, we can comprehend, at once, that the idea that they "sprung her a little" was a mere picture of the witness' imagination or something worse. He testified to a physical

impossibility. His words, "gave it a little slack," are the key to what was done. The only thing they could have given a "little slack" to was the sprocket-chain. A "little slack" does not describe any movement that would have been required to get respondent's foot out from under the shaft, if it were possible for it to be there. Give it "a little slack" fittingly characterizes loosening of the sprocket-chain. Rolling the wheel back slightly was the only practicable way to release the foot if caught between the wheel and the chain. "Pried her up," under the circumstances, in connection with the fact that the shaft was tight in the journal-box, with "give it a little slack," tells the only true story it seems, i. e., they put the end of the lever under one of the projections of the sprocket-wheel and against the timber or something for a fulcrum, or against the shaft on the south side of the wheel, and from there against the end of a link in the interval between two links at the side, or in some other way obtained a leverage by means of which they turned back the wheel sufficiently to "give it," the chain, "a little slack," and then, as the witness said, "they worked his foot out by hand." We note that the evidence does not indicate what kind of a lever was used. It might have been a bar of iron permitting of giving the chain a little slack in the ³⁵¹ way suggested. We do not overlook the fact that the witness spoke of the lever as a "handspike," but that does not indicate but what it might have been of iron or in such form as to permit of the use indicated. Respondent must have been hanging onto something while he was being released, as the witness said, in order to support himself. That something must have been the sawdust spout. Doubtless, as he testified at one point, he was so excited he could not remember just how the accident occurred or how he was released. It was simply impossible for him to have leaned down, as he said he did, and with both hands taken hold of his foot and crowded it down between the sprocket-wheel and the timber. He could not have kept his place on the timber while making such a movement. Moreover, there was no place, as we have seen, for his foot to be so crowded down and out. The gouged-out space was occupied by the collar, allowing the rim of the wheel to come within about two inches of the timber. Is not that plain when the whole situation is comprehended?

Again, crowding the foot down and out was impossible, since it was caught at some point between the wheel and chain requiring the latter to be given "a little slack."

On the whole, it seems clear that the injury was not caused by the projecting set-screw. Too bad, we fully appreciate, the unfortunate plaintiff must irreparably bear his loss. The law does not deal in charity, merely taking from one who will not suffer much by the deprivation, and giving to another who

will otherwise seriously suffer. It does not judicially punish one for the benefit of another whom he has not wronged, however much that other may need the assistance. It takes from one who commits a wrong to another's loss, giving the net of that which is taken to that other, not considering any loss for which the one is not responsible, nor any loss for which such other is himself responsible.

By the COURT. The judgment is reversed and the cause remanded, with directions to render judgment for defendant.

³⁵² MARSHALL, J. (Speaking Independently). As the writer rests from speaking the foregoing for the court, may he not, appropriately and beneficially, soliloquize briefly upon the law's uncharitableness with distressing losses like that here treated.

Why not such inevitable incidents of activities upon which all depend to satisfy demands of legitimate human desire be laid at once upon the subjects of consumption where they must in the end inevitably go for final liquidation? Why not with a minimum of anguish instead of with the maximum thereof? Is it not for the whole, indirectly toiled for but removed in general from the zone of danger as well as those who present their bodies to the peril, that the latter be so? If so, why should an element as to either, involving no moral turpitude, be the deciding factor as to whether the one or the other shall be irreparably impaired? And moreover, why irreparably impaired at all, crushing human ambition, human hope, and human life as well? Why should not the sacrifices for all be taken at once as the burdens of all; not scattering by the way human wrecks to float as derelicts for a time, increasing the first cost till the accumulation disappears from view in the world of consumable things? Such losses, starting immediate victims—particularly the weakest and humblest and often the most indispensable of them to a lower level—go on by trackless ways till, enhanced by transition over the long road, the whole, disseminated so broadly as to be at last unappreciable, comes to rest as noiselessly, imperceptibly, and certainly as moves the "breath of the summer night"—upon and is absorbed in, increasing the costs of subjects of human desire, there to be accounted for at the full money equivalent by the exchanges incident to consumption. Is not this a verity? Why, then, cannot such inevitable end occur without the added loss and arbitrary classification by which the majority of those who feel the misfortune most deeply are not compensated at ³⁵³ all, and the rest only by transfer in each instance to one engaged with the bodily sufferer in mutuality of general purpose and mutuality of risk from inadvertences which can only be minimized according to the degree of natural infirmities of the mutual actor? The courts cannot answer. They do not make the law. They only execute it, and must do that with

fideliity and with care without sympathy or fear or favor. Only the law-making power can answer. At its door lies the duty to do so, and will lie any sin there may be in not laboring to that end. To there in increasing volume points and will continue to point unrequited sorrow till there shall be a remedy. If these words shall help to render humanity's petition effective, they will not have been spoken in vain.

Kerwin, J., dissented.

In the Subsequent Case of *Driscoll v. Allis-Chalmers Co.*, 144 Wis. 451, 129 N. W. 401, where a judgment in favor of an employee in his action against his employer for personal injuries was reversed, Chief Justice Winslow concluded his opinion in the following language, which seems well worth consideration in connection with the statements of Justice Marshall in the foregoing case:

"It gives me no pleasure to state these long-established principles of the law of negligence. I have no fondness for them. If I were to consult my feelings alone I would far prefer to let the case pass in silence. No part of my labor on this bench has brought such heart-weariness to me as that ever-increasing part devoted to the consideration of personal injury actions brought by employees against their employers. The appeal to the emotions is so strong in these cases, the results to life and limb and human happiness so distressing, that the attempt to honestly administer cold, hard rules of law which either deny relief entirely or necessitate a new trial make drafts upon the heart and nerves which no man can appreciate who has not been obliged to meet the situation himself.

"If it be said that some of these rules are archaic and unfitted to modern industrial conditions I do not disagree; in fact, that has been my own opinion for long. Upon reflection it seems that this could hardly be otherwise. Principles which were first laid down in the days of the small shop, few employees, and simple machinery could hardly be expected to apply with justice to the industrial conditions which now surround us. In those earlier days the laborer ordinarily knew his fellow-workmen, worked with simple machinery, and ran comparatively small risk of injury. The genius of our present remarkable industrial development requires that he carry on his patient toil in company with veritable armies of fellowmen, many of whom he can neither see nor know; it surrounds him with mighty and complicated machinery driven by forces beyond his control, whose relentless strength rivals that of the thunderbolt itself; and it requires him to labor day by day with faculties at highest tension in places where death lurks in ambush at his elbow, awaiting only a moment's inadvertence before it strikes.

"The faithful laborer is worthy of his hire in these latter days as never before; but is he not entitled to more, and are not those dependent upon his labors entitled to more? When he has yielded up life, or limb, or health in the service of that marvelous industrialism which is our boast, shall not the great public for whom he wrought be charged with the duty of securing from want the laborer himself, if he survives, as well as his helpless and dependent ones? Shall these latter alone pay the fearful price of the luxuries and comforts which modern machinery brings within the reach of all?

"These are burning and difficult questions with which the courts cannot deal, because their duty is to administer the law as it is, not to change it; but they are well within the province of the legislative arm of the government. Happily the legislature has seen the need and now has these questions under serious consideration. If it shall solve them justly and equitably within constitutional lines, or even make a substantial advance in the direction of such a solution, it will be entitled to the gratitude of all citizens. Confidently I can say that none will welcome such a solution more heartily than the judges of the courts. I am authorized to state that Mr. Justice Barnes concurs in this opinion."

As to the Duty of the Master to Furnish Safe Machinery and Appliances for the work to his employees and a safe place to work, see the notes to *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289; *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 885; and the recent cases of *Massy v. Milwaukee Electric Railway & Light Co.*, 143 Wis. 220, 139 Am. St. Rep. 1096; *Hume v. Fort Halifax Power Co.*, 106 Me. 78, 138 Am. St. Rep. 332.

The Doctrine of Assumption of Risk and Contributory Negligence in the law of master and servant is discussed in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289.

STATE v. MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY.

[144 Wis. 386, 129 N. W. 623.]

PUBLIC STREETS—Duty to Sprinkle is Public.—The sprinkling of the streets of a municipality is a public duty and benefit, and an ordinance providing therefor is one to preserve the public health and promote its comfort. (pp. 1028, 1029.)

PUBLIC STREETS—Sprinkling by Railroad.—*Mandamus* will lie to compel a railroad company to perform its duty to sprinkle certain streets of a municipality. (p. 1029.)

MANDAMUS—Continuing Duty.—Where a legal duty is clear, *mandamus* will not be denied because the duty is a permanent continuing one and not of a mere temporary character. (p. 1029.)

PUBLIC STREETS—Sprinkling by Railroad—Mandamus—Moot Question.—It cannot be said in a *mandamus* proceeding to compel a railroad to perform its duty to sprinkle certain streets of a city, that the question is a moot one, because the proceeding is heard at a time during certain months when such sprinkling is not required, upon the ground that when next required the company may do its duty, where it appears that it has refused to do so for over five years. (p. 1029.)

PUBLIC STREETS—Sprinkling by Railroad—Mandamus—Interest of City.—It cannot be said that a city has not sufficient financial interest in the controversy to maintain *mandamus* to compel a railroad company to sprinkle certain streets, because it might compel abutting owners to do the sprinkling, as it is not compelled to do so, and in any event would retain the obligation to sprinkle the crossings. (p. 1030.)

MUNICIPAL ORDINANCES.—Rules and Regulations Adopted by a Board of public works, under the provisions of an ordinance, and ratified and approved by the council enacting the ordinance, become to all intents and purposes a part of the ordinance and make it complete. (p. 1031.)

MUNICIPAL ORDINANCES — Revision — Effect as Repeal.—Where an ordinance requiring a railroad company to sprinkle certain parts of certain streets in accordance with rules and regulations adopted by the board of public works is retained in a revision of ordinances, but the rules and regulations are not mentioned in the revision, which, however, provided that all ordinances prescribing any rules, regulations, or restrictions upon street railway companies are not repealed, the rules and regulations adopted in pursuance of the ordinance requiring the sprinkling are not repealed but remain in force and effect. (p. 1031.)

PUBLIC STREETS—Sprinkling by Railroad.—A Statute Authorizing the Common Council of any city of a certain class to provide whether the streets thereof should be sprinkled during the current year, and to charge the cost thereof, with certain exceptions, to the abutting owners in case it decided to sprinkle, being made amendatory to existing charters only so far as they were inconsistent with the act, and providing that it should expire by limitation at the end of that year, does not have the effect to repeal an ordinance requiring street railway companies to sprinkle certain portions of the streets occupied by them, as the authority conferred by the statute was merely cumulative and supplementary to the existing rights and powers of the city. (pp. 1031, 1032.)

STATUTES — Repeals by Implication are not Favored.—An earlier act remains in force unless it is clearly inconsistent with or repugnant to the later one, or unless some express notice is taken of the former act in the later one which plainly indicates an intention to abrogate it. (p. 1032.)

STATUTES—Repeal by Implication—Revision and Codification.—Where the legislature legislates upon a given subject, and it is manifest that it intended to revise and codify all existing laws and to cover the entire subject, former acts dealing with such subject will be deemed to have been impliedly repealed, although there is an absence of an express repealing clause. (p. 1032.)

PUBLIC STREETS—Sprinkling by Railroad.—A Resolution Providing for the sprinkling of certain streets between July and October of a certain year and during the pendency of legal proceedings to compel a railroad company to sprinkle parts of such streets under an ordinance which it had refused to obey, does not effect a repeal of the ordinance. (pp. 1032, 1033.)

PUBLIC STREETS—Sprinkling by Railroad, Right to Require.—Under a statute providing for the use of the streets of cities by street railway companies and providing that "Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may, by ordinance, from time to time prescribe," a municipal corporation may, by ordinance, require a street railway company to sprinkle parts of the streets occupied by it. (p. 1035.)

PUBLIC STREETS—Sprinkling by Railroads.—An Ordinance Requiring a street railway company to sprinkle the streets immediately adjacent to its tracks is valid, and an ordinance providing that such sprinkling be done in such a manner as will keep the surface continually moist and prevent the dust from arising at all times each day when the work is done, "but not in such a manner

as to create mud or pools of water," is not unreasonable when properly construed. (pp. 1034, 1035.)

PUBLIC STREET—Sprinkling by Railroad.—An Ordinance Requiring street railway companies to sprinkle the streets immediately adjacent to their tracks is not void as discriminating against such companies and in favor of other users of the streets, as by reason of the constant use of the street and the large amount of dust stirred up by street-cars, such use of the streets may be put in a class by itself. (p. 1035.)

MUNICIPAL ORDINANCES—Method of Adoption—"Aye" and "No" Vote.—Laws requiring the "aye" and "no" vote to be taken on certain questions and entered upon the permanent record of the council of a city are mandatory, and the requirement that the record be kept stands on no different footing from that relating to the manner of voting. (p. 1037.)

MUNICIPAL CORPORATIONS—Appropriation of Money or Creation of Debt.—An ordinance of a city, owning its own waterworks, requiring street railway companies to sprinkle certain streets adjacent to their tracks, and providing that the city will furnish the necessary water free of charge, is not an ordinance creating a debt or liability against the city or a charge on any fund thereof, within a charter provision requiring the "aye" and "no" vote to be taken and recorded on all ordinances creating a debt or liability against the city or a charge on any fund thereof. (p. 1038.)

Miller, Mack & Fairchild and J. B. Blake, for the appellant.

Daniel W. Hoan, city attorney, and John J. Cook, assistant city attorney, for the respondent.

³⁸⁸ **BARNES, J.** On July 14, 1902, the common council of the city of Milwaukee passed an ordinance requiring all street railway companies operating lines in the city to sprinkle with water the entire roadbed of the railways operated, between single tracks and double tracks and one foot outside of all tracks, as well as the space between double tracks, such work to be done under the general supervision of the board of public works and under rules and regulations adopted from time to time by said board and approved by the common council. Street railway companies were not required to do any sprinkling between November 1st and the first day of April following. The entire expense of such sprinkling was to be borne by the street railway companies, except that the city was to furnish the necessary water free of charge. The ordinance also provided that any violation thereof should be punished by a fine not exceeding three hundred dollars and costs.

³⁸⁹ No rules or regulations were adopted by the board of public works until July 10, 1905. Among other things, the rules adopted provided that the sprinkling called for by the ordinance should be done on all days from and including April 1st to November 1st in each year, excepting Sundays and legal holidays and such days as sprinkling was unneces-

sary by reason of rain or the moist condition of the streets; that sprinkling should be done in such manner and at such intervals as would keep the surface moist and prevent dust from arising between 6 A. M. and 7 P. M. upon each day when the work was required to be done, but not in such a manner as to create mud or pools of water, and that paved streets should be sprinkled lightly to meet the requirements, but graveled or macadamized streets should be thoroughly wetted down. The rules adopted by the board of public works were approved by the common council shortly thereafter. The defendant refused to comply with the ordinance and the rules adopted in pursuance thereof, and the city, on September 21, 1905, commenced a mandamus proceeding to compel the defendant to comply with the terms of the ordinance. From a judgment in relator's favor the defendant or respondent in the court below prosecutes this appeal.

Nine distinct reasons are advanced by the appellant in support of its contention that the judgment appealed from should be reversed. These are: (1) Mandamus is not the proper remedy. (2) The city of Milwaukee is not the proper relator. (3) The rules adopted by the board of public works were not included in the 1906 revision of the ³⁹⁰ charter of the city of Milwaukee and were therefore repealed thereby. (4) Chapter 501, Laws of 1909, repealed the street-sprinkling ordinance. (5) The street-sprinkling ordinance became inoperative because of a resolution adopted by the city council acting under chapter 501, Laws of 1909. (6) The city had no power conferred on it to pass an ordinance requiring street railway companies to sprinkle any portion of the public streets. (7) The ordinance is void because its requirements are unreasonable. (8) It is void because it is discriminatory. (9) It was never lawfully passed.

1. It is argued that mandamus will lie only to enforce a clear legal duty, and that no such duty is shown to exist in this case; that the duty imposed is not a public one and therefore performance will not be enforced by mandamus; that mandamus will not lie to enforce the performance of a continuous act; and that it will not lie because the case presents a moot question only.

Whether a clear legal duty was imposed on the appellant by the ordinance involved depends on the solution of various legal questions that will hereafter be discussed.

We entertain no doubt that the duty attempted to be imposed is of a public nature. The mere fact that the whole or a portion of the expense of sprinkling might be charged to an abutting owner does not determine the nature of the duty. Public streets are built at the expense of abutting property owners where the cost does not exceed the resulting benefits,

but the building of streets is none the less a public duty. Sidewalks are built and sewers are constructed in whole or in part at the expense of the abutting owner, regardless of special benefits. This is done by virtue of the police powers lodged in cities and villages, but the duty is as much a public one as if the cost had been defrayed by means of general taxation. It is somewhat difficult to see wherein any special benefit accrues to the abutting owner by reason of the street in front of his property being sprinkled. In any event the ³⁹¹ public shares in the benefit. The ordinance was passed to preserve the public health and to promote its comfort, and manifestly such an ordinance operates in the interest of and for the benefit of the public.

Neither do we see any good reason for saying that relief should not be afforded by mandamus because the duty to sprinkle is a continuous one. If the legal duty on the part of the appellant is clear, the relator should not be denied an appropriate remedy because the right sought to be enforced is not of a temporary nature. There can be no more objection to a court of law granting permanent relief by mandamus in an appropriate action than there is to a court of equity granting relief in a proper case by a mandatory injunction. The cases of *State v. Associated Press*, 159 Mo. 410, 81 Am. St. Rep. 368, 60 S. W. 91, 51 L. R. A. 151; *Diamond M. Co. v. Powers*, 51 Mich. 145, 16 N. W. 314; *State v. Einstein*, 46 N. J. L. 479, and *People v. Dulaney*, 96 Ill. 503, cited by the appellant, are for the most part cases where under the established facts the right to the continuous or perpetual relief sought was not sufficiently clear to warrant the judgments prayed for. That mandamus will lie to enforce the performance of a continuous legal duty has been decided at least by inference by this court: *State v. Janesville St. R. Co.*, 87 Wis. 72, 41 Am. St. Rep. 23, 57 N. W. 970. Such is the general current of authority elsewhere: *Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309; *Bridgeton v. Bridgeton & M. T. Co.*, 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837; *Detroit v. Ft. Wayne & B. I. R. Co.*, 95 Mich. 456, 35 Am. St. Rep. 580, 54 N. W. 958, 20 L. R. A. 79; *Oklahoma City v. Oklahoma R. Co.*, 20 Okl. 1, 93 Pac. 48, 16 L. R. A., N. S., 651; *State v. Atlantic C. L. R. Co.*, 48 Fla. 114, 37 South. 652.

The contention that the case presents only a moot question we do not take seriously. It is true that the appellant is not required by the ordinance to do any sprinkling between November 1st and April 1st, and appellant may conclude to ³⁹² comply with its terms beginning April 1st next. This ordinance, if valid, became operative more than five years ago and no sprinkling has been done thereunder as yet. Furthermore, the appellant is in court vigorously contesting

the right of the city to require it to do any sprinkling thereunder at any time in the future. In view of the situation the city is entitled to have its rights under the ordinance judicially determined.

2. It is argued that the city has no financial interest in the result of the suit and that the only ones who have are the abutting owners who will be relieved of their burden by the enforcement of the ordinance, and that the city therefore is not a proper relator. This argument seems to be based on the proposition that street sprinkling is a private matter which inures to the benefit of the abutting owner and which affects the public in an incidental way only. We have already said that the duty imposed is a public one, and, while the cost may possibly be charged to the lot owner, a point we do not decide, yet the special benefit that accrues to his property may be very slight, if indeed any. If we except chapter 501, Laws of 1909, which will be discussed later, there is no statute which compels or obligates or in express terms authorizes the city to impose on abutting property owners the burden of sprinkling. The city is authorized by its charter to provide for street sprinkling, and we see no objection to its providing that the expense thereof be met by general taxation. It may be that the city would be restricted to this method of raising the necessary fund to defray the cost of the work. Indeed, under the provisions of the 1909 law the city is directly and pecuniarily interested in requiring street-car companies to comply with the ordinance, because it must bear the expense of sprinkling the street crossings, which make up a very considerable fraction of the entire street surface in the city. Besides, the ordinance we are considering purports to be passed in the interest of public health, and the trial court found as a matter of fact that the circulation of dust was injurious to ~~393~~ public health and that disease-breeding germs were carried therein. There is no difference in principle between the case at bar and *Oshkosh v. Milwaukee M. & L. W. R. Co.*, 74 Wis. 534, 17 Am. St. Rep. 175, 43 N. W. 489, where the court at the suit of the city compelled the railway company to restore a highway used by it to its former state of usefulness. In some respects the present case is stronger, in that it involves the matter of public health. Other cases holding that the city is a proper relator in such a case are: *Bridgeton v. Bridgeton & M. T. Co.*, 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557, 66 N. W. 624, 41 L. R. A. 481; *Rutherford v. Hudson River T. Co.*, 73 N. J. L. 227, 63 Atl. 84; *Pleasantville v. Atlantic City & S. T. Co.*, 75 N. J. L. 279, 68 Atl. 60; *State v. New Orleans & N. E. R. Co.*, 42 La. Ann. 11, 7 South. 84; *Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 37 Am. St.

Rep. 312, 33 Pac. 309; International W. Co. v. El Paso, 51 Tex. Civ. App. 321, 112 S. W. 816.

3. In 1906 an ordinance was passed by the city of Milwaukee to revise, consolidate, and amend the general ordinances of the city. The ordinance requiring the appellant to sprinkle was included in the revision, but the rules adopted by the board of public works under said ordinance in 1905 were not included therein, and hence it is claimed that such rules were repealed by it. The rules adopted by the board of public works having been ratified and approved by the common council, they became to all intents and purposes part and parcel of the ordinance passed by the common council on July 14, 1902, and really make it complete. The revision does not in express terms purport to repeal the rules adopted and approved as stated, although they do not appear as part of the ordinance therein. But section 3 of chapter 30 of the revision expressly provides that all ordinances prescribing any rules, regulations, or restrictions upon street railway companies are not repealed. This provision we deem sufficiently broad to save the rules. If they did not become a part of the ordinance, ³⁹⁴ then obviously they were not repealed. The court found that the rules were not repealed by reason of the 1906 codification of the charter provisions, and no exception is taken to such finding, so the question is not really before the court.

4. Chapter 501, Laws of 1909, authorized the common council of any city of the first class to provide whether the streets of such city should be sprinkled during the current year, and to charge the cost thereof, with certain exceptions, to the abutting owners in case it decided to sprinkle. The act was made amendatory to existing charters only so far as they were inconsistent with the act, and it was provided that the law should expire by limitation on December 31, 1910. It is argued that this act repeals the ordinance under consideration.

The argument is not convincing. In the first place, the act provides that the common council may provide for street sprinkling. Then it recites that it modifies or repeals existing charter provisions only in so far as they are inconsistent therewith. Furthermore, the act has already expired by limitation, and if it should be construed to supersede all existing charter provisions relative to street sprinkling we would have neither a law nor an ordinance on the subject until one was passed. These considerations are strongly suggestive of a legislative intent to permit existing laws and ordinances on the subject to stand unless they were actually repugnant to the law in question. It is apparent that former laws which confer the power on cities of the first class to proceed in some other way are not inconsistent with the later act. The au-

thority thereby conferred is merely cumulative and supplementary to existing rights. If there was a repeal of the ordinance in question it must have been by implication, as it was not repealed by any affirmative declaration contained in the 1909 law. Repeals by implication are not favored. The earlier act remains in force unless it is manifestly inconsistent with or repugnant to the later one, or unless some express notice is taken of the former act in the later one which ³⁹⁵ plainly indicates an intention to abrogate it: *State v. Tomahawk Com. Council*, 96 Wis. 73, 71 N. W. 86. Where there are two affirmative statutes on the same subject, one will not repeal the other if both can stand together: *Attorney General v. Brown*, 1 Wis. 513; *Attorney General v. Railroad Cos.*, 35 Wis. 425. The implication to be operative must be necessary, and if it arises out of two acts, the later abrogates the older one only to the extent that it is inconsistent and irreconcilable with it. The two statutes will, if possible, be construed so as to stand together: 1 *Lewis' Sutherland on Statutory Construction*, 2d ed., p. 465; *Maxwell on Interpretation of Statutes*, 4th ed., 233; *Black on Interpretation of Laws*, sec. 53. Other Wisconsin cases illustrating the foregoing rules of statutory construction are *Goodrich v. Milwaukee*, 24 Wis. 422; *Foster v. Hammond*, 37 Wis. 185; *Vorous v. Phenix Ins. Co.*, 102 Wis. 76, 78 N. W. 162; *Bradley v. Cramer*, 61 Wis. 572, 21 N. W. 519; *First Nat. Bank v. Baker*, 68 Wis. 442, 32 N. W. 523; *Peterson v. Baker*, 68 Wis. 451, 32 N. W. 527. The exception, if such it may be called, is that where the legislature legislates on a given subject, and it is manifest that it intended to revise and codify all existing laws and to cover the entire subject, former acts dealing with such subject will be deemed to have been impliedly repealed although there is an absence of an express repealing clause: *Gymnastic Assn. v. Milwaukee*, 129 Wis. 429, 109 N. W. 109. No such purpose is apparent in chapter 501, Laws of 1909. In fact the intention appears to be quite to the contrary.

5. Acting under the power conferred by chapter 501, Laws of 1909, the common council of the city of Milwaukee on July 6, 1909, passed a resolution authorizing and directing the board of public works to sprinkle certain streets in the city until October 15, 1909, and to charge the expense of such sprinkling to the abutting owners. The resolution further provided that the cost of sprinkling streets at the intersection ³⁹⁶ thereof should be paid out of the street or alley fund. It is argued that this resolution had all the dignity, force, and effect of an ordinance; that it covered all streets upon which appellant maintained a street railroad, as well as the entire width of such streets; and that it operated to repeal the ordinance of July 14, 1902.

Too much is claimed for this resolution. The appellant refused to comply with the 1902 ordinance. This action was brought to compel it to do so and was pending in the courts. Until it was decided the city must either make some other provision for sprinkling or allow the portion covered by the 1902 ordinance to go unsprinkled. It would not have availed much to sprinkle the balance of the street. To meet the situation the city adopted a temporary expedient covering a period of less than three and one-half months. This was not intended to and in fact did not repeal the original ordinance, which made permanent provision for sprinkling that portion of the street occupied by the appellant.

6. The next contention is that there was no authority conferred on the city of Milwaukee to pass the ordinance in question. The city justifies its action on three grounds: (1) A provision in its charter authorizing it to provide for the sprinkling of streets; (2) broad police powers conferred on it empowering it to pass legislation abating nuisances and conserving the public health; (3) section 1862, Statutes of 1898.

The statute referred to provides for the organization of corporations to construct, operate, and maintain street railway lines, and authorizes any municipal corporation to grant to such corporation, upon such terms as it deems proper, the right to use the streets and bridges within the limits of the municipality for laying tracks and running cars thereon. The statute then provides:

"Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations ³⁹⁷ and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe."

This statute is as broad and comprehensive as language can well make it. The ordinance in controversy here is unquestionably a regulation. The language quoted precludes the idea that the "regulations" referred to must be passed when the right to use the streets is granted, because they may be passed "from time to time." There is no apparent reason for saying that some particular kind of regulations were intended to be covered and that others were intended to be excluded. The only limitation or restriction which the law fixes is that the "regulations" must be reasonable. It is not seriously contended that it is beyond the power of the law-making body to require a street railway company to sprinkle the streets immediately adjacent to its tracks. The reasonableness of this particular regulation is attacked on two grounds, which will be considered later. Being satisfied that section 1862, Statutes of 1898, conferred on the city the power to pass the ordinance, assuming it to be reasonable, it is unnecessary to consider the other acts argued by the

city in support of its right to legislate as it did. We apprehend that if the ordinance is not a reasonable regulation it cannot be justified on any ground. Ordinances requiring street railway companies to sprinkle the streets immediately adjacent to their tracks have been held valid by a number of courts: *City & S. R. Co. v. Savannah*, 77 Ga. 731, 4 Am. St. Rep. 106; *State v. Canal & C. R. Co.*, 50 La. Ann. 1189, 24 South. 265, 56 L. R. A. 287; *Newcomb v. Norfolk W. St. R. Co.*, 179 Mass. 449, 61 N. E. 42; *Chicago & Chicago U. T. Co.*, 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666. No decisions to the contrary have been cited and we have found none. Only in a case which is clear beyond a reasonable doubt will the courts declare laws void which are adopted under the police power in the interest of the public health: *State v. Currens*, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252; *Bonnett v. Vallier*, ³⁹⁸ 136 Wis. 193, 128 Am. St. Rep. 1061, 116 N. W. 885, 17 L. R. A., N. S., 487; *State v. Redmon*, 134 Wis. 89, 126 Am. St. Rep. 1003, 114 N. W. 137, 14 L. R. A., N. S., 229, 15 Ann. Cas. 408; *Benz v. Kremer*, 142 Wis. 1, 125 N. W. 99, 26 L. R. A., N. S., 842. The validity of a city ordinance is tested by the same rule: *Eastern Wis. R. & L. Co. v. Hackett*, 135 Wis. 464, 115 N. W. 376, 1136, 1139; *Stafford v. Chippewa Valley E. R. Co.*, 110 Wis. 331, 85 N. W. 1036; *C. Beck Co. v. Milwaukee*, 139 Wis. 340, 120 N. W. 293. We entertain no doubt that the power existed to pass an ordinance of the general character of the one adopted, provided such power was exercised in a proper manner. The reasons which support and sustain the imposition of such a burden will be discussed under an assignment of error which raises the alleged discriminatory features of the ordinance.

7. Is the ordinance void because of unreasonableness? It is urged that, assuming the city had power to pass some kind of an ordinance requiring the appellant to sprinkle a portion of the public streets, such power was exercised in an unlawful manner, in that the rules adopted by the board of public works aim at an ideal rather than a practical result, and that such result can only be attained by the expenditure of an extravagant sum of money which it is not reasonable to require the appellant to expend. The obnoxious requirement is found in rule 3, which imposes on the appellant the duty of sprinkling the streets in such a manner as will keep the surface continually moist and prevent the dust from arising at all times each day when the work is done, "but not in such a manner as to create mud or pools of water." It is argued, and reasonably enough, that it may be well-nigh impossible to so sprinkle streets that no dust will arise therefrom, and that it is impossible to sprinkle them in the usual and customary way and at the same time keep them entirely free from mud or even pools of water. But the rules must have a

reasonable interpretation, and if they are susceptible of one that will make the ordinance valid it is to be preferred to one which will render it void. It is a matter of common knowledge ³⁹⁰ that streets frequently have depressions in them and that water will run down hill and will collect in these depressions and form little pools, until it seeps into the ground or evaporates. But we think it was not intended that the street railway company should guard against a thing of this kind, but rather to prevent such large quantities of water from being poured onto the streets at any one time as to create continuous pools of water therein. So, too, we all know that dust will accumulate on the streets and that when it becomes sufficiently thick it will turn to mud when saturated with water. But here again it is very evident that what the rules were intended to guard against was the excessive use of water at any one time or the creation of a permanent condition. This would seem apparent from rule 4, which provides that paved streets shall be sprinkled lightly, but "graveled or macadamized streets shall be thoroughly wetted down." The board of public works did not mean that certain streets should be thoroughly wetted down and at the same time that the laws of nature should be defied in so doing. The rules must be read and construed together and be given a reasonable interpretation; and so interpreted they mean that the appellant must exercise ordinary care and caution in doing the work of sprinkling.

8. It is next claimed that the ordinance is void because it is discriminatory. It is said that some streets are used by steam roads and that automobiles and teams are constantly using most of them, and that no good reason exists for singling out one user from the many and compelling it to bear an expense not imposed on other users, and that appellant is therefore being denied the equal protection of the laws.

The question involved is really one of classification. The essentials requisite to constitute legitimate classification have been laid down in a number of cases recently decided and it is unnecessary to reiterate them. They will be found in *Kiley v. Chicago, M. & St. P. R. Co.*, 138 Wis. 215, 119 N. W. 309, ⁴⁰⁰ 120 N. W. 756; *Servonitz v. State*, 133 Wis. 231, 126 Am. St. Rep. 955, 113 N. W. 277; *State v. Evans*, 130 Wis. 381, 110 N. W. 241, and *State v. Currens*, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252. In the matter of stirring up dust and setting it in motion, street-car lines easily fall into a class by themselves. Their cars are large and heavy and run at a high rate of speed and with great frequency. The bodies of such cars rest close to the surface of the street. They occupy a very considerable of the best portion of the streets to the exclusion of the general public a large part of the time. They run on tracks which

create peculiar conditions for the accumulation of dust and dirt, and they occupy the streets by permission from the common council and not as a matter of absolute right. And finally, they are subjected by statute (Stats. 1898, sec. 1862) to reasonable rules and regulations. No other agency stands on the same footing with the street-cars in the matter of raising dust. The steam roads occupy a small portion of a few unimportant streets in the outlying districts and cross over some others at grade, but their occupancy of the streets is almost negligible as compared with the street railway system. Of course, many different kinds of vehicles occupy the streets and all stir up more or less dust when the necessary conditions exist, but it does not follow that because all are not called upon to contribute all must escape. This would entirely exclude the idea of classification. The purpose of this law is to provide for the sprinkling of a well-defined portion of the public streets of the city. The appellant has, under the franchise granted to it, a paramount right to use and occupy this particular part of the street. In so doing it is largely responsible for setting in motion the dust that arises therefrom, and falls within a class by itself under the authorities cited.

9. Was the ordinance legally enacted? The city charter, section 2, chapter 4, provided that "on all questions, ordinances or resolutions for assessing and levying taxes, or for the appropriation or disbursement of money, or creating any liabilities ⁴⁰¹ or charge against said city or any fund thereof, the vote shall be taken by ayes and noes; and every vote by ayes and noes shall be entered at length upon the journal." Section 4 of chapter 4 of the charter contains a provision substantially like that quoted. The roll-call showed forty-two members of the common council present at the meeting at which the ordinance was passed. An "aye" and "no" vote was taken on the adoption of the ordinance. Forty-one members voted aye and none voted no. The clerk preserved the original minutes showing the names of the aldermen who voted on the ordinance and how they voted. The entry made on the journal, however, was to the effect that forty-one votes were cast in favor of the passage of the ordinance and none in opposition, without stating the names of those voting. Thus it became impossible to tell from the journal what members voted on the passage of the ordinance.

Section 5 of chapter 4 of the charter provided that all proposed ordinances should be referred to appropriate committees before their passage, and that if any report was made on any ordinance appropriating money out of or creating any charge against any fund, such report should be countersigned by the city controller, and that the report should not be counter-

signed unless there was a sufficient amount of money in the fund to meet the appropriation.

The ordinance in dispute provided that the city should furnish, free of charge to the street railway companies, the necessary water for sprinkling, and that the water so furnished should be chargeable to and payable out of the general fund of the city. The street railway companies were required to furnish to the board of public works on the 5th of each month a statement of the amount of water used during the preceding month.

The contention of the appellant is that the ordinance created a charge or liability against the city or some fund thereof, and that, the "aye" and "no" vote not having been ⁴⁰² entered at length upon the journal, it was never legally passed.

Laws requiring the "aye" and "no" vote to be taken on certain questions and entered upon the permanent record of the common council of a city are generally held to be mandatory, and the requirement that the record be kept stands on no different footing from that relating to the manner of voting: *Steckert v. East Saginaw*, 22 Mich. 104; *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. 90; *Cook v. Independence*, 133 Iowa, 582, 110 N. W. 1029; *Payne v. Ryan*, 79 Neb. 414, 112 N. W. 599; *Rich v. Chicago*, 59 Ill. 286; *Logansport v. Crockett*, 64 Ind. 319; *Cutler v. Russellville*, 40 Ark. 105; *Sullivan v. Leadville*, 11 Colo. 483, 18 Pac. 736; 1 *Dillon on Municipal Corporations*, 4th ed., sec. 291. The reason for such enactments is that the people generally, and particularly the constituency of an alderman, are entitled to know how their representatives vote on important questions. In order that they may know, it is quite as important that the record of the vote be preserved as it is that it be taken in such a manner that it can be preserved. While it is possible in the present case to ascertain from the original minutes of the meeting who voted for the passage of this ordinance, it is not possible to do so from the journal, and this is the record which the law requires shall be complete. The only cases we have found which hold that a provision requiring the "aye" and "no" vote to be taken is directory are *Striker v. Kelly*, 7 Hill, 9, affirmed 2 Denio, 323, and *Elmendorf v. New York*, 25 Wend. 693. The reason which impelled the great majority of courts that have passed upon the question to hold such acts mandatory is quite convincing, and such a rule is apt to produce the best results in the administration of municipal affairs, and we adopt it without hesitancy.

It remains to be considered whether the ordinance created a debt or liability against the city or a charge on any fund thereof. Unless it did it was unnecessary that the "aye" and ⁴⁰³ "no" vote be taken or preserved. This presents one of the most serious questions in the case. If it is important that

the "aye" and "no" vote shall be taken and preserved in the manner the charter requires, it is just as important that it be taken on all questions falling within the charter provisions. The provisions, it is true, are broad and general, but liberality in construction should not lean in the direction of unduly restricting the application of the statute. That the ordinance does not create a "debt or a charge against any fund" is clear enough, but that it does not create a "liability" is not so clear. If the term is used in its broadest and most comprehensive sense, it would include any obligation which a party was bound in law or justice to perform and is synonymous with responsibility. In its more restricted and perhaps in its popular sense, it means that which one is under obligation to pay to another.

The city owns its own waterworks. The object and purpose of the ordinance is not to appropriate money or create any indebtedness, but to require the appellant to sprinkle a portion of the streets which it uses. Incidentally it is provided that no charge shall be made for the water used in sprinkling and which the city must pump into its mains. The city may refuse or decline to permit the appellant to draw water from its hydrants, but if it does the ordinance automatically becomes inoperative. No money is voted out of the city treasury by the ordinance and no expense is contemplated, except it be the fuel consumption in pumping the extra water, and the wear and tear on the pumps in doing the extra work. It is not even certain that these items of expense are real. We are not advised as to whether or not the streets were sprinkled before this ordinance was passed, but the fair presumption is that they were; else there would be little warrant for sprinkling a strip in the center of the streets and neglecting the rest of them. If they were, we must also presume that the city was furnishing water for such sprinkling and ⁴⁰⁴ was receiving no compensation therefor, unless we assume that the appellant was made a special object of bounty. The resolution of July 6, 1909, provided that the city should furnish water free of charge, which would indicate in some measure what its practice was. We mention these matters as indicating that there is no affirmative showing that the expense of the city would be at all increased by the passage of this ordinance. Indeed it may well be that it was relieved of a portion of the cost of sprinkling street crossings at least. We think the word "liability" as used in the charter means something other than a mere naked undertaking which may involve no expense to the city at all, and that it was intended to cover some claim or obligation which in the ordinary course of business should be presented to the council for audit and allowance, and which should upon allowance constitute a charge on some fund. Until the amount of expense, if any,

incurred under this ordinance was either ascertained or estimated, there was no charge against any fund, and the expense could be ascertained and provided for after the ordinance was passed as well as at the time of its passage. We conclude that the judgment is right and should be affirmed.

By the COURT. Judgment affirmed.

A Municipal Ordinance is Presumed to be Reasonable when not void on its face: *Bryan v. City of Birmingham*, 154 Ala. 447, 129 Am. St. Rep. 63; *Miller v. Mayor of Birmingham*, 151 Ala. 469, 125 Am. St. Rep. 31; *City of Butte v. Pastrovich*, 30 Mont. 18, 104 Am. St. Rep. 698. The test of the validity of ordinances, when they are attacked as denying the equal protection of the laws, is discussed in the note to *Montgomery v. West*, 123 Am. St. Rep. 36.

Aye and No Vote.—Where the City Council of a municipality is composed of eight members, and it appears from the minutes of a meeting that the eight members voted in favor of a resolution relating to a public improvement, this is equivalent to stating that eight members voted "yea," and there is a substantial and sufficient compliance with a statute requiring a yea and nay vote on any such resolution: *Whittaker v. Deadwood*, 23 S. D. 538, 139 Am. St. Rep. 1076. If a municipal ordinance is to be overthrown because irregularly adopted, it must appear affirmatively from the journals of the common council that the mandatory provisions of the city charter relative to the passage of the ordinance have not been observed; and mere silence of the record does not amount to such a showing: *Portland v. Yick*, 44 Or. 439, 102 Am. St. Rep. 633.

CLINE v. WHITAKER.

[144 Wis. 439, 129 N. W. 400.]

INJUNCTION—Whether Binding When Erroneous.—However erroneous an injunctive order may be in the sense of wrong or inexcusable use of judicial power, it is binding on the person restrained and efficiently notified thereof till set aside in some proper proceeding. (p. 1040.)

INJUNCTION—Whether Good Until Set Aside—Jurisdiction.—The saying that an injunctive order is good until set aside, if the court making it had jurisdiction of the subject matter, is to be understood, as to the word "jurisdiction," to refer to the existence or non-existence of judicial power, and as to the words "subject matter," to such subjects between the parties. (pp. 1040, 1041.)

INJUNCTION—When Erroneous Merely and not to be Defied.—If, in a given situation, there is any valid ground upon which a temporary injunctive order might, under any circumstances, be properly issued, though none be stated in the complaint, and it would be highly erroneous, even jurisdictionally wrong in the sense of inexcusable use of judicial authority, to allow such an interference, and such allowance nevertheless occurs, it is erroneous, not void, and cannot properly be defied. (pp. 1041, 1042.)

INJUNCTION—Duty to Obey Until Vacated.—As regards an injunctive order, "if the court's command is within its power to

make under any circumstances upon any grounds and for any reasons whatever, the person enjoined is bound to obey till the order shall have been vacated." (p. 1042.)

INJUNCTION—Issuance in Legal Action.—A Temporary Injuncti^onal order may be issued, under some circumstances, in a legal action. (p. 1041.)

(Syllabi by Judge Marshall.)

W. B. Rubin and W. C. Zabel, for the appellant.

David E. Johnson, for the respondent.

440 MARSHALL, J. Plaintiff commenced an action to recover damages from defendant for, as charged, having maliciously injured his business by publishing and distributing circulars containing false and defamatory statements concerning it. Upon a complaint stating a cause of action for damages for the wrong alleged, and an affidavit to the effect that such wrong was continuous and was threatened to be seriously active pending the litigation, supported by an affidavit by one Johnson, the court granted a temporary injuncti^onal order restraining defendant from continuing the alleged wrong. Subsequently to the service of the order on defendant, plaintiff informed the court, in due form, that the former had violated it, whereupon defendant was, in due form, requested to show cause, February 26, 1910, why he should not be punished for contempt. Before such order was heard the injuncti^onal order was, on motion, set aside with costs.

The hearing in the contempt proceedings was, in due time, had, resulting in defendant being found guilty and adjudged to pay a fine of twenty-five dollars and eight dollars and eighteen cents, costs and expenses, and to be committed till payment should be made. The appeal is to review such determination.

Is a temporary order void, made by a circuit court incidental to an action therein for damages for publication and circulation, by the one restrained, of circulars containing **441** libelous matter of and concerning plaintiff and his business, preventing continuation of the wrong pending the action? That is the vital question upon this appeal.

However erroneous the order in question may have been, or even if it were jurisdictionally bad, in the sense of inexcusable use of judicial authority, as distinguished from want of power under any circumstances to make the same, it was binding on appellant till set aside in some proper proceeding to that end: State v. Circuit Court, 98 Wis. 143, 73 N. W. 788. Willful disobedience of such an order, however improvidently issued, in the sense of an erroneous use or even abuse of power, is a criminal contempt. In the case cited, the court, in harmony with authority generally, said in effect: An injuncti^onal order, within the power of the court, must be implicitly obeyed

as long as it stands. It is not outside the power, if the court has jurisdiction of the subject matter, as said in *State v. Circuit Court*, 98 Wis. 143, 73 N. W. 788, or perhaps more accurately said in *Davis v. Mayor, etc.*, 1 Duer, 451, unless there is want of jurisdiction.

In dealing with such a matter as this the distinction between total want of jurisdiction, absolute absence of power, and want of jurisdiction, in the sense the term is commonly used, characterizing judicial action which is so highly erroneous as to be without legal justification, yet not, as has been said, beyond competency to err, must be kept in mind. The two phases of jurisdiction were discussed at considerable length in *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909, one being termed want of power and the other inexcusable departure from established principles—a gross misuse of power. The former is a usurpation. The resulting judgment or order is totally void. The latter is mere error. The resulting judgment is valid, till avoided in proceedings to that end. Defiance of one is wrongful. Defiance of the other is not.

⁴⁴² It is commonly said, in reference to this subject, that if the court does not have jurisdiction of the subject matter in an action its order or judgment entered therein is void. The words "subject matter" are liable to be as misleading as the word "jurisdiction." The latter is commonly used when want of power is not meant. The former are commonly used, merely to denote want of jurisdiction of the subject matter of the action in the particular instance and in the particular way judicial power is invoked, and also as characterizing disability to judicially deal with such subjects between the parties under any circumstances. It is in the latter sense only that an order of the sort in question is a usurpation and may safely be disregarded.

It follows from the foregoing that, if it be true, as counsel for appellant claim, that a temporary restraining order in a legal action is improper, nevertheless if the court could, under any circumstances, deal with the subject between the parties by such an order, then the judicial act would not be void. But it is not correct to say there is no warrant for an interim restraining order in a legal action. Section 2773, Statutes of 1898, specifies circumstances in such actions where such an order may be granted. Moreover, the complaint and the affidavits upon which the order in question was granted disclose a situation which might have been so presented for relief as to have rendered the act complained of proper. It was a legitimate subject for the court to deal with, though judicial power was not invoked in such a way as to warrant the action taken. That does not appear upon the face of the order, but does upon that of the complaint. So the order was plainly erroneous, perhaps jurisdictionally bad, in the sense of negligent

inexcusable use or abuse of authority, but not a usurpations act.

It should be understood that if in a given situation there is any valid ground upon which a temporary injunctional order might, under any circumstances, be issued, though none be ⁴⁴³ stated in the complaint and such an order is nevertheless allowed, it is not void. In case of the person restrained being so circumstanced as to be bound to submit if it is not void, he must, in the main, at least, look to the order only. If that is good on its face, in that it relates to a subject within the jurisdiction of the court, and otherwise appears regular, the duty to obey is plain. The person enjoined has no right to shape his course by merely what the complaint discloses. It may not state any cause of action and yet be subject to amendment in that regard. The complaint may not state facts warranting relief for which a temporary injunctional order is incidental, and yet such facts exist. The one enjoined cannot pass upon any of such questions and obey or defy the court according to his decision. As said, substantially, in the leading case of *Davis v. Mayor, etc.*, 1 Duer, 451, if the court's command is within its power to make under any circumstances, upon any grounds and for any reason whatever, the person enjoined disobeys at his peril.

The result of the foregoing is that the circuit court did not usurp authority in this case. Therefore, the willful violation of its order was a criminal contempt: *State v. Superior Court*, 105 Wis. 651, 668, 81 N. W. 1046, 48 L. R. A. 819; Stats. 1898, sec. 3477.

Some other questions are discussed by counsel and have been considered, but do not seem to have sufficient merit to warrant treating them in detail, or really in discussing them at all. They do not involve error affecting the substantial rights of appellant.

By the COURT. Judgment affirmed.

The Fact That an Injunction is Erroneously or Improvidently Issued, the court having jurisdiction, cannot be urged as a defense in proceedings for contempt in violating the injunction: *Ex parte Cash*, 50 Tex. Cr. 623, 123 Am. St. Rep. 865; *Franklin Union No. 4 v. People*, 220 Ill. 355, 110 Am. St. Rep. 248; *State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932; *In re Knaup*, 144 Mo. 653, 66 Am. St. Rep. 435. But a person committed for contempt in disobeying an injunction which the court had no jurisdiction to issue is entitled to his discharge on habeas corpus: *People v. Barrett*, 203 Ill. 99, 96 Am. St. Rep. 296; *Ex parte Lake*, 37 Tex. Cr. 656, 66 Am. St. Rep. 848. If a court has jurisdiction of the parties and subject matter of the cause of action in which an injunction is issued, the fact that it is erroneously and improvidently issued does not excuse disobedience on the part of those who are bound by its terms: *Pitcock v. State*, 91 Ark. 527, 134 Am. St. Rep. 88.

PEARSON v. SCHOOL DISTRICT NO. 8 OF TOWN OF GREENFIELD.

[144 Wis. 620, 129 N. W. 940.]

SCHOOLS—Contracts With Teacher—Statute Controls.—In making contracts with teachers, a school district is controlled by the statute. It must strictly follow the statute, and has no power to contract otherwise than as provided by it. (p. 1044.)

SCHOOLS.—Oral Contracts With Teachers are valid unless a statute provides that they shall be in writing. (p. 1045.)

SCHOOLS—Oral Contracts With Teachers.—A statute providing that a contract of a school board with a teacher shall specify certain things and that it, with a copy of the teacher's certificate, shall be filed with the clerk, is directory merely, relates to a detail respecting the keeping of a record, and does not preclude the making of a valid oral contract with a teacher. (p. 1045.)

STATUTES in Derogation of the Common Law must be Strictly Construed, and courts cannot, by judicial construction, read into statutes provisions not found there for the purpose of changing the rules of the common law. (p. 1045.)

Froede & Bodenstab, for the appellant.

Otjen & Otjen, for the respondent.

⁶²⁰ **KERWIN, J.** This action was brought to recover damages for breach of contract. The plaintiff was a duly qualified teacher in Milwaukee county, Wisconsin, and the defendant a duly organized school district. The plaintiff's complaint is based upon an alleged contract with the defendant to teach its school for one year and that the defendant breached the contract, in consequence of which plaintiff sustained damages. The defendant claims that the contract was void because not in writing. The jury returned the following verdict:

"(1) Did the school board at a meeting lawfully convened, at which all members were present, authorize the employment of the plaintiff as the teacher of the district school in the defendant's district for the school year of 1907? A. Yes.

"(2) Did the clerk of said school district, pursuant to the authority as stated in question No. 1, make a proposition to the plaintiff to teach said district school for the school year 1907 on the same terms and conditions as contained in the ⁶²¹ written contract between the plaintiff and defendant for the year 1906? A. Yes.

"(3) If you answer question No. 2 'Yes,' then: Did the plaintiff accept said proposition? A. Yes.

"(4) If you answer questions Nos. 2 and 3 in the affirmative, was said agreement reduced to writing? A. (By the court.) No.

"(5) If you answer questions 2 and 3 in the affirmative, was the agreement between the parties revoked by mutual consent? A. No.

"(6) If you answer questions Nos. 2 and 3 in the affirmative, was the conduct of the plaintiff thereafter such as to justify the defendant in reasonably inferring that the plaintiff withdrew from the contract? A. No.

"(7) If the court shall be of the opinion that the plaintiff is entitled to recover, at what sum do you assess her damages? A. \$327.52."

The court on defendant's motion refused to change the answers in the special verdict and ordered judgment for plaintiff. Judgment was entered accordingly, from which this appeal was taken.

The only question here is whether the contract alleged to have been made between the plaintiff and defendant is valid. That question turns upon whether section 438, Statutes of 1898, requires the contract to be in writing. The contract by its terms was to be performed within one year from the time of making thereof. But it is argued by counsel for appellant that the district board is required to strictly follow the statute, and that it has no power to contract otherwise than as provided by the statute. This may be granted, and the question then arises whether the board in making the alleged contract did follow the statute. It is established without ⁶²² dispute that it did, unless it was necessary under the provisions of the statute that the contract be in writing in order to bind the defendant. Counsel for appellant relies on *McNolty v. Board of School Directors*, 102 Wis. 261, 78 N. W. 439, to the point that "the powers of school district officers are limited, and can only be exercised as the statute provides, and the plaintiff is legally charged with notice of the extent of such powers and the manner in which they must be exercised." But the case does not reach the point here. In that case it was established that the statute had not been complied with. Here it has been strictly complied with if it was not necessary that the contract be in writing, and it is not necessary unless the statute so provides. The statute reads:

"The board shall contract with qualified teachers, specify in the contract the wages per week, month or year to be paid, and when completed file the contract, with a copy of the certificate of the teacher so employed attached thereto, with the clerk. No contract with any person not holding a diploma or certificate authorizing him to teach shall be valid; and all such contracts shall terminate if the authority to teach expire by limitation and be not renewed or be revoked": Stats. 1898, sec. 438.

Appellant relied upon the provision, "and when completed file the contract, with a copy of the certificate of the teacher so employed attached thereto, with the clerk," and contends that no other conclusion can be drawn from this provision than that it means that the contract must be in writing. But the statute does not say that the contract must be in writing, and the court cannot read into the statute provisions not found there for the purpose of rendering an oral contract, otherwise unobjectionable, void because not in writing, in the absence of express statutory requirement. An oral contract by a school teacher with a municipality or school district is valid in the absence of requirement that it be in writing: *Roberts v. Clay City*, 102 Ky. 88, 42 S. W. 909; *Jackson School Tp. v. Shera*, 8 Ind. App. 330, 35 N. E. 842. The provision relied upon by appellant is at best only directory: 2 Lewis' ⁶²³ *Sutherland on Statutory Construction*, 2d ed., sec. 611 (447); *McShane v. School Dist.*, 70 Mo. App. 624; *Bladen v. Philadelphia*, 60 Pa. 464. It is a detail respecting the keeping of a record, and not a limitation on the power to make an oral contract. If the legislature intended that such a contract should be void if not in writing it would have so declared, as is obvious from other statutory provisions. Statutes in this state rendering contracts void because not in writing expressly so provide: Stats. 1898, secs. 2302, 2304, 2307, 2308. Also we find by the terms of section 529, Statutes of 1898, respecting township system of school government, which does not apply to the instant case, an express provision that the contract shall be in writing. Section 432, Statutes of 1898, provides that the director, treasurer, and clerk shall constitute the district board, and further provides how meetings shall be held and that no act authorized to be done shall be valid unless voted at its meeting. Here the board did meet and vote to hire the plaintiff, who was a qualified teacher holding a diploma or certificate, and specified the wages to be paid and the term of service. The plaintiff accepted the terms and assented to the proposition of the defendant. This constituted a good contract at common law, and must be upheld unless the statute changes the rule of the common law. It needs no citation of authority to the point that statutes in derogation of the common law must be strictly construed. Courts cannot by judicial construction read into statutes provisions not found there for the purpose of changing the rules of the common law.

It follows, therefore, that the contract in question was valid.

By the COURT. The judgment of the court below is affirmed.

The following opinion was filed February 15, 1911:

MARSHALL, J., Dissenting. In my judgment the conclusion reached in this case is clearly wrong.

At the outset it is conceded that the validity of the contract ⁶²⁴ depends on whether the statute was strictly followed. That concession was unavoidable since this court, in terms or effect, has so held, notably in *McNolty v. Board of School Directors*, 102 Wis. 261, 78 N. W. 439. There it was held that school district officers can only make a valid contract with a teacher by complying strictly with the statute. That was later emphasized in *Manthey v. School Dist.*, 106 Wis. 340, 82 N. W. 132, the court adjudging a contract, so called, void for failure to so comply. We need not pursue this branch of the case. The principle is elementary. The only fault I find with the majority opinion in respect thereto is that it was not emphasized and given controlling dignity instead of being merely conceded for the occasion and as a basis for the logic indulged in.

Now as to the logic. The first infirmity is failure to appreciate that by the common law, as we speak of it ordinarily, contracts with municipalities to be valid were required to be in writing. That is so familiar I will not suggest need of supporting it by referring to authorities. It is only in recent times the common law has been modified so as to enable public contracts to be made in parol. Such being the case, the rule of construction referred to by the court was improperly applied.

True, a statute in derogation of the common law, generally speaking, is to be strictly construed against change in established conditions. But that does not suggest that every such statute is to be construed. It means only that where, under all the circumstances, the statute is reasonably open to two constructions, one not changing established rules of conduct is to be preferred to another equally or less reasonable which does. Under no circumstances does it justify construing a statute which is not ambiguous for the purpose of avoiding its obvious effect, or to such end adopting any meaning which cannot be sanctioned by reason and common sense. Above all, it obtains rather with reference to the common law of England ⁶²⁵ supplemented for this country by such portions of the written law of the mother country as were, by the unwritten method, adopted here, not with reference to mere modern unwritten departures therefrom. Moreover, such dignity as the rule has, which seems to have been the chief reliance of the court, should have led to the opposite result from the one reached, since, as stated, a statute requiring such a contract as the one in question to be in writing to be valid, would be in strict harmony with the old common law.

The second infirmity with the court's logic is in assuming that the statute in question is ambiguous. The reasoning seems to carry the idea that a statute is necessarily uncertain and so open to construction if anything material is expressed otherwise than unmistakably in the letter. That is contrary to a very familiar rule—one many times declared and applied, and very recently. Those things which are necessarily implied in a writing are a part of the same as if clearly expressed in the letter. I will not take time to refer to authorities in support of such a familiar proposition. The logic of this opinion I aim to base on principles too familiar to warrant extending the length of it by citations.

Starting with the false premises mentioned, viz.: (a) that the common law formerly did not require a public contract to be in writing, therefore that the statute should be strictly construed in harmony therewith; (b) that such statute is ambiguous; and we might well add (c) that if open to construction it can reasonably be read as not requiring the contract to be in writing—it was not difficult for the court to concede, for the purposes of the case, that the agreement in question is void, if the statute requires such to be in writing, and yet hold it valid.

Conceding, says the court in substance, that under *McNolty v. Board of School Directors*, 102 Wis. 261, 78 N. W. 439, the contract is void if the statute was not strictly complied with, the statute was so complied with here "if it was not necessary ⁶²⁶ that the contract be in writing, and it is not necessary unless the statute so provides. The statute reads: 'The board shall contract with qualified teachers, specify in the contract the wages per week, month or year to be paid, and when completed file the contract, with a copy of the certificate of the teacher so employed attached thereto, with the clerk,' " etc.: Stats. 1898, sec. 438.

How one could face that language in quoting it, and yet conclude that it does not require the contract to be in writing, passes my comprehension. In this matter I mean no disrespect to my brethren who concurred in the opinion, but I must, in order to do my full duty in writing this dissent, say I cannot understand the logic. After quoting, the court proceeded: "Appellant relied upon the provision 'and when completed file the contract, with a copy of the certificate of the teacher so employed attached thereto, with the clerk,' and contends that no other conclusion can be drawn from this provision than that it means that the contract must be in writing. But the statute does not say that the contract must be in writing." Why, pray, does the statute not say the contract must be in writing? Does the court mean that the only way the law-making power could so say would be to use the word "writing"? Can it be that the court means, if a statute is so framed that it cannot by any possibility be

complied with unless the thing required is done in a particular way, that it yet does not unambiguously command accordingly? If so, what is to become of the supposed rules of logic by means of which truths are presented, as we are taught, in the aspect of demonstration? We cannot think the language of the court at this point was used with due consideration. Why did not counsel rightly contend that no other conclusion can be drawn from this provision than that it means that the contract must be in writing? Does not the statute which requires a chattel mortgage to be filed with the town clerk in order to be binding, except as between the parties, require it to be in writing in order ⁶²⁷ to be binding on a third person? If parties contract subject to a termination of the agreement by service of a notice thereof by mail, does not the agreement require the notice to be in writing? The impossibility of a negative answer being correct to either question, it seems, suggests the proper one. The statute requires the contract to have "attached thereto" the teacher's certificate. How could such a certificate be attached to a verbal contract? It requires certain things to be "specified in the contract." It requires the contract when completed with a copy of the certificate of the teacher to be filed. How can a verbal contract be filed in a public office? No one of those things, particularly the first and the last, could possibly be done without the contract being in writing. That seems as certain as that two things, each of which is equal to a third, are equal to each other.

Is that not unanswerable? Am I not justified in my astonishment, as I view the quotation of the statute, followed by the court's conclusion that a written contract is not required thereby? Facing the pains the court must have taken with its logic before venturing to ground a judgment upon it, and at the same time the aspect of the statute as seen by me, dominated strongly as I am by respect for the views of my brethren, if I stood alone I might tend to fall into uncertainty as to whether the mental compass, ordinarily enabling me to comprehend common forms of expression pretty clearly, has been dependable in the particular situation.

Proceeding, the court says, reasoning from absence of the word "writing" from the statute: "The court cannot read into the statute provisions not found there for the purpose of rendering an oral contract, otherwise unobjectionable, void because not in writing, in the absence of express statutory requirement." Here again I do not understand. Was it intended that counsel for appellant, or anyone, thought of reading into the statute any provision for any purpose, much less to render a contract void? Is the common thing of reading ⁶²⁸ out of the statute the idea thought to be there by necessary inference an attempt to read into the

statute anything not there? Was the intention that a statute could not expressly require a contract to be in writing in any other way than by using the word "writing"? But I will not pursue this further. I leave it believing that enough has been said, if anything were required other than to merely point to the plain language of the statute, to show that it expressly requires such contracts as that in question to be in writing as plainly as that could be done.

If the statute were ambiguous and so open to construction no argument is needed to show that the same result would be reached as before. First, formerly such contracts, as we have said, were required to be in writing; second, public policy so requires, for which reason courts have leaned to the view that the written law so commands where either language to that effect is used or the law cannot be executed otherwise than by reducing the contract to writing; third, because by practical construction of the statute for half a century or more, if construction were required, it commands such contracts to be in writing.

The foregoing second proposition could be well illustrated by reference to many adjudications. We will refer to two only. In Indiana the statute does not require, specifically, things to be done respecting such contracts which can only be done by reducing the agreement to writing, but does, as a part of the prescribed duties of the keeper of the official records, use language indicating that it includes contracts with teachers, though not mentioning them. The latter provision is widely separated from the one relating to the contracting power. Judge Elliott, speaking for the court in *Fairplay Tp. v. O'Neal*, 127 Ind. 95, 26 N. E. 636, said: "It is . . . not altogether clear that the statute does not require that all contracts shall be in writing, . . . but we do not deem it necessary to decide the question."

⁶²⁰ The context shows, clearly, that, had it been necessary to decide the question, the contract would have been declared void. The learned judge referred to sound public policy as governing the matter, clearly indicating a judicial view that in case of such a statute being open to construction, that meaning should be adopted which would require the contract to be in writing.

Jackson School Tp. v. Shera, 8 Ind. App. 330, 35 N. E. 842, to the effect that a contract of the sort under consideration is valid unless the statute requires it to be in writing. In connection with that, we may say in passing, the judge who wrote the opinion freely conceded that such a contract is void where the statute commands it to be in writing without any declaration to that effect, and agreed with Judge Elliott that "sound public policy requires that the law-making power should prescribe that when the minds of the parties meet as to the terms of such a contract, the same

should be reduced to writing," and in spirit suggested that when the legislature manifests such policy with reasonable clearness, though not in the plainest words of command, sound judicial policy requires the court to give effect thereto. The trouble there was that in the provision relating to the power to contract nothing was said suggesting a writing. Notwithstanding such situation the Indiana supreme court again referred to the matter in *Caldwell v. School City of Huntington*, 132 Ind. 92, 31 N. E. 566, saying: "It is, indeed, a question if the statute does not require that all contracts for the employment of teachers shall be in writing."

In support of the proposition that practical construction of the statute is contrary to the court's conclusion I appeal to common knowledge that such contracts have always been supposed to be required thereby to be in writing, and that the state superintendent of schools has so administered the law. The school code, officially published and distributed for the guidance of school officials, has, from the first edition published ^{ago} many years ago, contained a form of contract with suggestive features for its execution referring to the section of the statutes under consideration.

It is said that in case of a legislative purpose that a contract shall be void unless in writing, the statute so declares. No authority is cited to that as to public contracts, and I venture to say there is none. The authorities are at least substantially, if not universally, the other way as to decided cases and elementary works as well: *Perkins v. Independent School Dist.*, 99 Mo. App. 483, 74 S. W. 422; *Head v. Providence Ins. Co.*, 2 Cranch, 127, 2 L. ed. 229; *Wade v. Newbern*, 77 N. C. 460; *Logansport v. Blakemore*, 17 Ind. 318; *Starkey v. Minneapolis*, 19 Minn. 203; *Aurora W. Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946; *Crutchfield v. Warrensburg*, 30 Mo. App. 456; *McDonald v. Mayor, etc.*, 68 N. Y. 23, 23 Am. Rep. 144; *Stuart v. Cambridge*, 125 Mass. 102; 1 *Smith's Modern Law of Corporations*, sec. 263; 1 *Beach on Public Corporations*, sec. 253; *Dillon on Municipal Corporations*, sec. 373; *Terry v. Board of Education*, 84 Mo. App. 21; 35 Cyc. 957; 20 *Am. & Eng. Ency. of Law*, 2d ed., 1164.

In all these authorities it is held that where the statute requires public contracts to be in writing one otherwise made is void. Many instances will be found where recovery after performance even on a quantum meruit was denied. Nowhere is it suggested, at least in any well-considered case, that a contract not made in compliance with the statute is nevertheless valid, unless declared by the written law to be void. A distinction is made in the books between a conferred power, as in case of that of a municipality to contract, and a regulated power such as that to make contracts in general. In the latter failure to comply with the statutory regulations not expressly declared in the statute to be fatal in some cases is held to render the agreement void and in

others not, according to the supposed legislative purpose, but as to the former the extent of the power itself is measured by the terms of the statute including those in regard to its execution. So where ⁶³¹ the statute requires a public contract to be in writing, the power to contract is conditioned, necessarily, upon its being exercised in the manner indicated. Such is the philosophy of the law as it will be universally found stated, I venture to say, in the books.

The court seems to have overlooked the foregoing or would not have so easily ingrafted upon our system the novel idea that a public contract required by statute to be in writing need not necessarily be made that way in order to be valid, referring to sections 2302, 2304, 2307, and 2308 of the statutes relating to contracts in general respecting real estate and contracts within the statutes of frauds which I must say have no application to the subject under discussion.

Attention is called in the court's opinion to section 529, Statutes of 1898, relating to contracts with teachers under the township system, which requires them to be in writing. True, but such section does not provide that such contracts shall be void unless in writing, so by the logic of the court that result would not follow from a failure to obey the law. Again it must be remembered that section is new as compared with the one under discussion. It was adopted in the light of over twenty years of administration of the latter and was worded substantially the same as that had always been understood and evidently with the intention of including the same essentials as were embodied in the old statute.

The closing part of the court's opinion seems to be a key to the whole. There the idea with which the opinion opens is reiterated and emphasized, i. e., that the statute is in derogation of the common law and so a strict construction should be resorted to avoiding any change if possible. The force of the rule, as we have seen, where applicable at all, is not to the extent suggested, while the trend of judicial thought is rather toward a construction of the written law requiring public contracts to be in writing than otherwise, in harmony with the ancient common law. The misconception as to that and failure ⁶³² to distinguish between adjudications respecting contracts in general and public contracts, and the basis thereof, in that the latter involves power by grant and the former power by natural right which the written law merely regulates, led naturally to the result from which I dissent. I have no fear but that the departure from principle will be rectified at the first good opportunity. The looseness in public affairs which the decision sets a mark for in the particular field may be easily avoided by legislative action.

Winslow, C. J., and Barnes, J., concurred in the foregoing.

A Board of Education cannot Exercise Any Powers not Expressly Conferred upon it by statute or fairly arising by necessary implication. All who deal with it are charged with notice of the scope of its authority, and that it can bind the district only to the extent and by such contracts as are authorized by law: *Honaker v. Board of Education*, 42 W. Va. 170, 57 Am. St. Rep. 847.

A Contract by a School District to Employ a Teacher is unenforceable if it creates an indebtedness against the district in excess of the amount permitted by statute: *Wolfe v. School District No. 2*, 58 Wash. 212, 137 Am. St. Rep. 1057. A contract to employ one who has no certificate entitling him to teach is void: *Sheldon v. School District*, 4 N. D. 197, 50 Am. St. Rep. 639. One who teaches school without a certificate of qualification in violation of the terms of a statute is not entitled to compensation even though the school officers have issued a warrant therefor: *Goose River Bank v. Willow Lake School Township*, 1 N. D. 26, 26 Am. St. Rep. 605. As to the power of school directors to employ members of a particular religious faith, who wear the distinctive garb of a particular religious order, see *Hysong v. Galletzin Borough School District*, 164 Pa. 629, 44 Am. St. Rep. 632. A board of education, in the matter of making or altering contracts with teachers, must act when assembled as a board. The acts and declarations of the individual members when not so assembled will not create a contract enforceable against the district: *School District No. 39 v. Shelton*, 26 Okl. 229, 138 Am. St. Rep. 962.

LOOS v. GEO. WALTER BREWING COMPANY.

[145 Wis. 1, 129 N. W. 645.]

MASTER AND SERVANT—Discharge by Requiring Additional Services.—As long as a servant is permitted to perform the services he contracts for, he cannot treat a mere request or direction to perform additional services as a discharge; but when there is a refusal to permit him to perform the substantial or principal services he agreed to perform, and a direction to substitute a different service, then he may treat such refusal and direction as a discharge. (p. 1054.)

MASTER AND SERVANT—Breach of Duty, Whether Warrants Discharge.—Where a brewing company, which contemplates loaning money to one of its customers to enable him to purchase a saloon, sends an employee to assist in making the purchase, and the employee receives a commission from the vendor for making the sale, the question whether any wrong was intended by the employee, or any real injury resulted to the employer, warranting the discharge of the employee, is for the jury. (p. 1055.)

MASTER AND SERVANT—Discharge of Employee.—If misconduct on the part of an employee amounting to a breach of contract exists at the time of his discharge, the master can justify under it irrespective of whether or not he knew it at the time of the discharge. (p. 1055.)

J. Elmer Lehr, Albert Krugmeier and H. C. Sloan, for the appellant.

H. D. Ryan and A. M. Spencer, for the respondent.

¹ VINJE, J. Action to recover damages for alleged wrongful discharge from employment under a written contract entered into February ² 6, 1904, whereby it was agreed that plaintiff should render services to the defendant from March 1, 1904, to March 1, 1909, as salesman of its beer and beer products and as collector of its accounts and demands arising from sales of beer and beer products, and at times not so occupied it should be his duty in a general way to serve and assist in and about said business, according to his ability, and to observe and obey all proper directions that might from time to time be given him by the general manager or other authorized business representative of the defendant, for an annual salary of \$1,200 payable in equal installments at the end of each month. Plaintiff entered upon his employment at the stipulated time and remained therein until about April 16, 1906, when he claims he was discharged. Defendant denies that he was discharged, and alleges that, if he was, there was sufficient excuse therefor growing out of plaintiff's misconduct.

The jury by a special verdict found (1) that plaintiff was discharged from his principal employment; (2) that defendant was not justified in discharging him; (3) that plaintiff duly performed all the conditions of his contract while in the employ of the defendant; (4) that plaintiff did not cause any dissatisfaction among customers of the defendant with an intent to injure its business; (5) that plaintiff did not misrepresent defendant's business and management in a manner which tended to injure its business; (6) that plaintiff's conduct in the Hemple-Schmitz deal was not a breach of duty; and (7) that plaintiff was entitled to recover \$1,681, with interest from July 29, 1909. From a judgment upon the special verdict entered in favor of the plaintiff the defendant appealed.

² The assignments of error reduce themselves to two questions: Was the plaintiff discharged? And if so, was the defendant justified in discharging him? It is not claimed by either party that there was a discharge from all employment under the contract; but the plaintiff claims that his principal employment was that of a salesman and collector, and that on or about the sixteenth day of April, 1906, he was required by the defendant to take permanent charge of its bottling department, and that such a requirement was equivalent to a discharge. The defendant admits it required plaintiff to take charge of its bottling department, but maintains that he was asked to do so only temporarily while an investigation could be made relative to the alleged dissatisfaction of some of its customers claimed to have been caused by the plaintiff. Upon the issue as to whether or not such change in employment was to be permanent or only temporary there was a sharp conflict of testimony, and the finding of the jury in favor of the plaintiff cannot be disturbed as against the clear preponderance thereof

or as not supported by credible evidence. Undoubtedly the plaintiff, under the provisions of the contract set out in the statement of facts, could be required to perform temporary services in the bottling department, and a request so to do would not constitute a breach of the contract of employment. He agreed to perform such or any other reasonable service at times when he was not occupied in his principal employment, namely, that of a salesman and collector. It has been held that a request to perform an additional service of the same kind is not a discharge: *Koplit v. Powell*, 56 Wis. 671, 14 N. W. 831. As long as the servant is permitted to perform the services he contracts for, he cannot treat a mere request or direction to perform additional services as a discharge. Neither would a master be justified in discharging a servant for a refusal to perform services outside the scope of his employment: *Koplit v. Powell*, 56 Wis. 671, 14 N. W. 831. But when there is a ⁴ refusal to permit the servant to perform the substantial or principal service he agreed to perform and a direction to substitute a different service, as in this case, then the servant may treat such refusal and direction as a discharge: *Cooper v. Stronge & Warner Co.*, 111 Minn. 177, 126 N. W. 541, 27 L. R. A., N. S., 1011; *Marx v. Miller*, 134 Ala. 347, 32 South. 765; *Roserie v. Kiralfy Bros.*, 12 Phila. 209; *Warner v. Rector etc.*, 1 City Ct. R. 419; *Pepper v. Kisch*, 2 City Ct. R. 131. This is upon the principle that both parties are entitled to a substantial compliance with the contract, and that he who refuses to permit it is guilty of a breach thereof. The trial court, therefore, under the findings of the jury, properly held plaintiff was discharged. Even after a discharge the servant is under no obligation to enter upon a different employment in order to relieve his employer as much as possible from the loss consequent upon the breach of his contract: *Fuchs v. Koerner*, 197 N. Y. 529, 14 N. E. 445; *Wood on Master and Servant*, 2d ed., sec. 127.

It remains to consider whether or not the defendant was justified in discharging plaintiff. The ground upon which justification was urged in this court was his conduct in the so-called Hemple deal. It appears that before plaintiff entered the employ of the defendant and while he was in the employ of another brewing company, Mrs. Hemple, who owned a saloon, told him that she would give him \$200 if he would find her a purchaser for her saloon property. A Mr. Schmitz became a prospective purchaser, and he requested the defendant, who was to loan him some money to carry out the deal, to send some one to assist him. The defendant sent the plaintiff, because he was good at taking inventories, quick at figures, and able to draw the required papers. The deal was closed at \$5,000, the price Mrs. Hemple put upon the property, and plaintiff received from her a commission of either \$100 or

\$200. He says it was only \$100, but she says it was \$200. The defendant made a loan of \$4,500 to ⁵ Schmitz on the property, and afterward took it in payment of the loan, as Schmitz was unable to make the stipulated payments when they became due. Later the defendant sold the property, but at what price does not appear. Defendant claims this conduct on the part of plaintiff in accepting a commission from Mrs. Hemple warranted his discharge. This court has said: "It is not for every breach of duty that an employer is warranted in putting an end to a contract of employment before the appointed time. In a controversy over such a matter, especially where the employment is of a business nature, requiring the exercise of judgment and discretion, the breach of duty is not per se a legal justification for a discharge of the employee, unless such breach evidences moral turpitude, or the conduct is manifestly injurious to the employer's business. So, where the question of the breach itself is undisputed, but the evidence leaves it in doubt as to whether there was any wrong intended, or any real injury inflicted, upon the employer's business, whether it constituted reasonable ground to discharge the employee is always a fact to be found by the jury": *Schumaker v. Heinemann*, 99 Wis. 251, 74 N. W. 785.

We cannot say in this case, as a matter of law, that the fact that plaintiff received a commission from Mrs. Hemple in the sale of her property to Mr. Schmitz evinced moral turpitude on his part or was manifestly injurious to defendant's business. No pecuniary damage is shown. It was contemplated that Mr. Schmitz should become a customer of the defendant, and the evidence shows that he continued to be so as long as he carried on the business. After he quit, the subsequent purchasers bought only part of their beer from defendant, but the jury was undoubtedly warranted in finding that such fact was not the result of the commission received by the plaintiff. We do not desire to be understood as commending the action of plaintiff. Indeed, it comes close to the border line of a serious breach of duty. For that reason it was properly left to the jury to say whether or not any wrong was intended or ⁶ any real injury inflicted upon the master's business. They found there was not, and we cannot say such finding was erroneous.

It appears that at the time defendant directed plaintiff to take charge of the bottling department it had no knowledge of the fact that he had received a commission from Mrs. Hemple. Such knowledge, however, was not necessary in order to entitle it to justify the discharge on account of the alleged misconduct. If misconduct amounting to a breach of contract exists at the time of a discharge, the master can justify under it irrespective of whether or not he knew it at the time of the discharge: *Von Heyne v. Tompkins*, 89 Minn. 77, 93

N. W. 901, 5 L. R. A., N. S., 524; Wood on Master and Servant, 2d ed., sec. 121. We find no error in the record.

By the COURT. Judgment affirmed.

The Remedies of Employees Wrongfully Discharged by their employer are discussed in the notes to Decamp v. Hewitt, 43 Am. Dec. 205; McMullan v. Dickinson Co., 51 Am. St. Rep. 515.

The Motives Which Actuate a Master in Discharging a Servant are wholly immaterial, for the act is justified if any legal ground therefor existed at the time; and it is also immaterial whether or not all of the grounds were known to the master when discharging the servant. Nor is it necessary for the master to assign a reason for the discharge, and, should he assign one, he is not bound by it; nor is he estopped to rely upon some other or different reason or cause, whether known to him at the time of the discharge or not: Von Heyne v. Tompkins, 89 Minn. 77, 5 L. R. A., N. S., 524, 93 N. W. 901. See, also, Corgan v. George F. Lee Coal Co., 218 Pa. 386, 120 Am. St. Rep. 891.

A Contract Employing One as Manager of a Sales Department is Violated by the Master in reducing the servant to a sales clerk: Cooper v. Stronge & Warner Co., 111 Minn. 177, 27 L. R. A., N. S., 1011, 126 N. W. 541.

MANITOWOC v. MANITOWOC AND NORTHERN TRACTION COMPANY.

[145 Wis. 13, 129 N. W. 925.]

INJUNCTION—Conditional Relief, When Improper.—Where the circuit court, after a trial on the merits, finds the complainant entitled to a permanent injunction, as prayed, it is error to make the granting of such relief conditioned on the filing of an undertaking that if on appeal judgment is awarded the defendants, the plaintiff will pay such damages as they have sustained by reason of the injunction. (p. 1058.)

INTERURBAN RAILWAY—Contract With Municipality Fixing Rates.—An interurban railway company may make a contract with a municipality fixing the rate of charge for a given service, provided the contract violates no law and is not inimical to public policy; but in so doing it cannot forestall the state and prevent it from exercising its governmental function regulating rates. (p. 1059.)

INTERURBAN RAILWAY—Right of Way.—A City may Refuse, if it sees fit, to grant an interurban railway company the right to run cars over its streets. (p. 1061.)

INTERURBAN RAILWAY—Contract With City Fixing Rates. Where a city, with authority to refuse its consent to the use of its streets by interurban cars, grants to the railway company the right to run such cars in its streets on the condition that the company shall carry passengers between that city and another city at a specified rate, the agreement is binding between the parties; but if no specific authority has been conferred upon the city to make such an agreement, the state may interfere whenever public weal demands. Yet until the state sees fit to exercise its paramount authority to modify the rates (which in this case it has not done), the contract is in force between the parties. (pp. 1064–1066.)

A. L. Hougen, for the appellant.

Nash & Nash, for the respondent.

¹⁴ BARNES, J. This action was brought to perpetually enjoin and restrain the defendant from increasing its rates for carrying passengers on its interurban road between the cities of Manitowoc and Two Rivers. On October 15, 1900, the city of Manitowoc ¹⁵ passed an ordinance granting to Thomas Higgins the right to operate a street railroad upon certain streets in the city of Manitowoc upon certain prescribed conditions. By the same ordinance permission was granted to said Higgins to run interurban cars upon certain streets in the city of Manitowoc, which cars were to be operated along an interurban line which Mr. Higgins proposed to build to Two Rivers. One of the conditions upon which the right was given to run interurban cars on the streets of the city was that the rate of fare to be charged between said cities should not exceed ten cents for a single trip, during the life of the franchise, which was thirty-five years, and the ordinance provided that it should have no force or effect until its terms and conditions were accepted by the grantee. Such grantee did accept the conditions of the ordinance and constructed the street and interurban railroad contemplated therein. Thereafter the defendant corporation was organized and succeeded to all the rights and property to which said franchise pertained, and on November 24, 1902, at the instance of the traction company and with the consent of Mr. Higgins, an ordinance was passed granting to the traction company the same rights and privileges that had been granted by the former ordinance to Mr. Higgins, subject, however, to the same conditions and liabilities that were contained in the original ordinance. The traction company accepted the terms and conditions of the ordinance of November 24, 1902, and until the year 1909 continued to charge an interurban fare of ten cents between the cities of Manitowoc and Two Rivers. On April 25th of that year it made a public announcement that on and after May 1, 1909, it would raise the charge to fifteen cents. This action was commenced to prevent such raise and to compel the defendant to abide by its contract. The defense in substance was that the city in the first instance had no power or authority to exact such a condition, and that the portion of the ordinance relating to interurban fares was ultra vires. Further, that the ordinance in any event had been ¹⁶ superseded and repealed by subsequent legislative action, and that a fare of ten cents was not compensatory and one of fifteen cents was reasonable.

The trial court found that ten cents is not now a reasonably sufficient fare for travel upon said interurban railway in con-

sequence of increased taxes and other expenses between said cities, and that fifteen cents is not an unreasonable fare. As a conclusion of law the court found that the defendant was bound by the stipulation contained in the ordinance and that it could not exact to exceed a ten-cent fare, and that the temporary injunction issued in the action should be made permanent. As a condition of making it permanent, however, plaintiff was required to file a bond with sufficient surety to indemnify the defendant against loss if the judgment should be reversed on appeal. The plaintiff refused to file the bond, and on proof of such failure judgment was entered dismissing the complaint, from which judgment this appeal is taken.

¹⁸ The trial court found as a conclusion of law that the plaintiff was entitled to the permanent injunction prayed for. As a condition of granting such relief it required the plaintiff to file within fifteen days an undertaking in the sum of five thousand dollars with sufficient surety, conditioned that, if on appeal to this court judgment should be awarded to the defendant, the plaintiff would pay such damages as the defendant sustained by reason of the injunction. The plaintiff refused to file the undertaking, and on proof of such fact judgment was entered dismissing the complaint.

The court was in error in awarding any such conditional relief. The case had been fully tried on its merits, and the findings of fact and conclusions of law on the litigated issues made and found by the court formed the basis for the final judgment that should be entered. Either the plaintiff was entitled to relief or it was not. If it was, the granting of that relief should not be made dependent on its ability to furnish a bond, or even on its willingness to assume the liability exacted, if it could furnish the bond. Section 9 of article 1 of our constitution provides: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

It seems quite clear that this provision of the constitution was overlooked and was violated in the instant case.

¹⁹ It is unnecessary to consider the ordinance of October 15, 1900, whereby certain rights and privileges were granted to Thomas Higgins, or the subsequent ordinance of November 24, 1902, whereby like privileges were granted to the Manitowoc and Northern Traction Company, except in so far as these ordinances relate to the rate of fare to be charged between Manitowoc and Two Rivers. Both of these ordinances granted the right to run interurban cars over the streets of the city of Manitowoc on the condition that the rate charged for a single fare between the two cities should not exceed ten

cents. Each provided that it should not have any force or effect until its provisions were accepted by the grantee of the privilege, and Mr. Higgins accepted such condition in the first instance and the traction company accepted the condition of the second ordinance. The language of the last acceptance is in part as follows: "The Manitowoc & Northern Traction Company does accept all and each and every of the grants, privileges and franchises created, granted or conveyed to said traction company by said ordinance, and you, the said mayor, and board of aldermen, and the said city of Manitowoc, are hereby notified that it is the intent of said traction company to accept said ordinance and all the grants, rights, privileges and franchises therein specified and to become and be and remain bound by the contract effected by said ordinance and this acceptance thereof according to the true intent and purpose of said ordinance."

We shall waste no time in discussing the proposition that this ordinance and the acceptance of it constituted a contract in form. The real questions involved in the case are three in number: (1) Did the parties have the power to make the contract? (2) If so, to what extent is it binding and enforceable? (3) Has it been lawfully superseded or nullified?

1. That the traction company had the right on its part to make a contract fixing the rate of charge for a given service, provided such contract violated no law and was not inimical ²⁰ to public policy, is clear enough. By so doing it could not forestall the state and prevent it from exercising its governmental function regulating rates. But until the state sees fit to interpose, the carrier ordinarily may exercise a free hand in fixing rates, subject to the qualification that they must not be unreasonably high and must not be unjustly discriminatory. In order to have a binding contract there must be mutuality of obligation, and whatever doubt arises on the branch of the case we are considering arises in reference to the right of the city to make the particular contract before us.

There was no law inhibiting the making of the contract involved at the time it was entered into, and there is nothing to show that it was discriminatory or against public policy. It was no doubt contemplated by the city that its residents would be liberal patrons of the road, and the consideration which it gave for the rate of fare fixed was the right to run the interurban cars in the streets of the city. The right of the city to make the contract which it did, in so far as it had any statutory right to do so, is found in section 1863, Statutes of 1898, as amended by chapter 425, Laws of 1901. It was held in *Milwaukee L., H. & T. Co. v. Milwaukee N. R. Co.*, 132 Wis. 313, 112 N. W. 663, that section 1862, Statutes of 1898, applied only to street railway companies, and that section 1863 applied to both street and interurban railways. Prior to the

passage of chapter 425, Laws of 1901, section 1863 contained no provision to the effect that interurban railways might pass through cities by obtaining the consent thereof. That law amended section 1863, Statutes of 1898, so as to provide that "Any street railway corporation may extend its railway to any point within any town adjoining a municipality from which it derived its franchise. . . . Corporations may be formed and governed in like manner as is provided in section 1862 for the purpose of building, maintaining and using railways . . . in any city, village or town or to extend from any point in one city, village or town to, into or through any other city, village or town . . . and for that purpose, with ²¹ the consent of the common council of any city, the board of trustees of any village and the written consent of a majority of the supervisors of any town in, into or through which such railway . . . may extend, may lay and operate their railways . . . upon, across and along any highway. . . . In any city or village the consent of the common council or board of trustees shall be given by ordinance, and upon such terms and subject to such rules and regulations and the payment of such license fees as the common council or board may prescribe."

There is no material difference in the provisions of these two sections in so far as they pertain to the matter of giving consent to the use of the public streets. Section 1862, Statutes of 1898, authorizes a city to grant the use of a street to a street railway company upon such terms as the proper authorities shall determine, while section 1863, Statutes (Supp. 1906: Laws 1901, c. 425), authorizes an interurban railway company to use the streets of the city provided its consent is obtained, and such consent may be given upon such terms as the common council may prescribe. The first ordinance was passed before chapter 425, Laws of 1901, became a law, and therefore before we had any statute expressly authorizing a city to consent that the cars of an interurban railway company might be run over its streets. The franchise was also granted to an individual instead of a corporation. *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181, was decided in this court in April, 1902, in which it was held that a city had no authority to grant such a franchise to an individual, and that the grantee should be a corporation organized in the manner provided by statute. The ordinance of November, 1902, was no doubt applied for and obtained because it was assumed that the former ordinance was void for the reasons stated, the railway property having in the meantime been transferred to a corporation capable of taking it, as well as the necessary franchises to operate it. It is immaterial whether the original ordinance is valid or void: *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818. The legality of the second ordinance is not attacked in ²² its

entirety, although some of its provisions are claimed to be *ultra vires*.

This court has repeatedly held that the use of city streets by interurban cars subjected them to an additional burden for which the property owner must be compensated: *Chicago & N. W. R. Co. v. Milwaukee etc. R. Co.*, 95 Wis. 561, 60 Am. St. Rep. 136, 70 N. W. 678, 37 L. R. A. 856; *Zehren v. Milwaukee E. R. & L. Co.*, 99 Wis. 83, 67 Am. St. Rep. 844, 74 N. W. 538, 41 L. R. A. 575; *Beloit etc. R. Co. v. Macloon*, 136 Wis. 218, 116 N. W. 987; *Schuster v. Milwaukee E. R. & L. Co.*, 142 Wis. 578, 126 N. W. 26.

This court has also held that interurban railways could not exercise the right of condemnation given by section 1863a, Statutes of 1898, unless the consent of the municipality in which the right was sought to be exercised had been obtained in the manner provided by sections 1862 and 1863: *Milwaukee etc. T. Co. v. Milwaukee N. R. Co.*, 132 Wis. 313, 112 N. W. 663; *Beloit etc. R. Co. v. Macloon*, 136 Wis. 218, 116 N. W. 897; *In re Plowright*, 140 Wis. 512, 122 N. W. 1043; *Milwaukee etc. T. Co. v. Burlington E. L. & P. Co.*, 142 Wis. 436, 125 N. W. 932; *Schuster v. Milwaukee E. R. & L. Co.*, 142 Wis. 578, 126 N. W. 26.

The logic of the decisions cited from our own court leads to the conclusion that a city, if it sees fit, may refuse to grant an interurban railway company the right to run cars over its streets. The decisions elsewhere made under like statutes are to the same effect: *Galveston & W. R. Co. v. Galveston*, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33; *Pacific R. Co. v. Leavenworth*, 1 Dill. 393, Fed. Cas. No. 10,649; *Atchison St. R. Co. v. Nave*, 38 Kan. 744, 5 Am. St. Rep. 800, 17 Pac. 587; *Northern Cent. R. Co. v. Baltimore*, 21 Md. 93; *Indianapolis & C. R. Co. v. Lawrenceburg*, 34 Ind. 304; *Indianola v. Gulf etc. R. Co.*, 56 Tex. 594; *Detroit v. Ft. Wayne & B. I. R. Co.*, 95 Mich. 456, 35 Am. St. Rep. 580, 54 N. W. 958, 20 L. R. A. 79; *Monroe v. Detroit etc. R. Co.*, 143 Mich. 315, 106 N. W. 704; *People v. Barnard*, 110 N. Y. 548, 18 N. E. 354. See, also, *State v. Madison St. Ry. Co.*, 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771.

²³ In the case before us the city did give its consent, and the real question is, Did it have the right to impose the terms which it undertook to impose as a condition to such consent?

Under a statute not unlike our section 1862 of Statutes of 1898, the city of Detroit, subsequent to the construction of a street railway, passed an ordinance regulating the rate of fare to be charged. Speaking of the power of the city under such a statute the court said: "The right of a municipality, under the statute, to refuse its consent to the operation of a street railway in its streets, is an absolute one, and its power, in the first instance, to impose conditions, is unlimited. The nature

of the condition imposed does not depend upon other grants of power. Respecting the imposition of further conditions after consent given, it is only necessary that the municipality keep within the scope of the reservation": *Detroit v. Ft. Wayne & B. I. R. Co.*, 95 Mich. 456, 35 Am. St. Rep. 580, 56 N. W. 859, 20 L. R. A. 79.

In *People v. Barnard*, 110 N. Y. 548, 18 N. E. 354, it is held that under a statute authorizing a city "to secure adequate compensation for the right to construct . . . street railroads in cities," it was within the power of the city to prescribe the rates which should be charged as a condition of giving such consent.

In *Clinton v. Worcester Con. St. R. Co.*, 199 Mass. 279, 85 N. E. 507, it was held, under a statute authorizing the aldermen of cities through which street railway companies intended to pass to impose "such restrictions" upon such companies as "they deemed the interests of the public might require," that consent to the use of the streets might be given upon condition that children be transported to and from the public schools, and to and from the state normal school located at Worcester, at half fare.

In *Pacific R. Co. v. Leavenworth*, 1 Dill. 393, Fed. Cas. No. 10,649, a Kansas statute forbade a railway company to construct its road upon the streets of an incorporated city "without the assent of the corporate authorities." Consent was granted on the condition that the railway company should build a depot in a certain ²⁴ part of the city and "grade, riprap and pave the street it used." The company agreed to accept the use of the street on such terms. It was held that the city had the lawful right to make the condition, and that the company, having consented to it, was bound by its contract.

In *Atchison St. R. Co. v. Nave*, 38 Kan. 744, 5 Am. St. Rep. 800, 17 Pac. 587, it was held, under the Kansas statute above referred to, that the city might give its consent to the occupancy of its streets by a railway company on condition that the railroad be built within six months.

In *Indianapolis & C. R. Co. v. Lawrenceburg*, 34 Ind. 304, consent to the use of the streets by a railroad company was given on condition that "where the grade of said road shall be higher than such street, alley or public ground, the said company shall fill up on each side of their said road to form a convenient passage over the same." The grade of the street was changed after the road was built, and it was held that the railroad company was liable for the cost of doing the work stipulated for in the ordinance granting consent.

In *Indianola v. Gulf etc. R. Co.*, 56 Tex. 594, consent was granted to a railway company to use a public street on condition that the company extend its road a certain dis-

tance beyond the town and execute a bond in the sum of fifty thousand dollars as stipulated damages conditioned for the faithful performance of the agreement. The statute in force empowered the railway company to use a public street, but provided that the city might object to the use of the particular street selected, and on objection being made it was further provided that the governor might appoint some competent person to select a route. Objection was made to the use of the street selected, which objection was removed by the company assenting to the condition proposed and filing its bond as required. Thereafter it refused to extend the road as agreed. In an action brought upon the bond it was held that the contract was not ultra vires, and that the city might recover the penalty prescribed in the bond because of the breach of the contract.

²⁵ In *Omaha W. Co. v. Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A., N. S., 736, the statute involved empowered the city of Omaha to contract for the construction and maintenance of "waterworks on such terms and under such regulations as may be agreed on." It was held that the statute authorized the city to enter into a contract for the construction of waterworks and to provide for the rates at which the contractor should furnish water to private consumers.

In *Walla Walla v. Walla Walla W. Co.*, 172 U. S. 1, 19 Sup. Ct. Rep. 77, 43 L. ed. 341, the statute involved empowered the city of Walla Walla to erect or to authorize the erection of waterworks and to permit the use of the streets for the purpose of laying pipes for a term not exceeding twenty-five years, and it was held that this provision authorized the city to enter into a contract granting a water company the right to lay its pipes for twenty-five years, and to agree on its part that so long as the contract remained in force the city would not itself construct waterworks.

In *Vicksburg v. Vicksburg W. W. Co.*, 202 U. S. 453, 26 Sup. Ct. Rep. 660, 50 L. ed. 1102, 6 Ann. Cas. 253, the statute involved authorized the city of Vicksburg to contract for the erection and operation of a system of waterworks, and it was held thereunder that the city might lawfully, as a term of the contract for the construction of such waterworks, give the grantee the exclusive right to erect and maintain waterworks for a definite period of time, during which it could not erect its own system in opposition to that of the company receiving the franchise.

The cases relied upon by the respondent as establishing a contrary doctrine are *Galveston & W. R. Co. v. Galveston*, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33, and *South Pasadena v. Los Angeles T. R. Co.*, 109 Cal. 315, 41 Pac. 1093. The Texas case is not in point. It was there held that the city could not oust the railway company for failure to comply with

its contract, because the destruction of the railroad might operate to the disadvantage of the public. The court did not ²⁶ hold that an appropriate action might not be brought either to recover damages for the breach of the contract or to compel the railway company to comply with it, and there is no intimation in the decision that it was intended to overrule *Indianola v. Gulf etc. R. Co.*, 56 Tex. 594, which covers the precise situation presented in the case before us.

The California case is in point to the proposition to which it is cited. The decision goes upon the ground that it would be against good public policy to permit a city to dictate the rates of fare that should be charged outside of its boundaries, because the general public is interested in such rates and should not be concluded by the action of a single city. We think this decision overlooks the important fact that the general public was not concluded by the agreement. That question will be subsequently discussed.

Inasmuch as the city might on any terms refuse its consent to the use of its streets by interurban cars, we see no reason why it might not exact any conditions it saw fit, provided they were not unlawful in themselves, and as to the parties to the contract there was nothing unlawful about the condition we are considering. The decided cases fully sustain this view. We therefore hold that the parties were competent to make the contract entered into.

The statutes under consideration are not analogous to section 1778, Statutes of 1898, which was construed to extend to telephone companies, in *State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657, *State v. Milwaukee Ind. Tel. Co.*, 133 Wis. 588, 114 N. W. 108, 315, and *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1, 110 Am. St. Rep. 886, 104 N. W. 1009, 1 L. R. A., N. S., 581. When these decisions were made, telegraph and telephone companies not only received their franchises directly from the state, but they were expressly authorized by the state to use the public streets and highways under prescribed conditions without any permission or consent from the municipalities in which their lines were built. Cities, in the exercise of the ²⁷ general police powers conferred on them, might prescribe reasonable regulations governing the use of streets by such companies, and in the cases referred to it was merely held that a city under the guise of such power could not wholly exclude such companies from using its streets, but was restricted under the law to the exercise of legitimate police regulations.

2. We next come to a consideration of the question of the extent to which the contract before us is binding and enforceable. That the legislature of the state might expressly empower cities to make such contracts as the one in question is well settled. In passing such an ordinance as we have before us, a city, proceeding under a grant of power specifically con-

ferred, acts as the agent of the state, and the public is concluded by the contract during its life, and its obligations could not be impaired by subsequent legislative action, unless it were held that the ordinance was part of the charter of the railway company and subject to amendment or repeal under section 1, article 11, of our constitution. Otherwise, a state may, in matters of proprietary rights, exclude itself and authorize its municipal corporations to exclude themselves from the right of regulating rates: *Vicksburg v. Vicksburg W. W. Co.*, 202 U. S. 453, 26 Sup. Ct. Rep. 660, 50 L. ed. 1102, 6 Ann. Cas. 253; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 24 Sup. Ct. Rep. 756, 48 L. ed. 1102; *Detroit v. Detroit C. St. R. Co.*, 184 U. S. 368, 22 Sup. Ct. Rep. 410, 46 L. ed. 592; *New Orleans W. W. Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. Rep. 273, 29 L. ed. 529; *St. Tammany W. W. v. New Orleans W. W.*, 120 U. S. 64, 7 Sup. Ct. Rep. 405, 30 L. ed. 563; *Walla Walla v. Walla Walla W. Co.*, 172 U. S. 1, 19 Sup. Ct. Rep. 77, 43 L. ed. 341; *Los Angeles v. Los Angeles City W. Co.*, 177 U. S. 558, 20 Sup. Ct. Rep. 736, 44 L. ed. 886; *Home T. & T. Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. Rep. 50, 53 L. ed. 176; *Knoxville v. Knoxville W. Co.*, 212 U. S. 1, 29 Sup. Ct. Rep. 148, 53 L. ed. 371; *Nelson v. Murfreesboro*, 179 Fed. 905, and cases cited on page 908.

Statutes granting to cities the right to make long-time contracts binding on the public and fixing a rate to be charged by a public service corporation are not looked upon with favor, and will be strictly construed. It is only where the right is very clearly conferred that the state will be held to have relinquished its power to enact laws regulating tolls: *Freeport W. Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. Rep. 493, 45 L. ed. 679; *Detroit v. Detroit C. St. R. Co.*, 184 U. S. 368, 22 Sup. Ct. Rep. 410, 46 L. ed. 592; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 33 L. ed. 970; *Stanislaus Co. v. San Joaquin etc. I. Co.*, 192 U. S. 201, 24 Sup. Ct. Rep. 241, 48 L. ed. 406; *Georgia R. & B. Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. Rep. 47, 32 L. ed. 377; *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. Rep. 832, 27 L. ed. 812; *Home T. & T. Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. Rep. 50, 53 L. ed. 176.

No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting section 1862, Statutes of 1898, or section 1863, Statutes (Supp. 1906: Laws 1901, c. 425), the state intended to surrender its govern-

mental power of fixing rates. That power was only suspended until such time as the state saw fit to act: *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *Home T. & T. Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. Rep. 50, 53 L. ed. 176; *Freeport W. Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. Rep. 493, 45 L. ed. 679; *Stanislaus Co. v. San Joaquin & K. R. C. & I. Co.*, 192 U. S. 201, 24 Sup. Ct. Rep. 241, 48 L. ed. 406. Furthermore, the right conferred on a railway company to use the public streets, under section 1862 or section 1863, becomes one of the corporate franchises of the corporation to which it is granted, the city acting as the delegated agent of the state in granting it: *State v. Madison St. R. Co.*, 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771; *Wright v. Milwaukee E. R. & L. Co.*, 95 Wis. 29, 60 Am. St. Rep. 74, 69 N. W. 791, 36 L. R. A. 47; *State v. Anderson*, 90 Wis. 550, 63 N. W. 746; *State v. Superior Court*, 105 Wis. 651, 81²⁹ N. W. 1046; *State v. Portage City W. Co.*, 107 Wis. 441, 83 N. W. 697; *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181. This being so, the reserved power of amendment or repeal, contained in section 1, article 11, constitution, would seem to empower the legislature to modify the conditions on which such franchise was given, as well as to repeal or amend the franchise itself: *Chapin v. Crusen*, 31 Wis. 209; *West Wisconsin R. Co. v. Trempealeau Co.*, 35 Wis. 257; *Attorney General v. Railroad Cos.*, 35 Wis. 425.

3. Whether the state has exercised its right to modify this rate remains to be considered. Chapter 362, Laws of 1905, applies to interurban railway companies: In re Application of Chapter 362, Laws of 1905, to Certain Street Railways, 1 Wis. R. R. Comm. Rep. 178. By that statute (section 3) it is provided that all charges made by any carrier coming under its provisions "shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Railway companies are required to file their tariffs with the railroad commission and are prohibited from making changes therein except on ten days' notice, and the rates fixed in such tariffs are declared to be the lawful rates until changed as provided by the act. Section 12 of the law provides that the commission may, on complaint or on its own motion, proceed to determine the reasonableness of any rate, and, whenever such rate is found to be unreasonable, may fix and determine what a reasonable charge shall be, and thereupon the rate so fixed shall be the lawful rate. By subdivision "c" of section 12 a railway company is given the same right to make complaint that is given to any other person or corporation.

It is contended that this law has superseded the contract involved in this suit, and that therefore the contract no longer has any binding force or effect. We do not think so. The

statute worked no change in existing rates. It simply provided that all rates should be reasonable, and left to the railroad ³⁰ commission the power to determine the fact as to whether or not a given rate was reasonable. When that determination was reached the law became operative upon the particular rate called in question, and the rate arrived at then became the lawful rate and continued so until set aside in the manner provided by the law. The railroad commission has made no determination in the case before us; at least, if it has, it is no part of the record. Until that determination is made the contract is in force. When it is made the contract is superseded, if the rate is changed. The commission has ample authority to proceed upon its own motion. The traction company, under subdivision "c" of section 12, has power to make the necessary complaint to compel an investigation. This works no hardship on anyone. It may be, as the trial court found, that a ten-cent fare is unreasonable and that a fifteen-cent fare is not so. Usually, long-time contracts made under like conditions operate against the public interest, and, if the fare provided for is unreasonably low, the legislature has the same power over it that it would have if it were unreasonably high. It may also be that adequate service cannot be given at the rate fixed or that conditions have so changed that the road cannot be operated unless rates are increased and that the public will be better served by raising the rate than by permitting it to remain where it is. This is a question which calls for the exercise of legislative policy and discretion. The court cannot relieve the defendant from an improvident contract, but the contract is of such a character in the present instance that the legislative branch of the government may, in the interest of the public, abrogate it. If, as is contended by counsel for the respondent, no contract was entered into and we were dealing with the ordinance as a legislative enactment pure and simple, and not as part and parcel of a contract, there might be good reason for the claim that it is superseded by chapter 362, Laws of 1905, without any affirmative action on the part of the railroad commission. But such is not the case before us.

³¹ By the COURT. The judgment of the circuit court is reversed and the cause is remanded, with directions to enter judgment enjoining the defendant from changing the rates of fare between the cities of Manitowoc and Two Rivers provided for in the ordinance of November 24, 1902, until such time as such rates are changed by the legislature or through a legislative agency in the manner provided by law.

As to Whether an Interurban Railway Constitutes an Additional Servitude on a public street or highway, see the note to Mordhurst v. Ft. Wayne etc. Co., 106 Am. St. Rep. 243.

A Municipal Ordinance Requiring Railroad and Street Cars to stop at grade crossings to take on and discharge passengers is not a legislative exercise of the police power, and is opposed to public policy when applied to an interurban railway. Hence mandamus does not lie to compel such a railway to stop its cars at the designated places: Village of Excelsior v. Minneapolis etc. Ry. Co., 108 Minn. 407, 133 Am. St. Rep. 455.

An Ordinance Requiring the Sale of Tickets on Cars good for transportation during certain hours of the day, at the rate of eight for twenty-five cents, does not impair or destroy the rights or franchises of a street railway company, where the ordinance granting its franchise contained a reservation "to make such further orders, rules or regulations as may from time to time be deemed necessary to protect the interests, safety or accommodation of the public: City of Detroit v. Fort Wayne etc. Ry. Co., 95 Mich. 456, 35 Am. St. Rep. 580.

A Line Acquired by Purchase is a Part of a Street Railway System, and included within a provision of an ordinance granting a franchise to the company to construct its road through a township, providing that the rate of fare from any point in the township to the city of Detroit, and vice versa, shall at no time exceed the rate fixed by the company from Pontiac to Detroit, and vice versa: Township of West Bloomfield v. Detroit United Ry., 146 Mich. 198, 117 Am. St. Rep. 622.

LOVELAND v. LONGHENRY.

[145 Wis. 60, 129 N. W. 650.]

MINING LEASES Form a Distinct Class of Instruments, creating special and peculiar legal relations and rights. (p. 1072.)

MINING LEASE—Diligence in Prospecting, Necessity of.—Where a mining lease is granted upon the consideration that the lessee shall observe the covenants and conditions thereof, and the lessee covenants to prospect the land and in case he discovers a mine pay the lessor rent, royalty, or tribute based upon the ore mined from such mine if discovered, the covenant to prospect the mine is in the nature of a condition, and the lessee must proceed with and persist in prospecting with reasonable diligence and continuity of effort. (p. 1073.)

MINING LEASES—Diligence in Prospecting—What is not.—Where a mining lessee, before having made a discovery, discontinues prospecting for fourteen months, his delay is unreasonable, and lack of means to carry on the work is not a sufficient excuse. He does not prospect with the reasonable diligence and continuity necessary to prevent a forfeiture. (p. 1073.)

MINING LEASE—Forfeiture—Waiver.—The Lessor in a mining lease may, without waiving a forfeiture resulting from the lessee failing to prospect with reasonable diligence, offer to allow the lessee to retain part of the demised tract on condition that the lessee acquiesce in the forfeiture of the remainder. (pp. 1073, 1074.)

Action by a lessee to enjoin repeated and continuous trespasses on the premises by the landlord and persons claiming under him. The defense was that the lease had been terminated by forfeiture. From a judgment dismissing the complaint this appeal is taken.

Richmond, Jackman & Swansen and T. L. Cleary, for the appellant.

Kopp & Brunckhorst and Thomas & Hackney, for the respondents.

⁶² TIMLIN, J. The defendant Longhenry is the owner in fee of several adjoining tracts of mineral-bearing land, and on December 6, 1906, executed and delivered to the Grant County Mining Company an instrument in writing by the terms of which, "in consideration of the rents, covenants, and conditions herein agreed to be paid, kept, and performed by the party of the second part," he leased and let for mining purposes three parcels or tracts of this land. To the first described parcel, viz., lot 32, he had no title, and it was probably ⁶³ inserted in the lease by mistake. The second parcel is part of lot No. 37, and the third parcel is part of a tract which we may designate and which was known as the "Nagel tract." The instrument further provided that the lessee should "commence operations on said premises on or before the first day of July, 1907, and thereafter is to prospect said lands and work, develop and operate any mine or mines discovered on said land in a good, reasonable and minerlike manner for at least nine months in each and every year, subject, however, to strikes, delays of carriers, and breakages of machinery and other causes beyond the control of the second party." The lessor retained surface rights except such as would be necessary for sinking shafts, equipping machinery, and raising ore. Provision for payment was as follows: "The party of the second part agrees to and with the party of the first party to pay him as rents and tributes for the uses, rights, and privileges hereby given one-tenth part of the value at the railroad of all lead, drybone, zinc, and other ores and minerals discovered and mined in and upon said premises."

It is noticeable that the lease fixed no time for its expiration, fixed no day for the payment of rents or tributes, and contained no express provisions for forfeiture.

Section 1647, Statutes of 1898, reads: "Where there is no contract between the parties or terms established by the landlord to the contrary the following rules and regulations shall be applied to mining contracts and leases for the digging of ores and minerals."

Then follow certain rules and regulations which may or may not be of great importance, depending upon whether or not the proofs bring the undisclosed titles within one or the other of the two cases mentioned in the statute above quoted. It appears very clearly that prior to the execution of the written lease in question the mining company and its grantors or assignors were occupying these Longhenry lands under

other licenses or leases, oral or written. The terms and conditions ⁶⁴ of these leases or licenses are not all in evidence. We cannot ascertain whether they were one or several, nor, if several, what lands were covered by each. These things are essential because of the statute above quoted and because it seems that a discovery was made on lot 34, but whether there was a separate license or lease on that lot, or whether it was included with others, cannot be ascertained from the evidence. There is no evidence of mining customs, so that it is impossible to say whether the mining company is entitled to hold lot 34 under the statute, or how much more if any more, nor, if there was a lease or license, what were its terms or conditions as to all the lands not covered by the written lease in question. It appears that the written lease in question was given and received in an attempt to settle a previously existing controversy between the parties. There is no attempt at reformation. The parties do not agree with reference to what other land the written lease in question was intended to cover. But it is undisputed that it was intended to cover lot 37 and the Nagel tract. It is admitted that it fails to conform to the intention of the parties, but what was this intention is not clearly shown, so that the elder claim, right or title, whatever it was, to all lands not described in the written lease was not displaced by this written lease. All this is obvious and undisputed. The learned circuit court no doubt observed this, but considered it immaterial because the defendant Longhenry at the trial took the ground that he would not exact a forfeiture of lot 34, which lies north of Grant street, nor of any land north of Grant street, which also includes all the land from which any rent or tribute was ever due and several parcels of land not covered but intended to be covered by the written lease. It is, however, highly important that the rights of the parties be not concluded by the decree herein as to any lands or titles not actually covered by the written lease, because these rights have not been adequately presented on either side. Longhenry does not appeal ⁶⁵ from the decree, so that the release or waiver of forfeiture of part of the land covered by the written lease in question, not being injurious to the appellant, should not be disturbed unless such release operated to waive the forfeiture as to all the land so covered. Longhenry in his notice of declaration of intention to consider the lease at an end which he served on the mining company November 13, 1908, includes other lands not held of him by the mining company under the written lease in question and north and south of Grant street, but as to all such lands not included in the written lease in question the notice must be deemed ineffectual because there is no proof of the terms on which other lands were held, no proof that such terms were

breached, and no evidence on which the forfeiture could be upheld, and because the notice of forfeiture relates specially to the written lease and its stipulations. For these reasons it seems best that the decree of the court below be confined to its effect upon the rights of the parties arising out of their written lease of December 6, 1906. The decree below must be limited accordingly, and thus the decree would leave the written lease in question forfeited as to all lands therein described and lying south of Grant street, and in force as to all lands north of Grant street and actually described in the written lease. More specifically the appellant has lost by the decree below all that part of the Nagel tract lying south of Grant street extended.

With reference to the land covered by the written lease the circuit court found on sufficient evidence that the Grant County Mining Company, after entering and beginning work under the written lease in question, discontinued mining operations on or about September 1, 1907, and carried on no further work of this kind until November 14, 1908; "that the delay and neglect to prospect said lands and work, develop, and operate any mine or mines discovered thereon was not caused by strikes, delays of carriers, breakages of machinery, or any other causes beyond the control of the Grant County Mining Company; that said Grant County Mining Company did not prospect said lands and work, develop, and operate any mine or mines discovered on said premises in a good, reasonable, and minerlike manner or as provided in said lease." The evidence shows beyond dispute that no mine and no "crevice or range" containing ore was discovered on the lands included in the written lease in question. There is no proof of the usages of miners. After or at the time of serving his notice of forfeiture Longhenry authorized the defendant Wisconsin Zinc Company and its employee, Thorne, to prospect for ore on that part of the Nagel tract covered by the written lease in question, and the Grant County Mining Company brought this suit for an injunction against Longhenry, the Wisconsin Zinc Company, and Thorne to restrain repeated and continuous trespasses in so doing. While the suit was pending the Grant County Mining Company became bankrupt, and the action is now prosecuted by its assignee in bankruptcy. The circuit court denied any relief to the plaintiff and dismissed its complaint.

We may leave out of consideration the failure to pay rent or tribute on ore mined because there was no ore mined on any land covered by the written lease in question. We may also leave out of consideration any failure to "work, develop and operate any mine or mines discovered on said land in a good, reasonable and minerlike manner for at least nine months in each and every year," because there was no mine

discovered on any land covered by said written lease. This leaves the only default of the plaintiff to consist of suspending prospecting operations on said land from September 1, 1907, to November 14, 1908. The lease is expressly given in consideration of the rents to be received and the covenants and conditions to be performed by the lessee. No rent would ever become due if no ore was discovered and mined. No ore would be discovered without prospecting. One of the stipulations of the lease, going to the whole consideration and described ⁶⁷ therein as a covenant and condition, was that the lessee should, after July 1, 1907, prospect the lands. This meant diligent and fairly continuous prospecting and search for a mine so that the land owner would receive something for his land. While analogies arising from urban or agricultural leases are not to be wholly rejected, it must be remembered that these mining leases form a distinct class of instruments, creating special and peculiar legal relations and legal rights. In *Maxwell v. Todd*, 112 N. C. 677, 16 S. E. 926, the mining lease had a fixed term of ninety-nine years, but otherwise it was very similar in terms to the lease in the instant case. The court, noticing that there was in the lease no stipulation for forfeiture for failure to open and work the mines, held that the construction which the law put on the lease would be the same as if such stipulation had been expressly written therein. The contrary construction would prevent the lessor from getting his tolls under the express covenant to pay the same and at the same time deprive him of all opportunity to work the mine himself or lease it to others. In *Starn v. Huffman*, 62 W. Va. 422, 59 S. E. 179, there was a mining lease from Starn to Huffman for one year and as much longer as Huffman should continue to work the mine, the lessee to pay ten cents per ton for all coal mined and begin mining coal on or before December 19, 1902, and pay for said coal every thirty days. There was nothing in the form of a condition and no express stipulation for forfeiture. Nothing was done under the lease, and it was held that this called for a termination of the lease. Many cases are collected and reviewed in the opinion of the court: See, also, *Shenandoah L. & A. C. Co. v. Hise*, 92 Va. 238, 23 S. E. 303; *Western Pennsylvania G. Co. v. George*, 161 Pa. 47, 28 Atl. 1004; *Woodward v. Mitchell*, 140 Ind. 406, 39 N. E. 437; *Huggins v. Daley*, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; 20 Am. & Eng. Ency. of Law, 2d ed., 779, 781; 26 Cyc. 708, 709, and cases.

⁶⁸ In *Island C. Co. v. Combs*, 152 Ind. 379, 53 N. E. 452, it is said: "In leases of mineral lands, of the nature of the one in question, where the lessee agrees to pay to the lessor a royalty or rent, which depends on the amount of coal or other product mined, the lessee thereby, in the absence of

any provision to the contrary, impliedly obligates himself **to** begin the development of the coal, and the mining thereof, **within** a reasonable time after the execution of the lease. **As** to what may be regarded as a reasonable time, however, **depends** upon the circumstances of the particular case."

The application of a cognate principle is discernible in *Western L. & C. Co. v. Copper River L. Co.*, 138 Wis. 404, 120 N. W. 277. *Horner v. Chicago etc. R. Co.*, 38 Wis. 165, contains these words: "(1) Although there are technical words, which, if used in a conveyance, unmistakably create a condition, yet the use thereof is not absolutely essential to that end, and a valid condition may be expressed without employing those words. (2) It is not essential to a valid condition that, in case of a breach thereof, a right of re-entry be expressly reserved in the deed, or that it be expressed therein that the estate of the grantee shall terminate with a breach of the condition."

Applying these abstract rules, we say in the instant case: Where a mining lease is granted upon the consideration that the lessee shall observe the covenants and conditions thereof, and the lessee covenants to prospect the land and in case he discovers a mine pay the lessor rent, royalty, or tribute based upon the ore mined from such mine if discovered, the covenant to prospect the mine is in the nature of a condition, and the lessee must proceed with and persist in prospecting with reasonable diligence and continuity of effort. Was the delay of the lessee in the instant case unreasonable? In *Norway v. Rowe*, 19 Ves. Jr. 144, it was averred in the bill, and apparently assumed to be correct by the court and counsel, that by the custom of Cornwall suspension of operations by prospectors^{es} or adventurers for a year and a day was ground for forfeiture of their interest in the mineral land. *McSwinney* accepts this as proof of the custom of Cornwall in his excellent treatise on Mines. In this age and country of greater hurry and activity the limit of suspension of prospecting should without sufficient excuse certainly not exceed that. The finding of the learned circuit court, whose circuit includes the most ancient and active mining district in this state, also supports the conclusion that the delay in the instant case was unreasonable. We are, aside from authority and foreign customs, disposed to agree with this determination. We find no sufficient excuse for the delay in the fact that the lessee was without means to carry on the prospecting work.

The only remaining question is whether the forfeiture which resulted from failure to persist in prospecting with reasonable diligence and continuity was waived as to that part of the Nagel tract south of Grant street because the lessor did not insist on a forfeiture of all the land covered

by the written lease in question. The alleged waiver consists of a paragraph in the answer of defendants as follows: "That the defendant Martin Longhenry is still willing to make, execute, and deliver to the plaintiff a new mining lease to the northerly part of said premises so as not to interfere in any manner or form with the plaintiff's enjoyment of its mining lease," together with some evidence of conversations between lessor and agents of lessee. This unusual averment in the answer seems to be put forward as a sort of consolation to the lessee for the forfeiture declared by Longhenry—a salve for the wounded conscience of the lessor, or a modified form of donation for expiation not unknown in history or in our day. The legal guilt of the lessor cannot logically be inferred from such act, because it is often prompted by tenderness rather than a sense of wrongdoing. No doubt this could not be done against the will of the lessee in an ordinary lease binding ⁷⁰ the lessee to payments or other obligations which he might not be willing to assume as to part of the demised premises. But even then it could be done by consent of parties. In a mining lease this offer, after a forfeiture is complete, to waive the forfeiture as to part of the premises seeks to impose no obligation or duty upon the lessee, but merely to give him the option to hold the remainder of the demised tract and prospect it if he choose or abandon it without expense or liability. This offer by the lessor is made after a forfeiture is incurred and declared, and was in effect, as the evidence here shows, conditioned upon the lessee acquiescing in the forfeiture and accepting back under his lease a part of his former leasehold. The evidence on this point is not in conflict, and the finding is that the lessor waived his right to insist on a forfeiture as to the lots covered by the lease and intended to be covered thereby lying north of Grant street. So far as this relates to lands "intended to be covered," these were apparently the most valuable lands of the lessee, on which it had done most of its work and made some apparent discoveries and which it held under some other license or lease. The other lands must be considered as covered by a conditional offer to waive the forfeiture, which the lessee did not accept, but which was carried forward into the litigation, wherein the trial court upheld the forfeiture but took the lessor at his offer and decreed the forfeiture waived as to lands north of Grant street. This was probably error, because it gave the lessee the benefit of the waiver without consenting to the condition of his acquiescing in the forfeiture as to the remainder of the tract, but it was error of which the lessee cannot complain, and the lessor has not appealed.

The decree of the court below must be so modified as to exclude from its confirmation of forfeiture all lands not

described in the written lease of December 6, 1906, and as so modified affirmed.

By the COURT. Judgment modified and affirmed, with costs.

A Lessee of a Mine has No Option to Work or not to Work It for an indefinite time, where the rent reserved to the lessor is a royalty of so much per ton on the ore taken out: Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285. The right to go upon the land and occupy it for the purpose of prospecting, if of unlimited duration, is a freehold interest, but being vested for a specific purpose, it becomes extinct when the purpose is accomplished or the work abandoned: Watford Oil etc. Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144. As to forfeiture of oil leases, see Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027; Venedocia Oil and Gas Co. v. Robinson, 71 Ohio St. 302, 104 Am. St. Rep. 773. If the parties provide for a test well, and what shall be done in case it produces oil in paying quantities, but make no provision in case the well proves dry, there is an implied obligation on the part of the lessee, if the test well proves dry, to proceed with the exploration and development of the land with reasonable diligence, according to the usual course of business: Aye v. Philadelphia Co., 193 Pa. 451, 74 Am. St. Rep. 696.

HANNA v. KELSEY REALTY COMPANY.

[145 Wis. 276, 129 N. W. 1080.]

FOREIGN CORPORATION—Noncompliance With Law Incapacitates to Acquire Land.—Where the statutes provide that no foreign corporation shall transact business or acquire, hold or dispose of property in the state unless it shall have first complied with certain statutory requirements, and that every contract relating to property within the state before such compliance is "wholly void" on the part of the corporation, a conveyance to a foreign corporation that has not complied with the statutes is void, not voidable merely, and the right to question its validity rests with parties interested and not with the state only. (pp. 1078, 1080.)

FOREIGN CORPORATION—Penalty for Noncompliance With the Law.—It is within the legislative province to prescribe the penalties to be visited on a foreign corporation for failure to comply with the laws of the state, and courts cannot soften or mitigate them. (p. 1080.)

FOREIGN CORPORATION—Noncompliance With Law—Acquisition of Land.—The doctrine of estoppel cannot be invoked against a mortgagee in an unrecorded mortgage for failure to take the necessary steps to apprise a foreign corporation of his rights, when the corporation cannot acquire title to property because it has not complied with the statutes of the state. (pp. 1080, 1081.)

Frank B. Dorothy and W. N. M. Crawford, for the appellant.

Morris E. Yager and Walter L. Chapin, for the respondent.

²⁷⁷ BARNES, J. The plaintiff was the owner of several parcels of land in Polk county on the eighth day of April,

1908, which lands were encumbered by a mortgage on which there was due the sum of three thousand one hundred dollars. Prior to said date the plaintiff and the defendant Johnson entered into a verbal agreement by which plaintiff agreed to convey by warranty deed to said Johnson, subject to said mortgage, the lands referred to. Said Johnson agreed to execute a mortgage back to the plaintiff for the sum of three thousand four hundred and fifty dollars to secure his note, which was to be taken as part payment for the purchase price of said lands. Johnson also agreed to convey to the plaintiff certain real estate in St. Cloud, Minnesota. Pursuant to such agreement the plaintiff and his wife executed a deed of the Polk county property to Johnson, and Johnson executed a mortgage to the plaintiff covering the same property and also a deed of the St. Cloud property. The conveyances were delivered on the eighth day of April, and immediately thereafter Johnson requested the plaintiff to permit him to examine the note and mortgage which he had given to plaintiff. The mortgage was handed to Johnson, who thereupon said that there were some back taxes against the lands conveyed and that he would hold the note and mortgage until such time as they were paid. It was thereupon agreed between the parties that Johnson should hold the mortgage until the taxes were taken care of, and that neither the deed nor the mortgage should in the meantime be placed on record. The plaintiff at various times demanded the surrender of the mortgage and of the note which was given to secure such mortgage, which demands were refused, Johnson endeavoring to induce the plaintiff to take in lieu thereof some corporate stock of small or uncertain value which he owned. In the meantime Johnson recorded his deed and conveyed the lands to one Bart. J. Goodwin of Minneapolis, the name of the grantee in the deed being left blank. Thereafter ²⁷⁸ Goodwin inserted the name of one Maggie M. Finlay as grantee, and on August 26, 1908, recorded the deed in the office of the register of deeds of Polk county. No consideration was paid by said Maggie M. Finlay for the deed, she permitting her name to be used as grantee therein at the request of Goodwin. The court found on sufficient evidence that Goodwin was not a purchaser in good faith, but took the title with full knowledge of the fraud that Johnson was attempting to perpetrate upon the plaintiff. Thereafter Goodwin sold the lands to the defendant, the Kelsey Realty Company, a corporation organized under the laws of the state of Minnesota and authorized by its articles of incorporation to deal in real property, and caused the lands to be deeded to that company by Maggie M. Finlay. The court found that the Kelsey Realty Company was a purchaser in good faith for a valuable consideration, but that said corporation failed to comply with

the provisions of section 1770b, Statutes of 1898, and that it was not authorized or licensed to transact any business in Wisconsin prior to October 26, 1909. The deed to the Kelsey Realty Company was dated September 7, 1908, and was delivered on September 16 and recorded October 9, 1908, in the office of the register of deeds of Polk county. The plaintiff did not learn that the deed from Johnson to Finlay had been placed on record or that any other transactions in reference to the land had taken place until September 25, 1908, and on the twenty-ninth day of that month he tendered to Johnson all taxes due against the same and demanded the note and mortgage, which Johnson refused to deliver and which he had in fact destroyed during the month of August. The evidence tends to show that plaintiff knew that Johnson had placed the deed to him on record as early as April 28th. The plaintiff commenced an action to enforce his lien for the sum of three thousand four hundred and fifty dollars and interest against the premises conveyed to Johnson, and to have the title of Johnson's grantee decreed to be subsequent and subject to his mortgage.

²⁷⁹ The summons and complaint in this action were filed in the office of the circuit court for Polk county on October 30, 1908, and notice of lis pendens was apparently filed on the same day. Maggie M. Finlay executed a quitclaim deed of the lands in controversy under date of November 6th to the Kelsey Realty Company. The circuit court found that the deed first executed to the Kelsey Realty Company was void because of the failure of that company to comply with the provisions of section 1770b, Statutes of 1898, and that by the subsequent deed of November 6th the corporation acquired the interest of Johnson in said lands subject to the mortgage lien of the plaintiff. It was provided by the judgment that unless the Kelsey Realty Company should elect, on or before July 1, 1910, to pay to the plaintiff the sum of three thousand four hundred and fifty dollars, with interest at six per cent per annum from April 8, 1908, plaintiff might apply to the court for an order for foreclosure of plaintiff's lien upon the property. From a judgment entered in pursuance of the order of the court defendant prosecutes this appeal.

It is urged by the appellant (1) that the court was in error in holding that the Kelsey Realty Company acquired no title to the lands involved because section 1770b of our statutes (Statutes of 1898) had not been complied with; and (2) that the plaintiff is estopped from setting up any such defense to the action. Some other errors are assigned, but the contentions of the appellant in reference thereto are either untenable or immaterial in view of the conclusion reached, and they will not be discussed.

The appellant was a foreign corporation amenable to the ²⁸⁰ provisions of section 1770b, provided it saw fit to extend its

activities to the state of Wisconsin and to do any of the things which such corporations are forbidden to do without compliance with the statute. By subdivision 2 of the law it is provided that no foreign corporation "shall transact business or acquire, hold or dispose of property" in the state unless it shall have first complied with the requirements of the statute, and by subdivision 10 of the law every contract relating to property within this state before compliance with the requirements of the law is declared to be "wholly void" on the part of the corporation making it. It must be conceded that the appellant attempted to acquire property within the state, and did so, unless the statute we are considering provides otherwise, and that there was no element of interstate commerce involved in the transaction which takes it outside of the statute. The claim of the appellant is that the statute does not render the transaction void, but voidable only at the election of the state, and that the state only can question the validity of its title and decree a forfeiture.

In support of his contention counsel for appellant invites our attention to a number of cases, which for convenience may be divided into three classes. The first class comprehends those wherein it is held that although aliens are disabled by the common law from acquiring, owning or holding real estate within a state, yet if an alien does acquire property by grant or descent the transaction is not void, but is voidable only at the election of the state. Such were the cases of *Craig v. Radford*, 16 U. S. (3 Wheat.) 594, 4 L. ed. 467, and *Gouverneur v. Robertson*, 24 U. S. (11 Wheat.) 332, 6 L. ed. 488, as well as other cases that might be cited. The second class comprehends those cases where a corporation acquires real estate without being authorized so to do by its charter or its articles of incorporation, and where, therefore, its act in this behalf is ultra vires. In such a situation it is generally held that the right, at least of a foreign corporation, to hold property can only be questioned²⁸¹ by persons directly interested in the corporation or by the state whose charter and franchises are being exceeded or abused. Such was the holding in *Illinois S. Co. v. Warras*, 141 Wis. 119, 123 N. W. 656, and in the cases cited on page 126 of the opinion. To the same effect is *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. ed. 547. It should be noted, however, that the rule in *Illinois S. Co. v. Warras* is expressly limited to cases where there is no statutory prohibition against the holding of the property involved. The third class of cases pertains generally to statutes akin to our section 1770b, although in most instances differing therefrom in some respects. Some courts hold that under such a statute the conveyance is voidable only at the election of the state. It was so held in *Carlow v. C. Aultman & Co.*, 28 Neb. 672, 44 N. W. 873, and in *Reed v. Todd*, 25 S. D. 421, 127 N. W. 527, two of

the five judges dissenting; also in Hickory Farm Oil Co. v. Buffalo etc. R. Co., 32 Fed. 22. The case of McKinley-Lanning L. & T. Co. v. Gordon, 113 Iowa, 481, 85 N. W. 816, can hardly be said to be authority on the proposition, as the suit involved a contract relating to Nebraska real estate, and the Iowa court construed the contract in accordance with the law of Nebraska as announced in Carlow v. C. Aultman & Co., 28 Neb. 672, 44 N. W. 873.

Other courts have held that, where there is a valid statute expressly prohibiting a corporation from acquiring real estate and declaring any conveyance made in defiance of the law to be void, such a conveyance should not be held voidable merely, and that any party in interest might take the benefit of the statute. Such was the conclusion of the New York court in the elaborately considered case entitled Estate of McGraw, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387, which decision was affirmed on appeal to the supreme court of the United States, although the decision of that court is not particularly valuable, inasmuch as it followed the construction of the New York statutes placed thereon by its court of appeals. Other cases where the view of the New York court is upheld ~~are~~ are Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84; Hanchey v. Southern H. B. & L. Assn., 140 Ala. 245, 37 South. 272. The same doctrine by inference is found in Chicago T. & T. Co. v. Bashford, 120 Wis. 281, 97 N. W. 940, although that case did not necessarily involve a decision of the question.

The New York court differentiates between an act of a corporation which is merely ultra vires and one which is in contravention of a positive statute, holding that, while the former may be voidable merely at the election of the state, the other is void and may be taken advantage of by any party in interest.

This court has had before it a number of cases arising out of business transactions by foreign corporations in the state where the statute had not been complied with, as well as cases involving contracts made in the state by such corporations, and has uniformly held that parties in interest might assert the benefit of the statute: See International T. Co. v. Peterson, 133 Wis. 302, 113 N. W. 730, 14 Ann. Cas. 965; Southwestern S. Co. v. Stephens, 139 Wis. 616, 131 Am. St. Rep. 1074, 120 N. W. 408, 29 L. R. A., N. S., 92; Duluth M. Co. v. Clancy, 139 Wis. 189, 131 Am. St. Rep. 1051, 120 N. W. 854; Ashland L. Co. v. Detroit S. Co., 114 Wis. 66, 89 N. W. 904.

No good reason suggests itself why a party who is affected by a foreign corporation doing business or making a contract in the state in violation of the statute may take advantage of it, while one who is affected by the corporation acquiring or holding property may not do so. All these prohibitions oc-

cur in the same sentence in the statute, and the penalty is precisely the same as to the violation of each of them.

But more convincing is the fact that this court has unequivocally held that the words "wholly void" as used in the statute "mean just what they say," and that is, "absolutely void and a nullity": *Ashland L. Co. v. Detroit S. Co.*, 114 Wis. 66, 89 N. W. 904. In adopting such construction the court followed the decision in *Land L. & L. Co. v. McIntyre*, 100 Wis. 245, 75 N. W. 964, ²⁸³ wherein the word "void," as used in section 692, Revised Statutes of 1878, was given a like construction. So, unless we overrule our former decisions, it naturally follows that we cannot adopt for our guidance the pronouncements of courts that elect to construe the word "void" as meaning simply "voidable" in such a statute. It therefore appears that the real question in issue has already been decided, as it would hardly be contended that if the deed to the appellant was "absolutely void and a mere nullity," the plaintiff could not show that fact and take the benefit of it. If its deed was void, the appellant took nothing under it and has no right or title to assert by virtue of such deed.

The statute is in fact plain and unambiguous on the question we are considering and leaves little room for construction. Drastic and harsh in its penalties it may be, but the legislature undoubtedly knew that cases involving great hardships might arise because of the statute. The state evidently intended to make the consequences of violating the law so great as to enforce obedience to it. It was within the legislative province to prescribe these penalties, and this court cannot soften or mitigate them without violating the law: *Ashland L. Co. v. Detroit S. Co.*, 114 Wis. 66, and cases cited on page 78, 89 N. W. 904. If the construction contended for by the appellant should prevail, the statute, in so far as it relates to the acquiring or holding of property in this state, would be practically nullified. Even if the state should attempt to assert its right, it might be utterly impossible for it to get any service upon the foreign corporation so as to commence any action or proceeding in the courts of this state. It is no great hardship in the present case to hold that the appellant must comply with section 1770b before it can take the benefit of our recording statute, section 2241, Statutes of 1898, under and by virtue of which it claims priority over the plaintiff. We hold, therefore, that the conveyance first made to the appellant was not simply voidable, but was void, and that the plaintiff may show that ²⁸⁴ fact and take the benefit and advantage of it.

The ground of estoppel relied on is failure on the part of the plaintiff to take the necessary steps to apprise parties of his rights who might be induced to purchase the real estate.

There is no claim that the plaintiff ever had any communication with the appellant in reference to the lands, directly or indirectly, or even that he knew of the corporation. Inasmuch as the appellant could not lawfully acquire the lands until it had complied with the law, and the transaction by which they were acquired was void, the plaintiff did not owe to the appellant the duty of more promptly beginning his action and filing a notice of lis pendens. Constructive notice is intended to protect innocent parties who are about to engage in lawful transactions.

By the COURT. Judgment affirmed.

Vinje, J., took no part.

A Statute Providing That Contracts of a Foreign Corporation, which has not complied with the requirements of the statute, shall be wholly void on its behalf, must be enforced according to the words: Allen v. City of Milwaukee, 128 Wis. 678, 116 Am. St. Rep. 54. See, also, Halsey v. Jewett Dramatic Co., 190 N. Y. 231, 123 Am. St. Rep. 546; Union Stock Yards Nat. Bank v. Bolan, 14 Idaho, 87, 125 Am. St. Rep. 146. A single contract falls within the ban of the Wisconsin statute which declares contracts unenforceable when made by a foreign corporation that has not complied with the law of the state: Southwestern Slate Co. v. Stephens, 139 Wis. 616, 131 Am. St. Rep. 1074. See, also, Duluth Music Co. v. Clancy, 139 Wis. 189, 131 Am. St. Rep. 1051. In some jurisdictions, however, foreign corporations which have not complied with the statutes of the state have, nevertheless, been permitted in some instances to maintain suits in its courts for the recovery of debts: Garratt Ford Co. v. Vermont Mfg. Co., 20 R. I. 187, 78 Am. St. Rep. 852. In Woolfort v. Dixie Cotton Oil Co., 77 Ark. 203, 113 Am. St. Rep. 139, a contract made by a foreign corporation before compliance with the terms of a statute authorizing or permitting it to do business within the state is held not void, but may be enforced in the courts of that state after the corporation has duly complied with the statutory requirements: See, however, Tri-State Amusement Co. v. Forest Park etc. Co., 192 Mo. 404, 111 Am. St. Rep. 511.

BURNS v. STATE.

[145 Wis. 373, 128 N. W. 987.]

JUROR—Opinion as Disqualifying in Criminal Case.—A juror in a criminal case is not necessarily incompetent simply because of his having an impression or opinion respecting the merits of the case, formed from reading newspaper accounts and from other hearsay information. (p. 1085.)

JUROR—Opinion in Criminal Case.—In Case of a Challenge in a criminal case of a juror who has formed an opinion as to the merits of the case, the issue presented is one of fact to be determined with reference to the evidence of the juror, his general characteristics as appears thereby, and impressions upon the court created by the opportunity of seeing him and witnessing and participating in his examination. (p. 1085.)

JUROR—Opinion as Disqualifying—Review on Appeal.—That the action of a trial court in a criminal case in holding a juror competent who has formed an opinion may be disturbed on appeal, it must clearly appear that the court ought to have found that the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest that the law left nothing to the conscience or discretion of the court. (p. 1086.)

JUROR—Opinion as Disqualifying in Criminal Case.—Generally speaking, trial administration in a criminal case is to be commended which excuses a juror upon his testifying, on the voir dire, that he has heard and read about the case and therefrom formed an opinion upon the merits thereof which will persist until removed by evidence, notwithstanding he may testify that in his opinion he can act impartially upon hearing the evidence. (p. 1086.)

CRIMINAL TRIAL.—A Court may Properly Instruct a jury in a criminal case respecting any facts established by the evidence beyond any room for reasonable controversy, and when such evidentiary facts exist establishing beyond any room for reasonable controversy an essential of any ultimate conclusion sought, it is not harmful error, if error at all, to treat such essential as having been proved. (p. 1086.)

BAILMENT—Creation by Operation of Law.—An Agreement Inter Partes is not necessary to create a bailment; it may be created by operation of law. (p. 1087.)

BAILMENT.—Taking Possession Without Present Intent to Appropriate raises all the contractual elements essential to a bailment. (p. 1087.)

BAILMENT—Taking Property Thrown Away by a Lunatic.—Where a lunatic throws away a roll of money while being pursued, and one of his pursuers picks it up and turns it over to a constable who takes the lunatic in charge, the constable becomes a bailee of the money. (p. 1088.)

LARCENY BY BAILEE.—The Purpose of Section 4415, Statutes of 1898, was to abolish the distinction between conversion by a bailee of an entire thing, as property in a package, and the unlawful breaking of the package and conversion of part or all of the contents—whether preceded by the element of breaking bulk with intent to permanently deprive the owner of the thing appropriated or not—making the latter a statutory class of larcenies, differing only from ordinary larcenies by absence in the former of the element of trespass. And where the evidence shows that the accused broke a package of money and extracted a part of the contents, his acquittal under a count charging larceny of the money is not inconsistent with his conviction of the offense of larceny as bailee. (p. 1088.)

JUROES—Misconduct in Reading Newspaper.—Where the officer in charge of a jury in a criminal case permits a newspaper to be possessed by the jurors, from which they learn that the conditions of their deliberations are known to the public, the conduct of the officer and the jury as well, and the newspaper too, are reprehensible to a high degree; but if the appellate court is unable to conclude that, had the improper conduct not occurred, the result might, within reasonable probability, have been different, the misconduct does not call for a reversion. (p. 1088.)

FREEDOM OF PRESS—Publication of Secrets of Jury-room.—The publication by a newspaper of the secrets of the jury-room in a pending criminal case is highly reprehensible, and should be rebuked or punished by the court. (pp. 1089, 1090.)

WITNESS—Competency of One Mentally Impaired.—A person is not necessarily incompetent to testify because of mental impairment. The decision of the trial court receiving his testimony cannot

be disturbed unless manifestly wrong. Ordinarily, such infirmity goes to the weight of evidence by the witness, not to the competency to testify, unless the impairment is substantially total, or such as to render him wholly unconscious of the obligation of an oath. (p. 1090.)

The accused was informed against in two counts, the first as having committed the larceny of four hundred dollars, and the second as having, while in the possession of four hundred dollars as bailee, feloniously converted the same to his own use. The owner of the money was alleged, in each count, to be Paul Adamsky.

Gittins & Burgess, Wallace Ingalls and Wm. E. Lee, for the plaintiff in error.

Levi H. Bancroft, attorney general, A. C. Titus, assistant attorney general, and Fulton Thompson, for the defendant in error.

375 MARSHALL, J. The evidence proved, or tended to prove, this situation: Adamsky, who was somewhat insane, May 6, 1909, had upon his person six hundred and two dollars and seventy-five cents in money, mostly in five dollar, ten dollar and twenty dollar bills which he had drawn from the bank at Two Rivers on that day. Five hundred dollars of the money was in a package wrapped in a paper as he received the same from the bank. He stayed at Two Rivers till the evening of the next day, spending the night at home with his family. He did not count his money after he left the bank. On such evening he went to Manitowoc on a street-car. He remained there through the night in the depot, and then left by railroad train for Indiana. He was suffering from a delusion that some one was trying to get his money. He went about in his half-crazed condition for some three days, when he brought up at Corliss on a railroad train which came in from the south. As the train drew in to the station he jumped out of the car window and fled easterly toward an intersection of the Chicago, Milwaukee and St. Paul track with the Chicago and Northwestern track, about a mile east of Corliss where there was a switch and signal tower. Several, including one Kasdorf, pursued him. Before reaching the tower he made a motion as if taking something from his coat pocket and throwing it away. Upon arriving at the tower he drew his revolver on the tower-man, but without discharging it put it up and fled toward Milwaukee on the Chicago and Northwestern track. The tower-man with a track bicycle, accompanied by Kasdorf, followed. Soon they saw Adamsky lay something down on the track, which proved to be a roll of money. Kasdorf possessed himself of the roll and they delayed further pursuit for a moment while he partially counted the money. Before finishing they again

started in pursuit of Adamsky, who they had concluded was insane. This part of the pursuit was ³⁷⁶ made on foot and away from the track, the tower-man being in the lead. He finally came up with Adamsky and was soon joined by Kasdorf. The latter asked Adamsky if the money was his. Adamsky replied that he did not want it. Thomas Burns, a constable, and others who had pursued the fleeing man from Corliss, came up, whereupon Kasdorf handed the package to Burns in the condition it was in when he stopped counting, as aforesaid. Burns put the roll in his pocket. He then took Adamsky in charge and, in due course, placed him in custody of the sheriff of Racine county at the city of Racine, asking the sheriff to telephone Adamsky's wife that upon her coming to Corliss he would turn over her husband's belongings. He then returned to Corliss, taking with him the roll of money and things he had obtained from Adamsky's person. He said at the jail that he had obtained fifteen dollars or seventeen dollars of Adamsky's money. He did not know himself then the amount as he had not fully counted the money. Later he made as an excuse for understating the amount that he did not care to have people know how much money he had on his person or about his premises. He searched the next day along the track for money reported to have been thrown away by Adamsky, other than the package, but did not find any. Several days after he received the roll of money, the sheriff, because of hearing there was more than he heard the accused reported, visited him in respect to the matter. On this occasion Burns delivered to the sheriff two hundred dollars, obtaining it from the barn, as all Adamsky's money which had come to his possession. He claimed that he counted the money upon reaching home after delivering Adamsky to the sheriff; that the bills were wrapped with some pasteboard in a form to disguise the amount; that they were wet; that he spread them on a girder in the barn to dry, and that before retiring for the night he went thereto, gathered up the bills, put them in a glass milk jar, threw it in the manger and covered it up with hay, where it remained, as he said, till he sought therefor to ³⁷⁷ make the delivery to the sheriff. He accounted for the peculiar way of safeguarding the money to have been adopted to prevent the bills being carried off or injured by rats or mice. In due time Mr. Knoblock was appointed guardian for Adamsky and demanded of Burns possession of the balance of the money. Burns denied having any more. Thereupon this action was commenced and prosecuted with the result before indicated.

Serious complaint is made because the trial court overruled a challenge for favor of one of the jurors, he having testified, upon the voir dire, of having formed an opinion on the merits of the case, about the time of the occurrence in

question, from what he had heard, including some things said by the guardian of Adamsky; that it was a mere impression, one from which he would not say the accused was guilty, and which, though it remained in his mind, would not influence him in rendering a verdict on the evidence. The examination of the juror was quite searching, and indicated that he was a business man of more than ordinary capability, without any personal acquaintance with the accused, or with the person whose money the latter was charged with having taken, without any interest in the result, more than that of citizens in general, and without any personal feeling for or against the accused.

The error assigned in respect to the foregoing is ruled in favor of the state by *Baker v. State*, 88 Wis. 140, 59 N. W. 378 570. It was there held, and is here affirmed, that a juror is not necessarily incompetent simply because of his having an impression or opinion respecting the merits of the case, formed from reading newspaper accounts and from other hearsay information; that in case of a challenge, as in this case, the issue presented is one of fact to be determined with reference to the evidence of the juror, his general characteristics as appears thereby, and impressions upon the court created by the opportunity for seeing him and witnessing and participating in his examination; that the other evidentiary matters referred to may so neutralize his mere statement of having formed an opinion or impression which will take some evidence to remove, that a finding that he satisfies the constitutional call for impartiality cannot be disturbed on appeal as manifestly against the clear preponderance of the evidence.

The doctrine of *Baker v. State*, 88 Wis. 140, 59 N. W. 570, has support, and condemnation as well, in other jurisdictions. It is believed there is progressive legal thought in its favor. Some courts hold that if a juror has an impression or opinion as to the merits of a case which will take evidence to remove, he is legally incompetent to act; that however firmly and conscientiously he may believe he can act impartially in the matter, it does not cure the infirmity, for the court, in deference to the constitutional right to an impartial jury, will not permit a litigating party, without his consent, to take the chances of the juror being wrong, must less compel him to. But many other jurisdictions, in harmony with *Baker v. State*, 88 Wis. 140, 59 N. W. 570, hold that, notwithstanding the mental condition suggested—in the absence of any evidence showing therewith, satisfactorily, the opinion or impression of the juror to be something more than such as is commonly created in the minds of intelligent people from reading and hearing the news from day to day, an opinion that amounts to real substantial prejudice—incompetency does not exist, necessarily, as a matter of law, but depends upon the trial judge's

determination of fact in ³⁷⁹ view of all the evidence and mental characteristics of the juror as disclosed by his presence in court and manner of testifying. The finding in that regard, in many jurisdictions, is classed the same as any other of fact by a trial court, as regards requirements to disturb it. This court and some others have gone somewhat further, as indicated in this language from *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244: "No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court."

The quoted language was referred to with approval in the *Baker* case (88 Wis. 140, 59 N. W. 570), and voices the rule in this state. In view of that we are unable to overrule the decision of the trial court, though the decision below might well have been the other way.

Great care should be exercised in a criminal prosecution to preserve to the accused his constitutional right to an impartial jury and a fair trial. Ill-advised impatience with the failures to convict, and delays and expense in criminal prosecutions, should not be allowed to overturn or invade the fundamental safeguards of personal and property rights. Notwithstanding the decision in the instance before us, which we feel bound to make in harmony with the settled judicial policy of the state, we have no hesitancy in saying that, generally speaking, trial administration is to be commended rather than complained of, which excuses a juror upon his testifying, on the voir dire, that he has heard and read about the case and therefrom formed an opinion on the merits thereof, which persists with him and will persist till removed by evidence; notwithstanding he may testify that, in his opinion, ³⁸⁰ he can act impartially between the parties upon hearing the evidence. Doubtless circumstances may alter cases as they do in most situations.

Error is assigned because the court instructed the jury to the effect that, if the accused converted to his own use any of *Adamsky's* money, he did so as bailee. It is suggested that the court should have defined the term "bailee," as used in the statute, and left it to the jury to find the fact as to whether the circumstances satisfied such statute or not.

A court may properly instruct a jury in a criminal case, as well as any other, respecting any fact, or facts, established by the evidence beyond any room for reasonable controversy,

and when such evidentiary facts exist establishing, beyond any room for reasonable controversy, an essential of any ultimate conclusion sought, it is not harmful error, if error at all, to treat such essential as having been proven, as the court here did in saying that the accused was a bailee of whatever of Adamsky's money came to his possession.

It seems to be thought that a bailment was not established by the evidence because some sort of contract inter partes was essential thereto. No particular ceremony or actual meeting of minds is necessary to the creation of a bailment. If one, without the trespass which characterizes ordinary larceny, comes into possession of any personalty of another and is in duty bound to exercise some degree of care to preserve and restore the thing to such other or to some person for that other, or otherwise account for the property as that of such other, according to circumstances, he is a bailee. It is the element of lawful possession, however created, and duty to account for the thing as the property of another, that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not.

It is said, generally, in the books, that a bailment is created by delivery of the personalty to one person by another to be dealt with in specie as the property of such other person ²⁸¹ under a contract, express or implied, but the word "contract" is used in a broad sense. The mutuality essential to the contractual feature may be created by operation of law as well as by the acts of the parties with intention to contract.

So it makes no difference whether the thing be intrusted to a person by the owner, or another, or by someone for the owner or by the law to the same end. Taking possession without present intent to appropriate raises all the contractual elements essential to a bailment. So the person who bona fide recovers the property of another which has been lost, or irresponsibly cast away by an insane man, as in this case, is a bailee as much as if the same property were intrusted to such person by contract inter partes. In the latter case the contract creates the duty. In the former the law creates it. Such a situation is to be distinguished from that where one knowingly receives money paid him by mistake and fraudulently retains it. There the element of bona fide possession may be said not to exist and so the duty accompanied by such possession essential to a bailment not to have been created: *Fulcher v. State*, 32 Tex. Cr. 621, 25 S. W. 625. We refer to that case by way of illustration, not by way of approval. The logic of it may not be strictly correct.

The finder of property, who voluntarily bona fide takes it into his possession, immediately thereupon has imposed upon him by law the duties of a depository, the mildest type, as regards degree of duty, of bailee: *Story on Bailments*,

secs. 86, 87; Edwards on Bailments, 3d ed., sec. 18; Paine on Bailments, sec. 24.

So the finder here of the cast-away money was clearly a bailee, and when his duties were voluntarily assumed by the accused, he became such, and as there was no controversy in respect to such finding and assumption, the court's reference to the matter was proper.

The next suggestion in behalf of plaintiff in error is that, if the accused was guilty of any offense, it was that of having ³⁸² broken the package and extracted therefrom part of the contents for the purpose of appropriating it to his own use, and executed such purpose, thus committing the offense of larceny, not of conversion by a bailee. It is a sufficient answer thereto that the purpose of the statute, section 4415, Statutes of 1898, was to abolish the distinction between conversion by a bailee of an entire thing, as a quantity of property in a package of some kind, and the unlawful breaking of the package and conversion of part or all of the contents—whether preceded by the element of breaking bulk with intent to permanently deprive the owner of the thing appropriated or not—making the latter a statutory class of larcenies, differing only from ordinary larcenies, by absence in the former of the element of trespass in gaining original possession, which is essential to the latter: *Topolewski v. State*, 130 Wis. 244, 118 Am. St. Rep. 1019, 109 N. W. 1037, 7 L. R. A., N. S., 757, 10 Ann. Cas. 627. The meaning of the statute, as indicated, seems very plain: "Whoever being a bailee of any chattel, money or valuable security shall fraudulently take or fraudulently convert the same to his own use or to the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny": Stats. 1898, sec. 4415.

It follows that the acquittal of the accused of the offense of larceny is not inconsistent with his conviction of the statute offense of larceny as bailee.

Error is assigned because of the misconduct of a juror after the panel had retired to deliberate upon their verdict, and misconduct of the officer in charge of the jury. Such misconduct consisted in the former, while the latter were in his charge, and absent from their room at the supper hour, permitting a paper to be possessed by them by which they learned that the conditions of their deliberations were known to the public, and particularly the fact that one juror was persisting against the opinions of his fellows that the accused ³⁸³ was not guilty. Though the conduct of the officer and the jury as well, and the newspaper too, are reprehensible to a high degree, we are unable to reach a conclusion that, had the improper conduct not occurred, the result

might, within reasonable probabilities, have been different. Therefore, under the uniform course of our administration and in harmony with the letter and spirit of section 2829 of the written law, the misconduct does not call for a reversal.

Notwithstanding the result as to the last assignment of error treated, we are constrained to severely condemn such conduct as the officer and the jury were guilty of, and condemn the abuse of freedom of the press in publishing the secrets of the jury-room while the case was there being considered. The press is accorded great freedom and constitutional protection, but it should not be forgotten that it is responsible morally and legally for abuse of that right. It is of great importance to the public welfare that such right should be kept inviolate, but of equal importance that its abuses should be prevented so far as practicable and otherwise punished both by legal remedies and by condemnation at the bar of public opinion.

Judicial proceedings, in a case which the law requires to be conducted in secret for the proper administration of justice, should never be, while the case is on trial, given publicity by the press. It is not infrequent that proceedings in courts of England in an important criminal case are highly commended by the press of this country and comparison with procedure in the latter unjustly made unfavorable thereto, without appreciating that the very things which attract the favorable mention are promoted by restrictions upon personal liberty which do not exist here at all, or are sparingly enforced. Such an occurrence during an important criminal trial, after retirement of the jury to deliberate upon their verdict, as publication in a newspaper of the secrets of the jury-room, would, in the mother country, be visited by prompt and severe punishment as contempt of court. That precedents of ³⁸⁴ like treatment of offenders may be found in the decisions of courts of this country is well illustrated by *State v. Howell*, 80 Conn. 668, 125 Am. St. Rep. 141, 69 Atl. 1057, 13 Ann. Cas. 501. Here the duty to abstain from such abuses is just as great as elsewhere. Here the sense of duty incident to good citizenship and public condemnation for such abuses ought to be sufficient to prevent such occurrences. Moreover, trial courts should be alive to the importance of protecting jurors from such interference during the course of a trial, particularly after their retirement to deliberate upon their verdict, in important criminal cases.

The best administration requires that all avenues of communication between the jury and others, except the officer in charge and the court in the presence of attorneys for the respective parties, should be closed as effectually as possible,

and all violations of duty in that respect by jurors and officers and others should be severely rebuked or punished according to circumstances. The inadvertence which permits jurors, after having retired for such deliberation, to leave the jury-room under such circumstances as to get into communication with others and read the newspapers, should be carefully avoided. This is but reiterating what has heretofore been said by this court on several occasions: *Hemp-ton v. State*, 111 Wis. 127, 86 N. W. 596; *Oborn v. State*, 143 Wis. 249, 126 N. W. 737, 31 L. R. A., N. S., 966.

We do not overlook the complaint that Adamsky was permitted to testify notwithstanding his impaired mental condition, particularly at the time of the occurrences in question. A person is not necessarily incompetent to testify because of such impairment. Whether he is so infirm by reason of insanity, or otherwise, as not to be entitled to testify at all, is generally in the field of competency. Therefore the decision of the trial court in favor of receiving the evidence for what it is worth cannot be disturbed unless manifestly wrong. Ordinarily, such infirmity goes to the weight of the witness' evidence, not to competency to testify, unless the impairment ³⁸⁵ is substantially total or such as to render the person wholly unconscious of the obligations of an oath: *Best on Evidence*, 10th ed., secs. 148, 150; *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. 164.

The foregoing covers all the complaints on behalf of the accused which require special attention.

By the COURT. The judgment is affirmed.

A motion for a rehearing was denied March 14, 1911.

Preconceived Opinions as a Ground for Challenging jurors are discussed in the note to *Smith v. Eames*, 36 Am. Dec. 521. And bias as a ground for rejecting jurors is discussed in the note to *Commonwealth v. Brown*, 9 Am. St. Rep. 744. An opinion which disqualifies a juror in a criminal case is of that fixed character which repels the presumption of the innocence of the accused, who is already condemned in the juror's mind: *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501. See, too, *People v. Gage*, 62 Mich. 271, 4 Am. St. Rep. 854; *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655. It is not error for a court to overrule a challenge of jurors who, on their voir dire, state that they have read in the newspapers what purported to be the facts of the case, and have formed and expressed some opinion therefrom upon the merits, but that it is not fixed and will not influence their verdict: *State v. Kelly*, 28 Or. 225, 52 Am. St. Rep. 777. As stated in *Commonwealth v. Minney*, 216 Pa. 149, 116 Am. St. Rep. 763, although a juror testifies that he has a fixed opinion, this does not disqualify him from serving on the jury if he declares that he can disregard such opinion, and be governed by the evidence alone. On a trial under an indictment for circulating a scandalous newspaper, a juror, who on his voir dire states that he has an opinion that such newspaper ought to be suppressed, but that he has no opinion as to the guilt or innocence of the defendant, that he has never read a copy of such

paper, that his opinion is formed wholly from public talk, and that he can give an impartial verdict, is competent as a juror: *State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627.

The Fact That Jurors in a Criminal Case have Heard of the Previous Trial and Conviction of the accused does not disqualify them if they have not formed any opinion as to his guilt or innocence: Early v. State, 51 Tex. Cr. 382, 123 Am. St. Rep. 889.

KNAPP v. ALEXANDER-EDGAR LUMBER COMPANY.

[145 Wis. 528, 130 N. W. 504.]

TRESPASS—Action Maintainable Only by One in Possession.—An action of trespass quare clausum can be maintained only by one in the actual or constructive possession of the premises on which the trespass is committed. (p. 1092.)

TRESPASS—Action for Injury to Possessory Right.—A cause of action for trespass for injury to the possessory right may be maintained by a person in the actual possession of land against another who holds no paramount right or title, or against a mere intruder, by proving such possession, unlawful entry and damage. (pp. 1092, 1093.)

TRESPASS—Action by One not in Actual Possession.—A plaintiff in an action quare clausum who is not in the actual possession of the land, and is therefore obliged to rely on constructive possession, must establish that possession by showing that he has good title. The constructive possession follows the title. (p. 1093.)

TRESPASS.—A Trespasser on Unoccupied Lands can be made to respond in damages but once, and then to the owner. (p. 1094.)

PUBLIC LANDS—When Title Acquired by Homesteader.—An entryman secures no title to the land he desires to homestead until he has complied with the law and has earned his patent. (p. 1094.)

PUBLIC LANDS—Trespass Before Patent—Action by Entryman.—Where, between the time when a person applies for a homestead entry on public lands and the time when he establishes his residence on the land, a trespass thereon by cutting timber is committed, the right of action therefor is in the United States as owner; and if the trespasser settles with the United States, the cause of action is extinguished, and is not revived in favor of the entryman by the subsequent issuance of a patent to him. (p. 1097.)

Kreutzer, Bird, Rosenberry & Okoneski, for the appellant.

Grace & Hudnall, for the respondent.

528 BARNES, J. This is an action brought to recover damages for a trespass committed on the homestead of the plaintiff. On February 20, 1902, pursuant to section 2289, Revised Statutes of United States, plaintiff made application for a homestead entry on the land upon which the trespass was afterward committed. The register of the land office attached a certificate to such application, reciting **529** that the application was made for lands subject to entry under the homestead act and that there was no prior adverse right

to the same. At the time of making his application plaintiff also filed an affidavit showing that he was entitled to make a homestead entry under the laws of the United States. On February 21st the receiver of the land office acknowledged receipt of the sum of eighteen dollars, being the amount of fee compensation to which the register and receiver were entitled on the entry. On February 26, 1902, plaintiff filed the nonsaline affidavit required by law. The foregoing papers constituted the homestead entry of the plaintiff in the lands described in the application. The trespass was committed on and between March 20, 1902, and April 7th of the same year, the defendant cutting and removing from said lands 49,140 feet of pine saw-logs. On July 1, 1902, the plaintiff established his residence on said land and continued to reside thereon for five years, and made his final proofs in August, 1907, when a final receiver's receipt was issued to him. This was followed by a patent which was issued in January, 1908. Plaintiff looked the land over once before making his entry, for the purpose of informing himself as to its value. On March 20th he went upon the land to see if any trespass had been committed thereon, and on April 5th went upon the land for the same purpose and found the defendant cutting timber and forbade its cutting any more. On July 13, 1903, the United States collected from the defendant the value of the logs cut and removed from the plaintiff's homestead, the amount collected being three hundred and twenty dollars and fourteen cents. After receiving his patent the plaintiff commenced this action and recovered judgment for the value of the lumber cut from the logs removed from the plaintiff's homestead, the amount recovered being seven hundred and fourteen dollars and eighty-seven cents. Defendant appeals from such judgment.

⁵³⁰ That the plaintiff at the time of the cutting was not in the actual possession of the land from which the timber sued for was cut is too plain to admit of controversy: *Mygatt v. Coe*, 147 N. Y. 456, 42 N. E. 17; *Rice v. Frayser*, 24 Fed. 460; *Staton v. Mullis*, 92 N. C. 623; *Travers v. McElvain*, 181 Ill. 382, 55 N. E. 135; *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431; *Omaha & F. L. & T. Co. v. Parker*, 33 Neb. 775, 29 Am. St. Rep. 506, 51 N. W. 139; *Gildehaus v. Whiting*, 39 Kan. 706, 18 Pac. 916. The action of trespass quare clausum can be maintained only by one in the actual or constructive possession of the premises on which the trespass is committed: *Gunsolus v. Lormer*, 54 Wis. 630, 12 N. W. 62.

That a cause of action for trespass for injury to the possessory right may be maintained by a person in the actual possession of land against another who holds no paramount

right or title, or against a mere intruder, by proving such possession, unlawful entry, and damage, is well established by the decided cases in this court: *Hungerford v. Redford*, 29 Wis. 345; *McNarra v. Chicago & N. W. R. Co.* 41 Wis. 69; *Gerhardt v. Swaty*, 57 Wis. 24, 14 N. W. 851; *Gunsolus v. Lormer*, 54 Wis. 630, 12 N. W. 62.

It is also well settled that a plaintiff in an action quare clausum who is not in the actual possession of the land upon which the trespass is committed, and who is therefore obliged to rely on constructive possession, must establish that possession by showing that he has good title. Stated in another way, the constructive possession follows the title. In *Hungerford v. Redford*, 29 Wis. 345, the court, after saying that actual possession is sufficient unless the defendant proves an adverse title of a higher character than a possessory one, continues: "If the plaintiff is not the real owner of the land, and the defendants shall be compelled to pay the judgment which he ⁵³¹ [the plaintiff] recovered against them in the circuit court, what rule of law will prevent such owner from bringing an action against them for the same logs and recovering therein? . . . The fact that a recovery by the holder of a merely colorable title is no bar to a recovery by the real owner demonstrates that none but the real owner can recover."

The action was one of replevin to recover logs wrongfully cut on unoccupied lands claimed by the plaintiff, and recovery was denied because he was unable to prove perfect title to the lands.

McNarra v. Chicago & N. W. R. Co., 41 Wis. 69, was an action to recover damages occasioned by a fire negligently set by the defendant. It was held that the title necessary to be proved in order to maintain the action was the same as in an action of trespass quare clausum fregit or in replevin for timber cut and removed, and that "in either case, if the lands upon which the trespass was committed were vacant and unoccupied, the plaintiff must prove his title thereto, or he cannot recover."

In *Gunsolus v. Lormer*, 54 Wis. 630, 12 N. W. 62, it was said: "That constructive possession which, in the absence of any actual possession, will warrant the bringing of this action [trespass quare clausum] is that of the owner of the premises alone."

In *Stephenson v. Wilson*, 37 Wis. 482, it was held that if the plaintiff in an action of trespass quare clausum cannot show actual possession, but is obliged to rely on his legal title, he must show a valid title.

In *Wadleigh v. Marathon Co. Bank*, 58 Wis. 546, 17 N. W. 314, the action was brought to recover the value of saw-logs cut upon lands owned by the plaintiff and converted

by the defendant to its use. Judgment was demanded for one thousand dollars, being the value of the logs, and for the sum of one thousand dollars for the damage to the land caused by the cutting of the timber. It was held that the action was in the nature of a trespass and was also brought to recover damages for permanent injury to the freehold. The court said: "Were no damages claimed other than for the mere invasion of plaintiff's possession, the lands being wild and vacant, ⁵³² it would be incumbent on him to prove his title thereto in order to show a constructive possession in himself. The cause of action being permanent injury to the land, to entitle the plaintiff to recover he must establish his title. The reason of this is, if the plaintiff is not the owner of the land, a recovery by him would be no bar to an action for such injury sought against the trespasser by the real owner."

Paige v. Kolman, 93 Wis. 435, 67 N. W. 700, was an action for trespass for cutting timber. The court said: "The land upon which the trespass was committed was unoccupied timber land. Hence the plaintiff must prove valid title in order to recover."

In some of the cases cited the defendants were mere naked trespassers who acted without any color of right. In all of them the plaintiffs showed or attempted to show some color of title. It seems, therefore, to be quite well established by our decisions that constructive possession follows the title, and that the trespasser on unoccupied lands can be made to respond in damages but once, and then to the owner. The decisions elsewhere to the same effect are numerous: Shipman v. Baxter, 21 Ala. 456; Smith v. Yell, 8 Ark. 470; Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19; Yahoola River etc. Co. v. Irby, 40 Ga. 479; Atlantic & G. R. Co. v. Fuller, 48 Ga. 423; Rockwell v. Jones, 21 Ill. 279; Gauche v. Mayer, 27 Ill. 134; Broker v. Scobey, 56 Ind. 588; Buck v. Aikin, 1 Wend. (N. Y.) 466, 19 Am. Dec. 535; Roe v. Wilbur, 57 Pa. 406; Snider v. Myers, 3 W. Va. 195; Church v. Meeker, 34 Conn. 421; Edwards v. Noyes, 65 N. Y. 125.

It is now pertinent to consider what interest the plaintiff had acquired in the lands at the time of the trespass. It has been held by this court and by the federal supreme court that an entryman secures no title to the land he desires to homestead until he has complied with the law and has earned his patent: Empey v. Plugert, 64 Wis. 603, 25 N. W. 560; Whitcomb v. Provost, 102 Wis. 278, 78 N. ⁵³³ W. 432; Shiver v. United States, 159 U. S. 491, 16 Sup. Ct. Rep. 54, 40 L. ed. 231; Stone v. United States, 167 U. S. 178, 17 Sup. Ct. Rep. 778, 42 L. ed. 127. If the homesteader, before he has earned and received a final receiver's receipt, cuts or re-

moves any more timber from his homestead than is necessary in the process of clearing his farm and fitting it for cultivation, he himself becomes a trespasser and liable to be prosecuted not only civilly but criminally for the trespass: *Timber Cases*, 3 McCreary, 519, 11 Fed. 81; *United States v. Lane*, 19 Fed. 910; *United States v. Freyberg*, 32 Fed. 195; *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. Rep. 54, 40 L. ed. 231; *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. Rep. 778, 42 L. ed. 127. No vested right is conferred on the claimant that may not be taken away by Congress: *Frisbie v. Whitney*, 76 U. S. (9 Wall.) 187, 19 L. ed. 668; *Yosemite Valley Case*, 82 U. S. (15 Wall.) 77, 21 L. ed. 82; *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. Rep. 54, 40 L. ed. 231. The homesteader on making his entry acquires an inchoate right to secure the title to the land filed on, on complying with the homestead law, in preference to all other applicants for such land whose claims are subsequent to his. The land thereby becomes segregated and set apart for his benefit, and, in a sense, appropriated for his use: *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. Rep. 54, 40 L. ed. 231; *Burlington etc. R. Co. v. Johnson*, 38 Kan. 142, 16 Pac. 125, and cases cited.

There was a right of action in someone to recover damages for this trespass as soon as it was committed. It is clear that such a right of action was vested in the United States as owner of the lands. It also seems clear that under the facts of this case there was but a single cause of action, and that the plaintiff had no title that carried the constructive possession so as to enable him to maintain the action. If there was but a single cause of action, that was extinguished by the settlement made with the only party who was entitled to make it.

The plaintiff, however, maintains that the doctrine of relation is applicable to the facts of the case, and that the patent should be held to relate back and convey title as of the date of the homestead filing, and a number of cases are cited in support of such claim.

⁵³⁴ The doctrine of relation is of equitable origin, but has a well-recognized application to proceedings at law. It is applied most frequently to conveyances of real estate made in pursuance of an antecedent contract, and is applied to give effect to the intention of the parties or to protect purchasers pending the fulfillment of the contract. It is also applied to public land transactions so as to cut off intervening claimants between the date of the entry and the date of the patent: *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Peyton v. Desmond*, 129 Fed. 1, 63 C. C. A. 651. OUR OWN

court has applied it to land contracts, at least as between parties and privies thereto, in the following cases: *Stahl v. Lynn*, 86 Wis. 75, 56 N. W. 188, *Krakow v. Wille*, 125 Wis. 284, 103 N. W. 1121, 4 Ann. Cas. 1016, *Evans v. Crawford Co. etc. Ins. Co.*, 130 Wis. 189, 118 Am. St. Rep. 1009, 109 N. W. 952, 9 L. R. A., N. S., 485, *Western L. & C. Co. v. Copper River L. Co.*, 138 Wis. 404, 120 N. W. 277, and *Blaha v. Borgman*, 142 Wis. 43, 124 N. W. 1047. It has also held that the doctrine would apply as against a trespasser: *Gilbert v. Auster*, 135 Wis. 581, 116 N. W. 177.

In *Peyton v. Desmond*, 129 Fed. 1, 63 C. C. A. 651, it is held that a homesteader after he secures a patent may sue and recover for a trespass committed before final proofs were made, the patent relating back to the date of entry. In this case it is held that the homesteader is entitled to receive the land in the condition in which it was on the date he made his entry. When the patent was issued, however, the timber was gone and a right of action only remained to recover its value. Equitably, as between the United States and the homesteader, that cause of action became the property of the latter as soon as he complied with the law, and it was held that the patent carried with it the right of action for the trespass. No attempt had been made by the United States to enforce the collection of the trespass. This case, which is strongly relied on by the respondent, is authority to the proposition that the moneys collected by the United States from the defendant equitably⁵³⁵ and justly belong to the plaintiff, now that he has perfected his title. It is not authority for the claim that the United States did not have the right to collect for the trespass in the first instance, and neither is it authority to the proposition that although the United States has comprised and settled its cause of action, the same cause of action can be prosecuted by the homesteader against the trespasser. On the contrary, the decision holds that, where the United States has a cause of action at the time the patent is issued, it parts with such cause of action against the trespasser by assigning it, in effect, to the homesteader.

The case of *Carner v. Chicago etc. R. Co.*, 43 Minn. 375, 45 N. W. 713, relied on by the appellant, is distinguishable from the case at bar in two respects. In the first place, the plaintiff was in the actual possession of the land under his timber entry when it was damaged by the fire negligently set by the defendant, and, secondly, the United States asserted no claim against the defendant for the damage resulting from the fire.

The case of *Hastay v. Bonness*, 84 Minn. 120, 86 N. W. 896, is also relied upon by the appellant. This action was brought by the homesteader after he had secured his patent,

and the United States had never attempted to collect for the trespass, and it was held that the patent related back to the date of entry. This case was very similar in its facts to *Peyton v. Desmond*, 129 Fed. 1, 63 C. C. A. 651.

Our attention has not been called to any case which holds that the United States was not entitled to collect for the trespass committed by the defendant at the time which it did collect for the same, and the law seems to be well settled the other way. Neither has our attention been called to any case where the homesteader who has not yet entered into possession of his homestead can maintain an action for trespass committed before he has taken possession and while his right to the land remains inchoate. This action is brought under ⁵³⁰ section 4269, Statutes of 1898, and that statute only gives a right of action for trespass for timber wrongfully cut "upon the land of the plaintiff." The decisions of our own court hold that constructive possession follows the title in an action of trespass involving injury to the freehold. Finally, we think there was but a single cause of action, which the United States might enforce at any time before a final receiver's receipt or patent was issued, and that when it was enforced and the damages claimed were paid it became extinguished and the issuance of a patent could not revive it. The rule requiring a party not in actual possession to show title before he can recover in an action for trespass for injury to real estate is reasonable. Our statute (section 4269) has been held to be highly penal, in that it permits the injured party to recover a sum which may be several times the amount of the damage actually sustained. Unless the law clearly permits every person having color of title to sue for and exact damages provided for in the statute, we should be loath to hold that there could be more than one recovery for a single injury to the freehold. Four persons may each have a tax deed on a vacant parcel of land on none of which deeds has the three-year statute of limitations run. Any one of the four may eventually acquire title by virtue of his deed and acts done thereunder. The original owner may succeed in setting aside all of the deeds and establish perfect title in himself. We do not think that each of these five parties could sue a trespasser and collect from him the value of the lumber manufactured from logs wrongfully cut from the land because each could show a colorable title and a better right to the premises than the trespasser. The equitable doctrine of relation cannot be applied simply to compel a wrongdoer to pay twice for the same wrong. If the doctrine of relation has any application in such a case as this, it is between the government and the homesteader, whereby the former, when the homestead is patented, should

be charged as trustee of the latter for the ⁵³⁷ amount collected. It follows that the settlement of the cause of action sued on by the defendant with the United States was a good defense to such action and that the court erred in awarding judgment in plaintiff's favor.

By the COURT. The judgment of the circuit court is reversed and the cause is remanded, with directions to dismiss the complaint.

Kerwin, J., dissents.

An Entryman Under the Federal Homestead Laws may bring an action for injury to his land, although he has not yet made final proof: *Wendel v. Spokane County*, 27 Wash. 121, 91 Am. St. Rep. 825; *McLeod v. Spencer*, 21 Okl. 165, 129 Am. St. Rep. 774. See, also, *Thompson v. Basler*, 148 Cal. 646, 113 Am. St. Rep. 321. In *Manitou etc. Ry. Co. v. Harris*, 45 Colo. 185, 132 Am. St. Rep. 140, it is affirmed that when a patent is issued to a homestead claimant, his title relates to the date of the homestead entry, and he has an action of trespass for intermediate injuries done the property.

After a Person Entering a Homestead has Made Final Proof entitling him to a patent, he has a vested right in the homestead: *Dale v. Griffith*, 93 Miss. 573, 136 Am. St. Rep. 546. In an action by one of two rival homestead claimants to a tract of public land to quiet his title and enjoin the other claimant from interfering with his possession thereof, it is proper for the state courts to decline to pass upon the question of ownership until after the government has parted with its title by duly issuing a patent therefor to one of such claimants: *Bupke v. Moran*, 87 Neb. 316, 138 Am. St. Rep. 489.

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ABTRACTER OF TITLE.

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2. ABTRACTER OF TITLE—Liability to Purchaser.—Under section 3197 of the Political Code, an abstracter of titles is liable for an error in the abstract to a purchaser of property who relied upon the abstract, without regard to whether he or the vendor ordered the abstract or paid for it. (S. D.) *Goldberg v. Sisseton Loan & T. Co.*, 775.

3. ABTRACTER OF TITLE.—The Sureties upon the Bond of an Abstracter of titles cannot be held liable for an error or omission of their principal occurring prior to the execution of the bond. (S. D.) *Goldberg v. Sisseton Loan & T. Co.*, 775.

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ANIMALS.

Allowing Stock to Run at Large.

1. ANIMALS—Allowing Stock to Run at Large.—The common-law rule making it the duty of the owner of domestic animals to keep them upon his own land is not recognized in Arkansas; the stock owner in this state is not accountable as a trespasser for permitting his stock to stray upon the open premises of another. (Ark.) *St. Louis Iron M. & S. Ry. Co. v. Newman*, 134.

Liability for Injury to Cattle.

2. ANIMALS—Attracting to Dangerous Place.—A land owner owes to the owner of straying cattle the duty to refrain from attracting or drawing them to a dangerous object or substance which he has placed upon his land. (Ark.) *St. Louis Iron M. & S. Ry. Co. v. Newman*, 134.

3. ANIMALS—Poisonous Oil Along Highway.—A carrier who permits a can of cottonseed oil to leak and remain along the roadside where domestic animals are accustomed to stray, which oil attracts such animals, is guilty of negligence and liable to the owners if the animals are killed by drinking the oil. (Ark.) *St. Louis Iron M. & S. Ry. Co. v. Newman*, 134.

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4. ANIMALS—Vicious Dogs—Right to Keep.—It is lawful for a person to keep a vicious dog, but unlawful to keep it in such a manner that neighbors are unnecessarily exposed to danger. (N. J. Eq.) *Rider v. Clarkson*, 614.

ANNUITIES.

1. ANNUITIES.—The Payment of Annuities from the Corpus of Trust Fund is authorized and directed by a provision of a will. And out of the fund so created they shall set apart a sum of not less than seventy-five thousand dollars (\$75,000), (if it shall produce so much) from which, together with the income thereof, they shall pay said annuities." (Ill.) *Wilce v. Van Anden*, 212.

2. ANNUITIES—Payment from Corpus of Fund.—It is often difficult to determine whether an annuity is to be paid out of the capital of an estate or only out of the income of the estate. The question must be determined by ascertaining the intention of the testator. Each case will depend largely upon the meaning of the words used by the testator. (Ill.) *Wilce v. Van Anden*, 212.

APPEAL AND ERROR.

In General.

1. APPEAL—Harmless Error.—Where the Court Failed to Acquire Jurisdiction, whatever errors it may have committed in the proceedings leading up to its judgment are neither material nor prejudicial to the appellant. (Utah) *Bristol v. Brent*, 804.

2. APPEAL—Improper Instructions—Right Verdict.—There are instances where, notwithstanding the circuit court has given improper or erroneous instructions, the whole record shows that the verdict was right, and in such instances the judgment will not be reversed; but where there is an issue for the jury, it is not the province of the supreme court to pass upon the weight of the evidence. (Mo.) *Simon v. Metropolitan St. Ry. Co.*, 498.

3. APPEAL—Approval of Form of Decree—Estoppel.—The approval of the form of a decree of the lower court by counsel for the appellant will not estop him from questioning the correctness of any ruling expressed therein. (Iowa) *Moore v. Crandall*, 276.

4. APPEAL—Theory of Action Below—Change on Appeal.—Where an action is tried upon a certain theory in the trial court, the respondent will not be heard to say that the judgment might be sustained upon an entirely different theory. Hence where an action has been tried as one for damages under the eminent domain law, the judgment will not be considered as one awarding damages for a private nuisance. (Utah) *Twenty-second Corporation of Church of Jesus Christ v. Oregon Short Line R. R. Co.*, 819.

5. APPEAL—Findings When the Evidence is not Brought Up in the record are, in an action at law, binding on the supreme court. (Mo.) *Brown v. South Joplin Lead etc. Min. Co.*, 509.

6. APPEAL—Error not Shown by Record.—The Overruling of a Demurrer to an amended plea cannot be reviewed where the amended plea is not set out in the record. (Ala.) *McAllister-Coman Co. v. Mathews*, 43.

7. APPEAL.—Where a Judgment of a Justice of the Peace Recites that after duly considering the "evidence as produced and confessed" the court finds the defendant guilty, in the absence of an affirmative showing that no evidence was introduced, it will be presumed that evidence was taken. (Okl. Cr.) *In re Jones*, 655.

8. APPEAL—Review of Instructions—Absence of Evidence.—Where an instruction attempts to state the law applicable to the facts which the court says are shown by the evidence, it is not necessary that the supreme court have the evidence before it or that it determine what facts are shown by the evidence. (Ind.) *State v. Tillet*, 246.

9. **APPEAL—Verdict Contrary to Evidence.**—The supreme court will not condemn the verdict of a jury as contrary to the evidence, if there is any evidence which, in any reasonable view, will sustain it; and in case a trial court on motion to set aside a verdict as contrary to the evidence approves it, its judgment should not be overruled unless clearly wrong. (Wis.) *Houg v. Girard Lumber Co.*, 1012.

Amended Brief.

10. **APPEAL—Amended Brief.**—Points Raised by an amended brief, filed before the appellee's argument is served, may be considered. (Iowa) *Moore v. Crandall*, 276.

Dismissal of Appeal.

11. **APPEAL—Dismissal—Cause Subsequent to Judgment.**—Matters outside of the record, occurring after judgment, which affect the right of an appellant to prosecute his appeal, may be shown to and considered by the appellate court on a motion to dismiss. (Wash.) *Trumbull v. Jefferson County*, 943.

12. **APPEAL—Dismissal—Cause Prior to Judgment.**—No showing of a cause for dismissal of an appeal, occurring prior to the judgment, should be allowed outside of the record. Such cause must be incorporated in the record by the proper procedure. (Wash.) *Trumbull v. Jefferson County*, 943.

Objections, Exceptions and Assignment of Error.

13. **APPEAL—Objection to Admission of Evidence.**—The party complaining on appeal of the admission of evidence objected to is the court below will be limited to the specific objections made to it there. (Pa.) *Benner v. Fire Association of Philadelphia*, 706.

14. **APPEAL—An Objection to the Jurisdiction of the Court** to entertain an appeal must be made in printed form, stating specifically the ground thereof, and be served upon the appellant as provided by statute; otherwise, it cannot be considered. (Iowa) *Stein v. McAuley*, 332.

15. **APPEAL—Where the Assignment of Errors is joint and several**, it is not subject to the objection "that it is joint and is not good as to all who join in it, and therefore is not good as to any of them. (Ind.) *Fleming v. Greener*, 254.

16. **APPEAL—Invalidity of Statute—Waiver.**—A defendant waives the right to question the validity of a statute by prosecuting an appeal to the appellate court. (Ill.) *Luken v. Lake Shore & M. S. Ry. Co.*, 220.

17. **APPEAL—Bill of Exceptions—Record.**—Though bills of exception be settled and signed in due time, they are not parts of the record unless made so by a certificate or an order entered upon the record. (W. Va.) *State v. Yoes*, 978.

Questions Reviewed.

18. **APPEAL—A Question not Presented by an Assignment of error** in accordance with the rules of the court will not be reviewed. This applies to all cases, whether they involve questions that have been passed upon by the trial court, or new questions that may be raised for the first time on appeal. (S. D.) *Goldberg v. Sisseton Loan & T. Co.*, 775.

19. **APPEAL—Review on Judgment-roll—Questions Considered.**—On an appeal from a judgment, the questions of the sufficiency of the complaint, the sufficiency of the findings or general or special verdict to sustain the judgment, or of a defect in the judgment, may be presented upon a proper assignment of error, notwithstanding the ques-

ion of their sufficiency has not been raised in the court below. (S. D.) *Goldberg v. Sisseton Loan & T. Co.*, 775.

Affirmance, Reversal, New Trial.

20. APPEAL—Affirmance by Appellate Court, When Conclusive.—In an action by a switchman for injuries suffered by reason of a defective automatic car-coupler, if the evidence fairly tends to sustain a count of the declaration, the court is justified in submitting it to the jury under that count, and in such case affirmance of the judgment by the appellate court is conclusive upon the supreme court. (Ill.) *Luken v. Lake Shore & M. S. Ry. Co.*, 220.

21. APPEAL—Verdict Contrary to Erroneous Instructions.—A verdict will not be disturbed which is in accordance with the law and the evidence, even if it is contrary to erroneous instructions given at the request of the party against whom it is rendered. (Ill.) *Luken v. Lake Shore & M. S. Ry. Co.*, 220.

22. APPEAL—Modification of Judgment.—Where it appears that no new trial is necessary, the supreme court may direct the lower court to modify the judgment in accordance with its opinion. (S. D.) *Goldberg v. Sisseton Loan & T. Co.*, 775.

23. APPEAL—Reversal—Direction for Judgment.—Where the only issue is one for the court, the appellate court will, upon reversing the judgment, direct the entry of a judgment in accordance with its opinion. (Md.) *Warren Bros. v. Kendrick*, 445.

24. APPEAL—Order for New Trial When Justice Requires.—The supreme court is expressly authorized to order a new trial when the justice of the case requires it. (Ind.) *Fleming v. Greener*, 254.

25. APPEAL—Decision on New Grounds—New Trial.—Where a reversal is ordered upon grounds not called to the attention of the trial court, and for defects which the opposing party was given no opportunity to remedy, a new trial will be directed. (Utah) *Bristol v. Brent*, 804.

Conclusiveness of Judgment—Stare Decisis.

26. APPEAL—Stare Decisis.—Where in a Former Case a construction has been placed by the supreme court upon the same words in the charter of a corporation as are in question in a subsequent case, such construction will not be departed from. (Pa.) *Benner v. Fire Association of Philadelphia*, 706.

27. APPEAL—Judgment of Appellate Court Conclusive.—The question whether or not the conduct of an insurance company amounted to a waiver of proof of loss is a mixed question of law and fact, upon which the judgment of the appellate court is final. (Ill.) *McInturff v. Insurance Co. of North America*, 153.

APPEARANCE.

1. APPEARANCE—Waiver of Defects in Service of Process.—Though an appearance in a cause, for any purpose other than to take advantage of defective execution or nonexecution of process, constitutes a waiver of defects in the service of process, the purpose of such appearance must bear some substantial relation to the cause. In other words, it must be a purpose within the cause, not merely collateral thereto. (W. Va.) *Fulton v. Ramsey*, 969.

2. APPEARANCE—When not General.—A Mere Inquiry as to whether a continuance can be taken, without waiver of service or offer to move for a continuance, provided it can be done without such waiver, does not amount to a general appearance. (W. Va.) *Fulton v. Ramsey*, 969.

3. APPEARANCE.—A General Appearance must be Expressly Arise by implication from the defendant's seeking, taking or agreeing to some step or proceeding in the cause, beneficial to himself and detrimental to the plaintiff, other than one contesting the jurisdiction only. (W. Va.) *Fulton v. Ramsey*, 969.

ARBITRATION.

See Insurance, 29-31.

ATTACHMENT.

Nonresident.

1. ATTACHMENT—Nonresident.—In attachment proceedings against a nonresident, where personal service is lacking, the court must obtain jurisdiction of the property of the defendant by its seizure and taking into the custody of the law. If no property is found or seized, the court does not acquire jurisdiction to proceed to judgment. (Utah) *Bristol v. Brent*, 804.

Bond to Dissolve.

2. ATTACHMENT—Bond to Dissolve—Amendment of Declaration.—Sureties upon a bond to dissolve an attachment are not discharged by an amendment of the declaration, unless its effect is to let in a new cause of action, and thus to impose upon them a liability greater than that which they assumed by signing the bond; or unless the nature and character of the original claim is altered, and the situation with reference to which they contracted is essentially changed without their consent. (Md.) *Warren Bros. v. Kendrick*, 445.

3. ATTACHMENT—Bond to Dissolve.—The Amendment of a Declaration containing the common counts and a special count referring to certain written contracts, the suit being for work done and materials furnished partly on special order and partly on the contracts, by striking out the special count, does not materially alter the cause of action and does not operate to discharge the sureties upon a bond given to dissolve an attachment. (Md.) *Warren Bros. v. Kendrick*, 445.

4. ATTACHMENT—Bond to Dissolve.—The Amendment of a Declaration by substituting in a common count a demand for \$10,000 damages in lieu of a specific statement of an indebtedness of \$7,157.53, and the striking out of a credit given, where other credits are allowed, and the amount of recovery is less than the claim for which the suit was brought, is not such a change in the character of the action or situation of the parties as will discharge the sureties upon a bond given to dissolve an attachment. (Md.) *Warren Bros. v. Kendrick*, 445.

See Chattel Mortgages, 1; Garnishment.

ATTORNEY AND CLIENT.

1. ATTORNEY—Purchase of Subject of Litigation.—An attorney will not be permitted to acquire an interest adverse to his client. When retained in litigation to enforce the claims of his client against a certain estate, he will not be permitted to purchase the residue of the estate to the prejudice of the client. (R. I.) *Stephens v. Dubeis*, 741.

2. ATTORNEY—Purchase of Subject of Litigation.—In an action by a client to have a purchase of the subject of litigation by his attorney held to be one in trust for him, it is not necessary to show any improper advantage was gained by the attorney. It is at the

option of the client to repudiate or affirm the transaction irrespective of any fraud. (R. I.) *Stephens v. Dubois*, 741.

3. ATTORNEY—Purchase by Attorney—Trustee for Client.—Where an attorney, retained in litigation to enforce claims of his client against an estate, purchases the residue thereof, he will be held to have done so in trust for the client and decreed to convey the same to the client upon reimbursement of his outlay. (R. I.) *Stephens v. Dubois*, 741.

4. ATTORNEY—Action to Declare Trust—Laches.—A delay of sixteen months in the bringing of an action by a client to have a purchase by his attorney declared one in trust for him, where the case was heard on the bill and answer, is not such laches as to bar the action. (R. I.) *Stephens v. Dubois*, 741.

See Criminal Law, 11, 18.

ATTORNEY'S FEES.

See Injunctions, 3, 4; Mortgages, 6.

Note.

Attorney and Client, specific performance of agreement between, 85.

BADGES.

See Constitutional Law, 17-20.

BAILEE.

See Larceny, 1.

BAILMENT.

1. BAILMENT—Creation by Operation of Law.—An Agreement Inter Partes is not necessary to create a bailment; it may be created by operation of law. (Wis.) *Burns v. State*, 1081.

2. BAILMENT.—Taking Possession Without Present Intent to Appropriate raises all the contractual elements essential to a bailment. (Wis.) *Burns v. State*, 1081.

3. BAILMENT—Taking Property Thrown Away by a Lunatic.—Where a lunatic throws away a roll of money while being pursued, and one of his pursuers picks it up and turns it over to a constable who takes the lunatic in charge, the constable becomes a bailee of the money. (Wis.) *Burns v. State*, 1081.

BANKS AND BANKING.

BANKS AND BANKING—Application of Deposit to Debt.—A bank to whom a depositor is owing a matured indebtedness may appropriate the general deposit of its debtor to the discharge of the obligation, but a deposit made for a special purpose, or under a special agreement, cannot rightfully be so appropriated. (Iowa) *Smith v. Sanborn State Bank*, 336.

BASTARDY.

BASTARDY PROCEEDING—Venue of Action—Residence of Complainant.—Under section 307 of the Code of Civil Procedure, it is not necessary that the complainant or her bastard child be residents of this state in order to maintain bastardy proceedings against a putative father, where the proceeding is instituted in the county of his residence. (S. D.) *State v. Etter*, 801.

BAWDY-HOUSE.

See Sales, 1.

BILLIARD AND POOL ROOMS.

See Nuisance, 5, 6.

BILLS AND NOTES.

See Corporations.

BOUNDARIES.

1. **BOUNDARIES—Agreed Line—Mistake.**—An agreement fixing a boundary line under the belief that it is the true line, when in fact it is not, is not binding, and may be set aside by either party when the mistake is discovered, unless there is some element of estoppel which prevents it. (Ark.) *Randleman v. Taylor*, 141.

2. **BOUNDARIES—Agreed Line—When Binding.**—It is only where the true line is unknown, or is difficult of ascertainment, and the parties establish the line to settle a disputed and vexatious question as to the boundary line between them, that the agreement is binding. In such cases the mutual concession between the parties is a sufficient consideration for the agreement. (Ark.) *Randleman v. Taylor*, 141.

Note.

Bridges, specific performance of contracts to build, 74.

BROKERS.

1. **BROKERS—Commission on Sales, When Earned.**—When a broker has found a customer ready, able and willing to purchase at the price fixed by the seller, he has earned his commissions; but when the result of the broker's labors is a mere order for goods, which is revocable at the pleasure of the party making the order, a revocation of the order is conclusive evidence that the purchaser is not willing to purchase the goods. (Ala.) *Richardson v. Olanthe M. & E. Co.*, 45.

2. **BROKERS—Commission.**—If the Seller Refuses to Deliver the property, or by any improper action on his part prevents the consummation of the purchase, he is liable for the broker's commission, but merely making a candid and honest statement of the quality of the goods, leaving the purchasers the option either to reaffirm the order, to change it to a better quality, or to revoke it, is not improper or a refusal to consummate the sale. (Ala.) *Richardson v. Olanthe M. & E. Co.*, 45.

BUILDING CONTRACTS.

See Contracts, 3-5.

BUILDING RESTRICTIONS.

See Deeds, 9.

BUILDINGS.

See Injunctions, 14, 15; Nuisance, 7, 8.

BURGLARY.

1. **BURGLARY—Breaking into Outhouse.**—Under a Statute providing "If any person . . . shall feloniously break into any dwelling-house . . . or any outhouse belonging to or used with a dwelling-house, and feloniously take away anything of value . . . he shall be confined in the penitentiary," etc., the offense is committed by breaking into a smoke-house and stealing meat therefrom, the dwelling to which such smoke-house belonged having been burned, and the

owner living in a school-house some two or three hundred yards distant. (Ky.) *Unsel v. Commonwealth*, 393.

2. BURGLARY—Outhouses—Connection With Dwelling.—In order to constitute the offense of breaking into an outhouse "belonging to or used with a dwelling-house," it is not necessary that it be in the same inclosure. It is sufficient if, considering both its situation and use, it can fairly be considered as appurtenant to the dwelling-house. (Ky.) *Unsel v. Commonwealth*, 393.

CARRIERS.

Of Goods.

1. CARRIERS—Change of Original Contract.—It is competent for a shipper and the carrier to agree to a change of the original contract, especially where the carrier is to receive a consideration for so doing. (Ky.) *Cincinnati etc. R. R. Co. v. Steele*, 388.

2. CARRIERS—Change of Destination.—A Consignor who is also the consignee of a car has the right to alter its destination so long as it is in the carrier's custody, and the issuance of a bill of lading by the carrier does not affect the right. The right is an incident of title. (Ky.) *Cincinnati etc. R. R. Co. v. Steele*, 388.

3. CARRIERS—Change of Destination or Stoppage—Rights of Owner.—The carrier's title to goods is subordinate to that of the owner, and aside from his lien for charges for carrying them, cannot be allowed to defeat the owner's right to control their destination. He has the same right to stop them during the trip as to start them on it. (Ky.) *Cincinnati etc. R. R. Co. v. Steele*, 388.

4. CARRIERS—Directions of the Owner-shipper of Goods must be Respected by the carrier where the rights of a consignee do not intervene, the carrier, of course, being allowed to receive its toll before parting with the goods. (Ky.) *Cincinnati etc. R. R. Co. v. Steele*, 388.

5. CARRIERS—Stoppage of Goods.—If a Carrier Negligently Falls to deliver a message from the consignor directing its agent to stop the goods which are then in its possession, or if it agrees to use all available means to stop the goods before delivery but negligently fails to do so, it will be held liable. (Ky.) *Cincinnati etc. R. R. Co. v. Steele*, 388.

Discrimination—Interstate Commerce.

6. CARRIERS—Discrimination—Interstate and Intrastate Commerce.—The pendency of a suit before the Interstate Commerce Commission for damages from unlawful discrimination in interstate commerce is not a bar to an action for damages for such discrimination in intrastate commerce. (Pa.) *Hillsdale Coal etc. Co. v. Pennsylvania R. R. Co.*, 700.

7. CARRIERS—Discrimination.—The Interstate Commerce Commission has no jurisdiction over a claim for damages sustained for unlawful discrimination between shippers by a carrier in connection with commerce wholly within a state. (Pa.) *Hillsdale Coal etc. Co. v. Pennsylvania R. R. Co.*, 700.

8. CARRIERS—Discrimination—Measure of Damages—Instructions.—An Instruction that "as we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from such mine," states the correct measure of damages in an action by the owner of a mine against a carrier for

damages for unlawful discrimination. (Pa.) *Hillsdale Coal etc. Co. v. Pennsylvania R. R. Co.*, 700.

9. **CARRIERS—Discrimination—Measure of Damages—Loss of Profits**, in order to be recovered as damages in an action by a mine owner against a carrier for unlawful discrimination, must be clearly shown, and the proof should not present merely a speculative basis for the claim. (Pa.) *Hillsdale Coal etc. Co. v. Pennsylvania R. R. Co.*, 700.

10. **CARRIERS—Discrimination—Mitigation of Damages.—The Burden of Proof** is on the carrier, in an action against it to recover damages for an unlawful discrimination, to show that the plaintiff would in the future receive as much profit from the shipment and sale of his goods as if no discrimination had been made, or any other facts in mitigation of the damages. (Pa.) *Hillsdale Coal etc. Co. v. Pennsylvania R. R. Co.*, 700.

Of Passengers—Injury at Depot.

11. **CARRIERS—Injury to Passenger—Sudden Starting or Jolt**.—Where a passenger has boarded a car and while in the act of finding a seat is injured by a jerk of the train, the railway company will not be held responsible unless it is shown that the moving of the train was caused by an unusual and unnecessary jerk. (Ky.) *Chesapeake etc. Ry. Co. v. Borders*, 396.

12. **CARRIERS—Reasonable Time to Board—Sudden Starting or Jolt**.—It is the duty of a railroad company to give to passengers a reasonable opportunity to board its trains, and where the train is moved while a passenger is upon the steps, but before he has had a reasonable opportunity to reach a place of safety, the company will be held liable whether the train was moved by an unusual and unnecessary jerk or not. (Ky.) *Chesapeake etc. Ry. Co. v. Borders*, 396.

13. **CARRIER—Concurring Negligence at Depot**.—A carrier may be liable for the concurring negligence of its servants in running a train by a depot without giving signals, and that of the servants of an express company in operating a hand truck at the depot, whereby a person steps toward the track and is struck by the train. (Ark.) *St. Louis etc. Ry. Co. v. Shaw*, 98.

14. **CARRIERS—Concurring Negligence—Liability**.—If the negligence of trainmen concurs as a proximate cause of an injury to a person at a depot, it matters not, so far as the carrier's liability is concerned, what other agency is the other concurring cause. (Ark.) *St. Louis etc. Ry. Co. v. Shaw*, 98.

15. **CARRIERS—Duty to Protect Persons on Premises**.—A carrier owes to passengers and others using by lawful right its premises the duty of protection from dangerous habits of others using the premises by its permission. (Ark.) *St. Louis etc. Ry. Co. v. Shaw*, 98.

16. **CARRIERS—Waiting for Train—Contributory Negligence**.—Where an infant while awaiting a train at a railroad station, in attempting to avoid a hand truck, stepped in front of a moving train, an instruction that if he could have avoided the truck by stepping in a direction away from the train he should have done so, and that his failure to do so constituted negligence, is erroneous in leaving out of account his ignorance of the approach of the train, its failure to give signals, and the fact of infancy. (Ark.) *St. Louis etc. Ry. Co. v. Shaw*, 98.

Interurban Railway—Fixing Rates.

17. **INTERURBAN RAILWAY—Contract With Municipality Fixing Rates**.—An interurban railway company may make a contract with a municipality fixing the rate of charge for a given service, provided

the contract violates no law and is not inimical to public policy; but in so doing it cannot forestall the state and prevent it from exercising its governmental function regulating rates. (Wis.) *Manitowoc v. Manitowoc & Northern Traction Co.*, 1056.

13. INTERURBAN RAILWAY—Contract With City Fixing Rates. Where a city, with authority to refuse its consent to the use of its streets by interurban cars, grants to the railway company the right to run such cars in its streets on the condition that the company shall carry passengers between that city and another city at a specified rate, the agreement is binding between the parties; but if no specific authority has been conferred upon the city to make such an agreement, the state may interfere whenever public weal demands. Yet until the state sees fit to exercise its paramount authority to modify the rates (which in this case it has not done), the contract is in force between the parties. (Wis.) *Manitowoc v. Manitowoc & Northern Traction Co.*, 1056.

See Street Railways.

Note.

Certiorari, whether title to office can be determined on, 201, 202.

CHARITIES.

1. WILLS—Trust for Charitable Use—Certainty.—A provision of a will creating a fund for the payment of annuities to the widow and daughter of the testator, and upon their death authorizing the trustees to give such portion thereof as they may think best and proper to any one or more of the testator's brothers or sisters that may stand in need of the same, "and the remainder shall be devoted by said trustees, in their discretion, to the advancement of the cause of temperance or in aid of one or more manual training schools in said city of Chicago," attempts to create a trust which by reason of its indefiniteness is incapable of being enforced in equity, and therefore is void. (Ill.) *Wilce v. Van Anden*, 212.

2. WILLS—Charities—Power of Trustees to Choose.—Where trustees in a will are given the power to choose between charities, a bequest may be upheld, but where they have a discretion to give what remains of a fund to private parties or donate it to charitable uses, the bequest must be held void for uncertainty. (Ill.) *Wilce v. Van Anden*, 212.

CHattel MORTGAGES.

1. CHATTEL MORTGAGES—Levy of Attachment as Waiver of Right to Foreclose.—In a jurisdiction where a chattel mortgage creates a mere lien upon the property, leaving the legal title in the mortgagor, the mortgagor has an equity of redemption which may be levied upon and sold. Hence a mortgagee of the property may, by attachment, levy upon this equity, and, by so doing, he does not waive his mortgage lien, especially where the attachment suit is dismissed without ever having gone to trial. (Iowa) *Stein v. McAuley*, 332.

2. CHATTEL MORTGAGES—Election of Remedies—Estoppel.—There is no election of remedies where a chattel mortgagee sues out an attachment of the property, because the proceedings by attachment and to foreclose are not inconsistent; and the mortgagee is not estopped to foreclose his mortgage because the mortgagor incurred expenses in resisting the attachment, especially where other attachment suits had been commenced and the expenses were incurred as much for one as the other. (Iowa) *Stein v. McAuley*, 332.

CHECKS.

See Gifts.

COLLEGES AND UNIVERSITIES.

1. **UNIVERSITY OF UTAH**—Proceeds of Land Grant.—Section 10 of the act of Congress of July 16, 1894, chapter 138, providing "that the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools," does not apply to the proceeds derived from the sale of lands granted for university purposes, such subject being provided for in section 8 in the act. (Utah) State v. Candland, 834.

2. **UNIVERSITY OF UTAH**—Debt of is Debt of State.—While the University of Utah is a corporation and constitutes a legal entity with a limited capacity, it is a state institution or agency. It holds all property in trust merely and cannot dispose of it without consent of the state. If the property is destroyed, the loss is that of the state, which must also provide funds to conduct and maintain the university by the same means and in the same manner that all other state institutions are maintained. Therefore any debt of the university is, in fact, a debt of the state itself. (Utah) State v. Candland, 834.

See States.

COLLUSION.

See Divorce, 2, 3.

COMMERCE.

1. **COMMERCE**—The States have Full Power over commerce which does not assume an interstate character, and may pass such laws regulating commerce within the states as they may deem expedient. (Ill.) Luken v. Lake Shore & M. S. Ry. Co., 220.

2. **COMMERCE**—When Interstate and When Intrastate.—If the places from which and to which passengers and property are carried, and the line over which they are carried, are within the state, the commerce is domestic and is subject to state control. The transportation between points within a state by a railroad engaged in interstate traffic does not, of itself, determine the character of the traffic and make it interstate commerce. (Ill.) Luken v. Lake Shore & M. S. Ry. Co., 220.

3. **COMMERCE**—Regulation by Both Federal and State Government.—The fact that some railroads may be engaged in both interstate and intrastate commerce does not prevent the state from adopting such regulations as it may deem proper to provide for the safety of men engaged in the intrastate commerce, if such regulations are not inconsistent with or repugnant to the acts of Congress adopted for the regulation of railroads engaged in interstate commerce. (Ill.) Luken v. Lake Shore & M. S. Ry. Co., 220.

See Carriers, 6-10.

CONDONATION.

See Divorce, 4.

CONSTITUTIONAL LAW.*In General.*

1. **CONSTITUTIONAL LAW**—Statutes Presumed Valid.—All laws passed by the legislative branch of the government and approved by the executive are presumed to be constitutional, and the courts will not conjure theories to overturn and overthrow the solemn declarations of the legislative body. There must be a plain violation of

some provisions of the fundamental law. (Wash.) *State v. Superior Court for King County*, 925.

2. CONSTITUTIONAL LAW—Validity of Statute—Reasonable Doubt.—In order to declare a legislative act void upon the ground that it is in conflict with the constitution, the conflict must be very clear. If the court entertains a reasonable doubt upon the question, then the law must be upheld. (Utah) *State v. Candland*, 834.

3. UNCONSTITUTIONAL STATUTE—Force and Effect of.—An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. (Utah) *State v. Candland*, 834.

4. CONSTITUTIONAL LAW—Fourteenth and Fifteenth Amendments.—Both the fourteenth and fifteenth amendments to the federal constitution operate on state actions, not on individual actions, and the privilege and immunity clause applies to privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the constitution. (Ind.) *Hammer v. State*, 248.

5. CONSTITUTIONAL LAW.—The Words "Immunity" and "Privilege" are synonymous terms, and mean a right conferred peculiar to some individual or body; a favor granted; a special privilege. (Ind.) *Hammer v. State*, 248.

6. CONSTITUTIONAL LAW.—The Word "Creed," as used in article 1, section 4 of the constitution of Indiana, is used as applied to religious belief and has no reference to any other subject. (Ind.) *Hammer v. State*, 248.

Class Legislation.

7. CONSTITUTIONAL LAW—Class Legislation—Province of Legislature.—Where any classification can be sustained, it rests entirely within the discretion of the legislature to determine and establish its basis, and its determination when expressed in statutory enactment cannot be questioned successfully, unless it is so manifestly arbitrary, unreasonable, inequitable and unjust that it will cause an imposition of burdens upon one class, to the exclusion of another, without reasonable distinction. (Wash.) *State v. McFarland*, 909.

8. CONSTITUTIONAL LAW—Class Legislation—Basis of Classification.—The legislature, within the limitations of the exercise of a reasonable discretion, is required to base its classification upon some practical consideration suggested by necessity. Any class created by legislative enactment must be such as to embrace all persons or corporations in like circumstances or situation and be practical, reasonable and certain, and not factitious, arbitrary or unjust. (Wash.) *State v. McFarland*, 909.

Refusal of Officer to Act Because He Deems Statute Unconstitutional.

9. UNCONSTITUTIONAL STATUTE—Refusal of Officer to Act Under.—When the law requires an officer to act, although in ministerial manner merely, if he is directly responsible for his official acts, he may refuse to act if in his judgment the law is in conflict with some constitutional provision. In case proceedings are instituted to coerce him, he may set up the supposed defect in the law as a defense. (Utah) *State v. Candland*, 834.

Determination of Constitutionality of Statute and Effect Thereof.

10. CONSTITUTIONAL LAW—Effect of Judgment Upholding Statute.—Where a court of competent jurisdiction has entered a judgment declaring an enactment valid, and such judgment under the general law is binding upon an officer, he may not disregard the

judgment and refuse to act simply because in his opinion the court has erred. Under such circumstances he is relieved from further responsibility the same as a mere subordinate, who is not responsible for the official act, would be, and hence cannot legally refuse to act. (Utah) *State v. Candland*, 834.

11. CONSTITUTIONALITY OF STATUTE—When and How Determined—Interest of Party.—A court should not refuse to pass upon the constitutionality of a law in any proceeding in which the question is properly presented and to which the party presenting it is a party; and while a party who attacks the constitutionality of a law should have some interest in having the question determined, an officer, who is responsible for his official acts, has such interest in complying with his oath of office and obeying the constitution as to entitle him to raise the question. (Utah) *State v. Candland*, 834.

Compelling Person to Produce Private Papers.

See *Druggists*, 1.

12. CONSTITUTIONAL LAW—Compelling One to Testify Against Himself—Private Papers.—The constitutional provision that no person in any criminal action shall be compelled to testify against himself secures a person against the involuntary production of his private books and papers in response to any order of court addressed to him in the character of a witness, as well as against the giving of compulsory testimony, in every case where the use of such documentary evidence, or such testimony, may tend to incriminate himself. (Ind.) *State v. Pence*, 240.

Impairment of Obligation—Corporate Charters.

13. CONSTITUTIONAL LAW—Obligation of Contracts.—The Charter of a corporation constitutes a contract between it and the state granting it, and, like all other contracts, it is protected by the federal constitution from legislation of the state impairing its obligation. (Ark.) *Arkansas State Co. v. State*, 103.

14. CONSTITUTIONAL LAW.—A Corporation is a Person within the meaning of the due process and equal protection clauses of the fourteenth amendment of the federal constitution. (Ark.) *Arkansas State Co. v. State*, 103.

15. CONSTITUTIONAL LAW—Amendment of Corporate Charter. The right to amend the charter of a corporation, and thus to limit or regulate its power to contract, is within the constitutional power of the legislature under the power reserved by sections 2 and 6 of article 12 of the constitution of Arkansas. (Ark.) *Arkansas State Co. v. State*, 103.

16. CONSTITUTIONAL LAW—Amendment of Corporate Charter. The power of the legislature to amend and alter the charter of a corporation is not unlimited. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. (Ark.) *Arkansas State Co. v. State*, 103.

Regulation of Wearing Badges and Adornment.

17. CONSTITUTIONAL LAW.—Regulating the Wearing of Badges or Emblems of societies, and prohibiting the wearing thereof by those who are not members of the society represented, is within the police power of the state. (Ind.) *Hammer v. State*, 248.

18. CRIMINAL LAW—Badges.—A Statute Prohibiting the Wearing of a badge or emblem of a society by one who is not a member thereof does no more than make a misdemeanor of that which at common law was indictable as a "cheat." It is in the same class as

statutes against false pretenses and false personation. (Ind.) *Hammer v. State*, 248.

19. CONSTITUTIONAL LAW—Badges.—A Statute Prohibiting the wearing of a badge or emblem of a society by a person not a member thereof is constitutional. (Ind.) *Hammer v. State*, 248.

20. CONSTITUTIONAL LAW—Right of Dress and Adornment.—The right of a person to dress and adorn oneself as he pleases is subject to the modification that he may not adorn himself so as to represent himself to be one whom he is not, and thereby assume a status to which he is not entitled. (Ind.) *Hammer v. State*, 248.

Regulation of Payment of Wages.

21. CONSTITUTIONAL LAW—Semi-monthly Payment of Wages. The act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state is not an unreasonable exercise of the legislative power over, and control of, corporations. (Ark.) *Arkansas Stave Co. v. State*, 103.

22. CONSTITUTIONAL LAW—Semi-monthly Payment of Wages. The act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state, does not deny to them the equal protection of the law. (Ark.) *Arkansas Stave Co. v. State*, 103.

23. CONSTITUTIONAL LAW—Semi-monthly Payment of Wages. The act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state is not void as restricting the right of contract between corporations and their employees. (Ark.) *Arkansas Stave Co. v. State*, 103.

Regulation of Druggists' Sales of Poison.

24. DRUGGISTS—Statute Regulating Sales of Poisons—Certainty. A statute prohibiting the sale at retail of any poisons without the druggist making the sale satisfying himself that the poison is to be used for legitimate purposes is not void for uncertainty in failing to define the terms "retail" and "legitimate purposes." (Ky.) *Katzman v. Commonwealth*, 359.

25. DRUGGISTS—Statute Regulating Sales of Poisons—Discrimination—Due Process.—A statute prohibiting the sale of poisons at retail except on certain conditions, but excluding from its operation manufacturing chemists and druggists selling at wholesale, does not make an arbitrary and unreasonable discrimination against druggists selling at retail nor deprive them of liberty or property without due process of law. (Ky.) *Katzman v. Commonwealth*, 359.

26. DRUGGISTS—Regulation of the Sale of Drugs and Poisons is within the police power of the state. (Ky.) *Katzman v. Commonwealth*, 359.

Inspection of Hotels.

27. CONSTITUTIONAL LAW—Inspection, etc., of Hotels.—A statute classifying hotels for the purposes of inspection, sanitary measures and protection from fire, according to the number of rooms contained therein, is not unreasonable or unconstitutional class legislation. (Wash.) *State v. McFarland*, 909.

28. CONSTITUTIONAL LAW—Inspection, etc., of Hotels.—A statute providing sanitary measures, fire protection, and inspection for hotels is not unconstitutional as depriving the owners thereof of property or liberty without due process of law, or as denying them the equal protection of the law. (Wash.) *State v. McFarland*, 909.

29. CONSTITUTIONAL LAW—Inspection of Hotels—Payment of Fees.—A provision in a statute providing for the inspection of hotels

that any owner, manager, agent or person in charge of a hotel "who shall refuse or neglect to pay the fee for inspection prescribed herein shall be guilty of a misdemeanor," and prescribing a penalty of fine or imprisonment, or both, is unconstitutional, as violative of the prohibition against imprisonment for debt. (Wash.) *State v. McFarland*, 909.

30. CONSTITUTIONAL LAW—Inspection, etc., of Hotels.—An Entire Statute will not be held invalid by reason of a single unconstitutional provision which is not essential to its purposes and validity as a whole; a statute providing for the inspection of hotels will not be held invalid by reason of the invalidity of a provision regarding the payment of the fees of inspectors. (Wash.) *State v. McFarland*, 909.

See Criminal Law, 9-12; Elections; Intoxicating Liquors, 4; Mandamus, 1; Master and Servant, 30; States.

Note.

Constitutional Law, officers acting or holding under unconstitutional statute, 182-188.

CONTEMPT OF COURT.

1. INJUNCTION—When Erroneous Merely and not to be Defied.—If, in a given situation, there is any valid ground upon which a temporary injunctive order might, under any circumstances, be properly issued, though none be stated in the complaint, and it would be highly erroneous, even jurisdictionally wrong in the sense of inexcusable use of judicial authority, to allow such an interference, and such allowance nevertheless occurs, it is erroneous, not void, and cannot properly be defied. (Wis.) *Cline v. Whitaker*, 1039.

2. INJUNCTION—Duty to Obey Until Vacated.—As regards an injunctive order, "if the court's command is within its power to make under any circumstances upon any grounds and for any reasons whatever, the person enjoined is bound to obey till the order shall have been vacated." (Wis.) *Cline v. Whitaker*, 1039.

CONTINUANCE.

CONTINUANCE.—When an Information is Amended upon the Eve of trial and the defendant files a motion for a postponement supported by affidavit showing surprise, and that the amendment to the information requires additional preparation upon the part of the defendant before he could be ready for trial, reasonable time should be allowed the defendant, by the court, within which to make such preparation. (Okla. Cr.) *Smith v. State*, 688.

CONTRACTS.

Validity.

1. CONTRACT—Validity of Agreement Between City and Health Officer.—Action to recover for medical services rendered by the plaintiff, who was the health officer of the defendant city at a fixed salary, in controlling and eradicating an epidemic of smallpox and typhoid fever in the city, pursuant to a contract with the city board of health, of which he was a member, that he should render such service and be paid the reasonable value thereof. Held, following *Stone v. Bevans*, 88 Minn. 127, and distinguishing *Chairman of Board of Health v. Board of County Commrs. of Renville County*, 89 Minn. 402, that the contract was void. (Minn.) *Bjelland v. City of Mankato*, 460.

2. CONTRACT to Buy Output of Mill—Mutuality.—A contract by which one party agrees to buy the lumber produced by a certain saw-mill at a certain fixed price is not void for want of mutuality, since

a corresponding obligation on the part of the other party to sell and deliver the lumber is implied. (Ark.) *Thomas-Huycke-Martin Co. v. Gray*, 93.

Building Contracts.

3. BUILDING CONTRACT.—Under a Contract to Erect a House and Sell it with the lot upon which it is erected, the vendee is not bound to take the property when it is not finished and tendered to him as provided in the contract, but may recover the money paid thereunder. (Ky.) *Nance v. Patterson Building Co.*, 398.

4. BUILDING CONTRACT—Departures and Imperfections.—Under an agreement to sell certain property to be improved by a certain kind of building, trivial departures in executing the work will not excuse acceptance; but where the evidence is such as to leave it in doubt, or to be determined from conflicting evidence, the question whether the performance of the contract was substantial, and whether any departure was material or merely trivial and inconsequential, is for the jury, who determine the fact by the standard of their own common sense and experience. (Ky.) *Nance v. Patterson Building Co.*, 398.

5. BUILDING CONTRACT—"Material Change"—"Substantial Compliance."—The terms "material change" and "substantial compliance," when used with reference to the performance of contracts where the matter is not so marked as to not admit of dispute, are best left to the jury without further definition of the terms. They are not legal terms like negligence, malice, felonious, and so forth, but are expressions of such common use as that to undertake to further define them is more apt to confuse than to aid a jury. (Ky.) *Nance v. Patterson Building Co.*, 398.

Fraud in Procuring—Remedies.

6. CONTRACTS—Fraud and Deceit—Remedies.—In cases of fraud and deceit the injured party has two remedies: First, he may rescind the contract; or, secondly, he may fully perform the contract, and sue for damages resulting from the fraud and deceit. (Mo.) *Brown v. South Joplin Lead etc. Min. Co.*, 509.

7. CONTRACTS—Fraud—Waiver of Damages.—Adhering to a contract is not a waiver of damages for fraud and deceit. The injured party is not compelled to abandon his contract upon the discovery of fraud, but may go on in the fulfillment thereof and rely upon his action for fraud and deceit. (Mo.) *Brown v. South Joplin Lead etc. Min. Co.*, 509.

8. CONTRACTS—Fraud in Procuring—Effect of New Agreement.—Where a party to a contract, with knowledge that it has been procured from him by fraud, makes a new agreement in reference to the subject matter, he cannot recover for the fraud tincturing the original contract; and this although he expended a large amount of money under the contract before discovering the fraud. (Mo.) *Brown v. South Joplin Lead etc. Min. Co.*, 509.

See Damages, 3-11.

CORPORATIONS.

In General.

1. CORPORATIONS—Commencement of Existence.—Under the statutes of Wisconsin a corporation comes into existence at the time of the filing of its articles with the register of deeds, and is capable from that time to bind itself by contract, and the signers of its articles have then lawful authority to manage its affairs. (Wis.) *Sentinel Co. v. A. D. Meiselbach Motor Wagon Co.*, 1007.

2. CORPORATIONS—Failure to Keep Record—Presumption.—The failure to keep a record by an officer of a corporation whose duty it is to keep such record ought to stand against him when he attempts to assert a claim against the corporation which should appear by such record in the absence of some other convincing evidence. (Ky.) *Star Mills v. Bailey*, 370.

3. CORPORATIONS.—Custom and Usage cannot arise out of a single transaction, nor can a custom be established by the acts of a corporate officer where it is shown that the corporation in each instance repudiated the act as soon as it was discovered. (Ky.) *Star Mills v. Bailey*, 370.

Directors must Act as Board.

4. CORPORATIONS—Directors must Act as a Board.—A corporate board of directors must act as a board, in order to bind the corporation. When a board can delegate a power and intends to, it should act in an official meeting and by its records. A corporation, being artificial, can act only in the manner allowed by law, and the acts of its directors are not its acts unless they act in the manner required by law. (Ky.) *Star Mills v. Bailey*, 370.

Powers of Officers.

5. A CORPORATION Acts Only Through Its Officers actually empowered to do so, or by the acts of those permitted by it to do the thing in question. The former is the strictly legal way in which the corporation acts. The latter may bind it, not because the officers are empowered to do so, but because, having been held out or suffered to act in such capacity, the corporation is estopped to deny their legal authority. (Ky.) *Star Mills v. Bailey*, 370.

6. CORPORATIONS—Authority of Incorporators and Officers to Bind.—Where it appears that one of the signers of articles of incorporation, immediately after the filing thereof, assumed the management of the business, and contracted indebtedness on behalf of the corporation and held himself out as acting for the corporation; that with the consent of the other signers of the articles he acted as secretary and manager of the sales department of the corporation upon salary, made contracts for it and represented it in the management of its business, the evidence is sufficient to support a verdict against the corporation upon a contract made by such officer. (Wis.) *Sentinel Co. v. A. D. Meiselbach Motor Wagon Co.*, 1007.

Loan by Director to Corporation.

7. CORPORATIONS.—A Director of a Corporation may Loan It money and take its binding obligation to repay it, but as in so doing he acts in a dual capacity, the presumption is unfavorable to him, and when his act is called in question by the corporation the burden is imposed on him to show by a preponderance of proof that he acted bona fide, and that the corporation got the benefit of the act to the extent charged. (Ky.) *Star Mills v. Bailey*, 370.

Borrowing Money and Execution of Note.

8. CORPORATIONS.—Power to Borrow Money.—A trading corporation may borrow money when not interdicted by its charter, and may execute its note to evidence the debt so made. (Ky.) *Star Mills v. Bailey*, 370.

9. CORPORATIONS.—Power of President to Borrow Money.—The president of a corporation has not the inherent power to borrow money for it, or to execute a note on its behalf. Such power must be delegated to him either by the by-laws or resolutions of its governing body, or by its charter, or by its custom of dealing. (Ky.) *Star Mills v. Bailey*, 370.

10. CORPORATIONS—Promissory Note—Presumptions of Authority to Sign.—In addition to showing the signature of the corporate name of a corporation by its president to a promissory note, the authority of the president must be shown. Without this proof the note imports nothing—raises no presumption of consideration and does not shift the burden to the maker to prove lack of consideration. (Ky.) *Star Mills v. Bailey*, 370.

Pledge of Own Stock.

11. CORPORATIONS.—Pledge of Its Own Stock cannot be made by a corporation. (Ky.) *Star Mills v. Bailey*, 370.

Foreign Corporations.

12. FOREIGN CORPORATION—Penalty for Noncompliance With the Law.—It is within the legislative province to prescribe the penalties to be visited on a foreign corporation for failure to comply with the laws of the state, and courts cannot soften or mitigate them. (Wis.) *Hanna v. Kelsey Realty Co.*, 1075.

13. FOREIGN CORPORATION—Noncompliance With Law Incapacitates to Acquire Land.—Where the statutes provide that no foreign corporation shall transact business or acquire, hold or dispose of property in the state unless it shall have first complied with certain statutory requirements, and that every contract relating to property within the state before such compliance is "wholly void" on the part of the corporation, a conveyance to a foreign corporation that has not complied with the statutes is void, not voidable merely, and the right to question its validity rests with parties interested and not with the state only. (Wis.) *Hanna v. Kelsey Realty Co.*, 1075.

14. FOREIGN CORPORATION—Noncompliance With Law—Acquisition of Land.—The doctrine of estoppel cannot be invoked against a mortgagee in an unrecorded mortgage for failure to take the necessary steps to apprise a foreign corporation of his rights, when the corporation cannot acquire title to property because it has not complied with the statutes of the state. (Wis.) *Hanna v. Kelsey Realty Co.*, 1075.

See Constitutional Law, 13-16; Larceny, 4.

COST BOND.

See Criminal Law, 1.

COTENANCY.

See Tenancy in Common.

COUPLING DEVICES.

See Railroads, 1-7.

COURTS.

COURTS—Continuing Jurisdiction.—Where a defendant appears generally or process is served upon him, he is in court for every purpose connected with the action and is charged with notice of whatever action the court may take while the suit is pending; the jurisdiction continues until judgment. (Md.) *McSherry v. McSherry*, 428.

CREED.

See Constitutional Law, 6.

CRIMINAL LAW.

In General.

1. CRIMINAL LAW—Felony.—Bond for Costs is not required to be given by one who institutes a prosecution for a felony. Such a

bond is void, and a judgment based thereon is coram non iudice, and void. (Ark.) *Emerson v. Hopper*, 121.

2. **CRIMINAL LAW—Reasonable Doubt.—An Instruction.**—"This court charges the jury that if, upon consideration of all the evidence, they have a reasonable doubt of defendant's guilt, arising out of any part of the testimony, they must find the defendant not guilty," asserts a correct legal proposition, and of necessity is apt in most, if not all, criminal trials. It could hardly be abstract in any criminal case. (Ala.) *Davidson v. State*, 17.

3. **CRIMINAL TRIAL.—A Court may Properly Instruct a jury** in a criminal case respecting any facts established by the evidence beyond any room for reasonable controversy, and when such evidentiary facts exist establishing beyond any room for reasonable controversy an essential of any ultimate conclusion sought, it is not harmful error, if error at all, to treat such essential as having been proved. (Wis.) *Burns v. State*, 1081.

4. **CRIMINAL TRIAL—Credibility of Defendant—Instructions.**—It is error to single out the defendant in a criminal case, and instruct the jury specially upon his credibility as a witness. (Okl. Cr.) *Culpepper v. State*, 668.

5. **CRIMINAL LAW—Construction of Verdict.**—In a criminal case the verdict should be construed with reference to the indictment or information and the entire record, and if, when so construed, it is definite and clearly expresses the manifest intention of the jury, and is otherwise legal, mere inaccuracies of expression will not render it void. (Ark.) *Blackshare v. State*, 144.

Criminal Statutes—Certainty—Construction.

6. **CRIMINAL STATUTES—Certainty Required.—A Penal Statute** creating an offense must be sufficiently plain and exact to enable persons of ordinary intelligence to understand its provisions; to determine in advance what they may and what they may not do under it. (Ky.) *Katzman v. Commonwealth*, 359.

7. **CRIMINAL STATUTES—Certainty of Meaning of Words and Phrases.**—The fact that different trial courts and juries may not always be harmonious in the conclusions reached upon the meaning of words or phrases used in a statute, or that there may be occasional doubt upon that subject, will not invalidate the statute. (Ky.) *Katzman v. Commonwealth*, 359.

8. **CRIMINAL STATUTES—Reasonable Construction.**—Every penal statute should be given a reasonable construction; one that will effectuate the legislative intent in its enactment. The established rules of construction do not require that the sufficiency of penal statutes should be measured by a technical standard that would impair their efficiency and make their enforcement difficult, if not impossible. A penal statute need not be so elaborate in its detail as to attempt to meet every possible state of fact that may arise under it. (Ky.) *Katzman v. Commonwealth*, 359.

8a. **CRIMINAL LAW—Statute Void in Part.**—If the part of a statute under which a defendant is prosecuted is valid it is immaterial that another part is invalid, if the two parts are separable. (Ind.) *Hammer v. State*, 248.

Right to be Confronted With Witnesses.

9. **CONSTITUTIONAL LAW—Right to be Confronted With Witnesses.**—Article 6 of the amendments to the federal constitution and section 7 of article 6 of the state constitution, providing that the accused shall be confronted with the witnesses against him, and that he shall have the right to meet the witnesses against him face to face, are satisfied where the defendant has once, at some proper stage of

the proceeding, been confronted with and met such witness face to face and has cross-examined him, or been given the privilege so to do. (S. D.) *State v. Heffernan*, 764.

Presence of Accused.

10. **CRIMINAL TRIAL**—*Presence of Accused, What Sufficient to Show.*—An order in a criminal case, reciting an appearance by the prisoner in discharge of his recognizance and an announcement of his readiness for trial, suffices to show his presence in court in his own proper person at the trial. (W. Va.) *State v. Yoes*, 978.

Right to Counsel.

11. **CRIMINAL TRIAL**—*Right of Accused to Assistance of Counsel.*—The clause of section 14 of article 3 of the constitution providing that, in the trial of criminal cases, the accused "shall have the assistance of counsel," is permissive and conditional upon the pleasure of the accused, in its application to the conduct of the trial; and, to make a conviction valid, the record need not affirmatively show the prisoner had the assistance of counsel. (W. Va.) *State v. Yoes*, 978.

Evidence.

12. **CRIMINAL LAW**—*Evidence of Other Crimes.*—*Letters Written* by a person accused of crime, showing his guilt of the offense charged, are competent evidence, although they contain admissions of other crimes. (Wash.) *State v. Thuna*, 902.

13. **CRIMINAL TRIAL**—*Evidence.*—*If the Accused Flees, or Attempts to Bribe a witness or a juror, or to fabricate evidence*, all such conduct is receivable as evidence of his guilt of the main fact charged. It is in the nature of an admission. (Ky.) *Turpin v. Commonwealth*, 378.

14. **CRIMINAL TRIAL**—*Testimony at Former Hearing.*—One of the exceptions to the general rule excluding hearsay testimony is, that the testimony of a witness given in a former action, or at a former stage of the same action, is competent in a subsequent action or a subsequent proceeding of the same action, where it is shown that such witness is dead, insane, disqualified or beyond the jurisdiction of the court, cannot conveniently be found, or has been kept away by the opposite party, and also that such former giving of testimony was under oath, and that the opposing party cross-examined or was given an opportunity to cross-examine such witness. This rule applies in criminal causes. (S. D.) *State v. Heffernan*, 764.

15. **CRIMINAL TRIAL**—*Testimony Before Committing Magistrate.*—The testimony of a witness taken before a committing magistrate upon the preliminary hearing of a charge, where the accused had the right of cross-examination, is competent upon the trial of the charge, upon a showing that the witness is dead, insane, or beyond the jurisdiction of the court, and its admission does not violate the constitutional or statutory right of the accused to be confronted with the witnesses against him. (S. D.) *State v. Heffernan*, 764.

Presumption of Innocence.

16. **CRIMINAL TRIAL**—*The Presumption of Innocence Fixes the Burden of proof* in the first instance, and designates the party whose duty it is to produce evidence and effect persuasion. It is not evidence and does not partake of the nature of evidence. (Okla. Cr.) *Culpepper v. State*, 668.

17. **CRIMINAL TRIAL**—*The Presumption of Innocence Remains* with the defendant only until it is overcome, and does not necessarily remain with him throughout the whole of the trial. (Okla. Cr.) *Culpepper v. State*, 668.

Conduct of Prosecuting Attorney.

18. **CRIMINAL TRIAL—Remarks of District Attorney.**—It is not prejudicial error for the district attorney in his closing argument in a prosecution for receiving stolen property, to say: "Why are all these people here? They came here to see if the law can be enforced; and I want to know, and they want to know, if property can be stolen and no explanation be offered, and a man go scot free." (Ark.) *Blackshare v. State*, 144.

19. **CRIMINAL TRIAL—Misconduct of Prosecuting Attorney.**—The statement to the jury by the prosecuting attorney that the defendant had attempted to bribe a juror, or that a juror had been "fixed" by or in the interest of the defendant, and that the judge knew such to be the fact, which the court upon objection refuses to strike out, is in the nature of evidence against the defendant without the presence of the witness, highly prejudicial, and ground for reversal of a judgment of conviction. (Ky.) *Turpin v. Commonwealth*, 378.

20. **CRIMINAL TRIAL—Argument of Counsel—Scope and Limitation.**—A counsel's argument is in its purpose a connected presentation of the facts supposed to have been proved by evidence tending in favor of his client. Any representation of fact by him in argument must not be an assertion made upon his own credit; it must be based solely upon those matters of facts of which evidence has already been introduced, or those judicially noticed. (Ky.) *Turpin v. Commonwealth*, 378.

21. **CRIMINAL TRIAL—Misconduct of Prosecuting Attorney—Removal of Prejudice.**—Improper and prejudicial argument of the prosecuting attorney should be withdrawn in such manner as to leave no doubt that its evil effect is removed, or, upon consent of the accused, the court should set aside the swearing of the jury. (Ky.) *Turpin v. Commonwealth*, 378.

See Jury.

Note.

Criminal Law, admissibility in evidence of adjudication of insanity, 351.

CROPS.

See Damages, 16-19.

Note.

Crops, damages to growing, 309-330.

CUSTOM AND USAGE.

See Corporations, 3.

DAMAGES.*In General.*

1. **DAMAGES—Action in Contract or in Tort.**—A Greater Latitude is allowed by the court to the jury in the assessment of damages in actions of tort than is allowed in actions of contract. (Pa.) *Hillsdale Coal etc. Co. v. Pennsylvania R. R. Co.*, 700.

For Loss of Hearing.

2. **DAMAGES—Measure of for Loss of Hearing.**—A verdict of six thousand nine hundred dollars, in an action for personal injuries sustained by a young man from a severe electrical shock, is not excessive, the evidence showing that he suffered greatly for several weeks; that the hearing in one ear was destroyed and in the other impaired. (Ark.) *Southwestern Telegraph & Tel. Co. v. Abeles*, 115.

For Breach of Contract.

3. CONTRACTS—Special Damages for Breach.—If the special, ulterior purposes of one of the parties in making a contract are disclosed, they then become an element of the duty thereby imposed upon the other party, and afford a substantial basis for the assessment of special damages. (Ala.) *Bixby-Theirson Lumber Co. v. Evans*, 47.

4. CONTRACTS.—Damages for Breach of Contract to Loan Money are in ordinary cases no more than nominal; money, like the staples of commerce, being in contemplation of law always in the market and procurable at the lawful rate of interest. (Ala.) *Bixby-Theirson Lumber Co. v. Evans*, 47.

5. CONTRACTS—Special Damages for Breach of Contract to Pay Money.—Where the obligation to pay money is special, and has reference to other objects than the mere discharge of a debt, special damages may be recovered, according to the actual injury suffered, for breach of the obligation. (Ala.) *Bixby-Theirson Lumber Co. v. Evans*, 47.

6. CONTRACTS—Special Damages for Breach of Contract to Advance Money.—Where one party to a contract agrees to advance to the other money necessary to build a dam, and to furnish certain logs, by sawing which at a stipulated price the other party should repay the advance, and other logs which he might saw at a profit, a breach of the obligation to advance the money involves by necessity a breach of the collateral agreement in respect to the manner of repayment, and the other party owes no duty to take up the additional burden of going into the market for money, or to expend money in hand in order to complete the dam, where it already appears that he would lose in any event a material advantage for which he contracted, and he is entitled to such damage as would be the equivalent of a restoration of his status quo ante. (Ala.) *Bixby-Theirson Lumber Co. v. Evans*, 47.

7. CONTRACTS—Breach of Contract to Advance Money.—Profits which the plaintiff may have expected to realize from the operation of a mill, and which the parties doubtless contemplated as a result of their contract, are nevertheless speculative, remote, and incapable of that clear and satisfactory proof which the law requires to constitute recoverable damages in an action for breach of a contract to advance money to construct a dam and mill. (Ala.) *Bixby-Theirson Lumber Co. v. Evans*, 47.

8. CONTRACTS—Special Damages for Breach of Contract to Advance Money.—Under a contract by which one party agrees to advance money to build a dam, etc., the other party to advance the difference only in case the sum agreed upon is insufficient, the latter cannot recover money spent in the work, as special damages, in an action for breach of the contract in failing to advance the money. (Ala.) *Bixby-Theirson Lumber Co. v. Evans*, 47.

9. CONTRACT—Damages for Breach—Mental Anguish.—Damages for mental anguish, because of the violation of a contract, are confined almost entirely to that class of contracts upon the breach of which the injured party may, if he so elect, bring an action sounding in tort. (Iowa) *Smith v. Sanborn State Bank*, 336.

10. CONTRACT TO PAY MONEY—Damages for Breach—Mental Anguish.—Damages for mental anguish growing out of the violation of a contract for the payment of money are not recoverable. (Iowa) *Smith v. Sanborn State Bank*, 336.

11. CONTRACT TO PAY MONEY.—Damages for Breach of Contract in failing to pay or deliver money according to agreement

are generally confined to the sum wrongfully withheld, with interest during the time payment is delayed. Special circumstances may sometimes justify the recovery of special damages, but these do not include compensation for mental suffering. (Iowa) *Smith v. Sanborn State Bank*, 336.

For Destruction of Trees or Timber.

12. **FIRES—Damages for Burning Standing Timber.**—The measure of damages for negligently burning over woodland is the difference in the market value of the land before and after the fire. (Pa.) *Mahaffey v. New York Cent. etc. R. R. Co.*, 730.

13. **FIRES—Damages for Burning Standing Timber.**—In an action for the negligent burning over of woodland covered with a growth, none of which was matured as timber, strictly speaking, but much of sufficient size to be merchantable for certain purposes, and the remainder a smaller growth ripening into marketable material, two standards of measurement of loss cannot be applied, one for the material that was marketable, and another for that not marketable. The loss is an entire one, and the only standard applicable is one covering every element of loss—the difference in the market value of the land before and after the fire. (Pa.) *Mahaffey v. New York Cent. etc. R. R. Co.*, 730.

14. **FIRES—Burning of Standing Timber—Evidence of Loss.**—In an action for negligently burning over part of a tract of woodland, evidence of the condition of the unburned portion, which is of the same character as that which was burned, is admissible as showing what has been destroyed. (Pa.) *Mahaffey v. New York Cent. etc. R. R. Co.*, 730.

15. **TREES—Measure of Damages for Destruction.**—The measure of damages when ornamental or fruit-bearing trees or growing timber is cut, is the difference in the value of the realty before and after the cutting. (Pa.) *Mahaffey v. New York Cent. etc. R. R. Co.*, 730.

For Injury to Crops.

16. **DAMAGES—Growing Crops—Measure of Recovery.**—In an action to recover damages for an injury to growing crops, where no recovery for injury to the land is sought, the value of the crops in the field, or else on the market with deductions of the reasonable cost of maturing and marketing, is the correct measure of damages. (Iowa) *Tretter v. Chicago etc. Ry. Co.*, 304.

17. **DAMAGES—Growing Crops.**—Instructions stating, in substance, that the action is to recover, not for damages to plaintiff's land, but to his growing crops; that the jury, in arriving at the amount, should consider the labor, care, attention and expense bestowed thereon up to the time of loss—in other words, the cost of production; that they may consider the market value of the crops in the field or in the market place, and how nearly the crops were ready for market in either place; that they are to consider all evidence as to plaintiff's damage or loss, and weigh the opinions of witnesses as to the value of the crops and the cost of producing them; and that to whatever amount is found interest shall be added, are not objectionable as assuming plaintiff's right to recover; nor are they objectionable as proceeding on the theory that all the crops were destroyed; nor because unsupported by evidence of the cost of production where there was evidence from which such cost might have been inferred. (Iowa) *Tretter v. Chicago etc. Ry. Co.*, 304.

18. **DAMAGES—Growing Crops.**—An instruction, on the measure of damages, in an action to recover for injury to a growing crop, is insufficient unless the jury are told whether the plaintiff should be allowed the market value of the crop in the field or in the market

place, and, if in the market place, whether deductions should be made of the cost of maturing the crop and placing it upon the market, or whether such expense is to be eliminated. (Iowa) *Tretter v. Chicago etc. Ry. Co.*, 304.

19. DAMAGES—Growing Crops—Evidence of Value.—In an action to recover damages for an injury to crops, caused by so obstructing surface water as to cause it to be thrown back and to overflow the plaintiff's land, evidence as to the value of the crops must be confined to such crops as the plaintiff had; and the exclusion of a price list is without prejudice where it gives the same prices for growing plants that the plaintiff has given in his testimony. (Iowa) *Tretter v. Chicago etc. Ry. Co.*, 304.

See Carriers, 8-10; Eminent Domain, 7-12.

Note.

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- evidence in case of partial destruction, 326.
- evidence of value at time of destruction, 321-326.
- evidence relative to market value, 320.
- evidence relative to rental value, 321.
- fruit crop or trees, 318, 327.
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- rental value of land as measure of, 311-314.
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DEEDS.

In General.

1. DEEDS.—Covenants in a Deed That are Plainly Intended to Defend that which has been granted must be construed to be only coextensive with the grant. (W. Va.) *Kiser v. McLean*, 948.

2. DEEDS—Form and Sufficiency—Grant for Certain Purpose.—An agreement under seal by which "The parties of the first part upon consideration of the premises hereinafter expressed, hereby agree that the said party of the second part, its lessees and assigns may and shall occupy forever for purposes of wharf all that strip of land . . . in consideration whereof said Borough [party of second part] hereby agrees that said party of the first part may and shall occupy from and after the date hereof without let, hindrance or interference from the said Borough to the sole use, benefit and behoof of said parties of the first part, their heirs and assigns forever and for whatever purpose the said parties of the first part may see proper," a certain piece of land, while not styled a deed or conveyance, is an agreement of bargain and sale, founded upon a valuable and sufficient consideration, and, when recorded, has the effect of a feoffment with livery of

seisin or of a deed under the statute of uses. (Pa.) *Riggs v. New Castle*, 733.

3. **DEEDS—Formal Parts, Whether Essential.**—It is not absolutely essential that a deed should contain all the ordinary formal parts. It is sufficient if the matter written is legally and orderly set forth by words which clearly specify the agreement and meaning of the parties and bind them. (Pa.) *Riggs v. New Castle*, 733.

4. **DEEDS.**—The Word "Successors" is not Essential to pass a fee. (Pa.) *Riggs v. New Castle*, 733.

5. **DEEDS.**—The Words "Bargain and Sale" are not Necessary to constitute a deed of bargain and sale, in order to pass a fee simple. (Pa.) *Riggs v. New Castle*, 733.

6. **DEEDS—Statement of Purpose of Grant.**—The mere expression of a purpose will not of itself debase a fee; thus, the addition of the words "for the purpose of wharf" to words sufficient to pass a fee simple in a grant to a municipality, not preceded or followed by any words of condition or limitation, do not diminish the estate created, but should be taken as used for the purpose of showing the grant to be lawful on its face, that is, made for a purpose for which the municipality had power to acquire real estate. (Pa.) *Riggs v. New Castle*, 733.

Mental Capacity to Execute.

7. **DEEDS—Mental Condition of Grantor.**—Old age, eccentricity, or even partial impairment of mental faculties of a grantor is not necessarily sufficient to warrant setting aside his deed. If he had sufficient mental capacity to comprehend the nature of the transaction and protect his own interests, the deed will not be set aside for want of mental capacity. (Ill.) *Crosby v. Dorward*, 230.

8. **DEEDS—Mental Capacity—Delusions.**—That the grantor may have been affected with certain delusions or lapses of memory, if they did not affect or have anything to do with the transaction in question, will not require the setting aside of his deed for want of mental capacity. (Ill.) *Crosby v. Dorward*, 230.

Building Restrictions.

9. **BUILDING RESTRICTIONS.**—A Covenant Prohibiting Anything but a Private Residence is violated by the erection of a flat, apartment or community house, designed and intended for occupancy by two or more families. (N. J. Eq.) *Koch v. Gorruffo*, 552.

Reservations and Exceptions—Minerals—Oil and Gas.

10. **DEEDS—Reservation of Mines and Minerals.**—The expression in a deed, "excepting mines and minerals which are not hereby intended to be conveyed," is a clear and unambiguous expression or assertion by the grantor that a part of his estate in the lands was not granted. It is an exception of a portion of the premises described as granted. And the subject of exception is not of some right to mine; it is the property in the minerals which the land contains, and in the mines from which they may be obtained. (N. Y.) *White v. Miller*, 618.

11. **DEEDS—Reservation of Minerals.**—Gypsum underlying a limestone formation is a mineral within the meaning of a reservation, by deed, of all mines and minerals. (N. Y.) *White v. Miller*, 618.

12. **DEEDS.**—A Grant or Exception of "Minerals" will include all inorganic substances which can be taken from the land, and to restrict the meaning of the term, there must be qualifying words or language evidencing that the parties contemplated something less general than

all substances legally cognizable as minerals. (N. Y.) *White v. Miller*, 618.

13. DEEDS—Exception of Minerals.—Under a Deed "excepting mines and minerals, which are not hereby intended to be conveyed," surface limestone is not excepted but every other mineral is. The grantee takes only the surface of the land, including the limestone. (N. Y.) *White v. Miller*, 618.

14. DEEDS—Exception of Minerals.—By Accepting a Deed excepting "mines and minerals," the grantee does not enter into any covenant with respect thereto, but in a proper case an equitable agreement may be implied which will work by way of estoppel. (N. Y.) *White v. Miller*, 618.

15. DEEDS—Exception of Minerals—Subsequent Grantees.—The grantee of a grantee under a deed excepting all the mines and minerals, whose deed is made subject to the original exception, does not, by accepting the same, enter into any covenant with respect to the exception and is not precluded from afterward acquiring title to the excepted property nor estopped from denying that his grantor had title. (N. Y.) *White v. Miller*, 618.

16. OIL AND GAS—Exception of in Grant of Land.—In a grant of land, an exception of the oil and gas and the right to go upon the land for the same is not defeated by covenants for quiet possession of the land and freedom from encumbrances thereon. Such covenants relate only to the thing conveyed—the land without the oil and gas—the land burdened with the right to operate thereon for the oil and gas retained. (W. Va.) *Kiser v. McLean*, 948.

See Religious Corporations.

Note.

Deeds, conveyance of severed mineral estate, 952.
conveyance of land carries minerals therein, 953.
severance of mineral and surface estates, 951.

De Facto Officers. See Officers De Facto.

DEFINITIONS.

See Words and Phrases.

Note.

Demonstrative Legacies, what are, 598-603.

DEPOTS.

See Carriers, 13-16.

DESCENT AND DISTRIBUTION.

DESCENT AND DISTRIBUTION—Title of Heirs to Personalty.—The naked legal title to the personal property of an intestate vests in the administrator, but the equitable title vests in the heirs, and the administrator holds the property in trust for the payment of debts. (Ill.) *Moore v. Brandenburg*, 206.

Note.

Devises, whether specific or general, 577-580.

DISTRICT ATTORNEY.

See Criminal Law, 18-21.

DIVORCE.

Agreements Respecting.

1. DIVORCE—Validity of Agreements Respecting.—The Policy of the Law favors marriage and disfavors divorce. Parties may

not be permitted to make agreements with respect to divorce suits which would be perfectly proper to be made in other litigations. (N. J. Eq.) *Sheehan v. Sheehan*, 566.

Collusion.

2. **DIVORCE—Collusion in Divorce Suits** is a definite kind of an agreement of parties concerning the divorce. It is not limited to a corrupt bargain to impose a case upon the court, either by the suppression of evidence or the manufacture thereof; it includes any agreement of the parties as the result of which no defense shall be made. (N. J. Eq.) *Sheehan v. Sheehan*, 566.

3. **DIVORCE—Collusive Agreement—Advancement of Money for Suit.**—An agreement between husband and wife that she will bring suit for divorce and he will not defend is within the definition of collusion, and such an agreement may be inferred from the fact that he advanced her money for the purpose of bringing the suit. (N. J. Eq.) *Sheehan v. Sheehan*, 566.

Condonation.

4. **DIVORCE—Condonation of Desertion.**—The fact that a man, after his wife deserts him, contributes money to defray her expenses during illness, and shows himself anxious to receive her should she return, does not constitute a condonation of her desertion. (Ark.) *Alexander v. Alexander*, 127.

Property.

5. **DIVORCE—Interest of Wife in Property.**—The act of March 28, 1893 (Kirby's Digest, section 2684), gives to the divorced wife for and during her natural life such interest and amount of the husband's real estate as would be her dower in case of his death. (Ark.) *Hix v. Sun Ins. Co.*, 138.

6. **DIVORCE—Effect upon Title to Property.**—A decree of divorce awarding the temporary possession of certain of the husband's real estate to the wife, and reserving the question of its division or the designation of the wife's portion, does not affect the title of the husband to the property. Until such division or designation is made he remains the sole owner thereof. (Ark.) *Hix v. Sun Ins. Co.*, 138.

Alimony.

7. **DIVORCE—Alimony—Jurisdiction Over Nonresident.**—A decree for alimony is a decree in personam, and unless the court has acquired jurisdiction over the person against whom it is passed, it is not binding upon him. Such jurisdiction over a nonresident can be acquired only by service of process within the state, or his voluntary appearance. Constructive service by publication, or a special appearance for the purpose of objecting to the jurisdiction, is not sufficient. (Md.) *McSherry v. McSherry*, 428.

8. **DIVORCE—Alimony—Jurisdiction Over Nonresident.**—Where by stipulation of the parties a decree of divorce required the defendant to pay to the plaintiff as alimony such sum as the court might thereafter determine upon application of either party, the court retained jurisdiction to fix such amount by supplemental decree on application of the plaintiff, although the defendant had removed from the state, and notice of such application to his attorney of record is sufficient. (Md.) *McSherry v. McSherry*, 428.

DOGS.

See *Animals*, 4-6; *Nuisance*, 3.

DRUGGISTS.*Compelling Production of Records as Evidence.*

1. CONSTITUTIONAL LAW—Compelling Druggist to Produce Records as Evidence.—A druggist or pharmacist cannot be compelled to produce, for use as evidence before a court or grand jury, in a proceeding where such use may tend to incriminate himself, prescriptions and applications for intoxicating liquors sold by him. (Ind.) *State v. Pence*, 240.

Regulating Sales of Poison.

2. DRUGGISTS—Regulating Sale of Poisons—Class Legislation.—A statute prohibiting, except upon certain conditions, the sale of certain drugs and poisons at retail, but not laying a like prohibition on the sale of the same at wholesale, is not void as discriminatory, arbitrary or unreasonable, as there is a well-defined distinction between the sale of goods at wholesale and at retail. (Ky.) *Katzman v. Commonwealth*, 359.

3. DRUGGISTS—Statute Regulating Sales of Poisons—"Legitimate Purpose."—Under a statute requiring a druggist who sells certain poisons without a physician's prescription to satisfy himself that the poison is to be used for legitimate purposes, the druggist must, when selling without a prescription, in good faith use reasonable care to satisfy himself the article is to be used for a legitimate purpose, and whether or not this degree of care is used is a question of fact. (Ky.) *Katzman v. Commonwealth*, 359.

4. DRUGGISTS—Statute Regulating Sale of Poisons—"Legitimate Purpose."—In a statute prohibiting the sale of poisons without a physician's prescription, unless the druggist satisfy himself that it is to be used for a legitimate purpose, the term "legitimate purpose" is used in a technical sense and should be given the technical meaning given it by physicians and druggists. (Ky.) *Katzman v. Commonwealth*, 359.

See Constitutional Law, 24; Intoxicating Liquors, 3, 4.

EASEMENTS.

EASEMENTS—Use of Land by Owner of Fee.—The owner of land subject to a public easement has the right to use his property for any purpose which he may deem proper, so long as the use does not interfere with the proper enjoyment of the easement which is held by the public therein. (Ill.) *Dallenbach v. Burnham*, 228.

ELECTIONS.

1. ELECTIONS—Right to Vote—Regulation by Legislature.—The right to vote is a constitutional right, given to certain citizens and withheld from others. But the manner in which the franchise shall be exercised is purely statutory. It is not within the power of the legislature to destroy the franchise, but it may control and regulate the ballot, so long as the right is not destroyed or made so inconvenient that it is impossible to enjoy it. That which does not destroy or unnecessarily impair the right must be held to be within the constitutional power of the legislature. (Wash.) *State v. Superior Court for King County*, 925.

2. ELECTIONS—Right to Vote—Constitutional Guaranty.—So long as an elector has the privilege of voting for the candidate of his choice, and a way is provided, there can be no challenge of an election law on constitutional grounds. Only such provisions as may in their operation shut off the voter from the ballot-box will be

held obnoxious to the constitutional guaranty of the right to vote (Wash.) *State v. Superior Court for King County*, 925.

3. **ELECTIONS—Right to Vote—Nature of Right.**—The right to vote is neither a property right nor a right of person, but a mere political privilege which the legislature may regulate to any extent not prohibited by the state or federal constitutions. (Wash.) *State v. Superior Court for King County*, 925.

4. **ELECTIONS.**—The Function of the Voter at an Election is to express an affirmative choice of some person, not to content himself with merely expressing his disapproval of certain candidates; and while the majority rules it should not pursue a policy of mere negation. (Wis.) *State v. Frear*, 992.

5. **ELECTIONS—General and Primary Election Laws.**—The provisions of section 34 of the general election laws of 1898, relating to the filling of vacancies caused by declination, death, or other disability of a nominated candidate, are not imported into the primary election law of 1903, as by section 13 of the latter law a special provision is made for the filling of vacancies and fully covers the same subject matter as that of section 34. (Wis.) *State v. Frear*, 992.

6. **ELECTIONS—Constitutionality of Statute—Regulating Nominations.**—A statute forbidding a committee of any party or independent body, authorized either to make nominations or to fill vacancies, to nominate a candidate of another party or independent body for the same office, is unconstitutional. (N. Y.) *Matter of Callahan*, 626.

7. **ELECTIONS—Constitutionality of Statute Regulating Nominations.**—While the legislature may prescribe in what manner and by what bodies nominations for office may be made, and may refuse to grant committees of parties or of independent bodies to make nominations at all, and require all nominations to be made by conventions, yet if it does grant to any convention, committee or body the right to make nominations, it cannot limit the right of such convention to nominate as its candidate any person who is qualified for the office. (N. Y.) *Matter of Callahan*, 626.

8. **ELECTIONS—Constitutionality of Statute Prescribing Qualifications.**—The legislature may prescribe qualifications for office where there is no constitutional provision on the subject, but it cannot enact arbitrary exclusions from office or arbitrary exclusion from candidacy for office. (N. Y.) *Matter of Callahan*, 626.

9. **ELECTIONS—Constitutionality of Statutory Regulations.**—Legislation regarding elections, to be valid, must not only not deprive the elector of his right to vote for whom he will, but for what candidate he will, and it must not discriminate in favor of one set of candidates against another set. (N. Y.) *Matter of Callahan*, 626.

10. **ELECTIONS—Nomination of Candidates.**—A Section of a Statute entitled "Party Nominations," and providing that "Party nominations of candidates for public office can only be made by a convention, or by a duly authorized committee of such convention, of a political party which at the last preceding general election, . . . cast ten thousand votes," etc., contemplates that the "party nomination" may be made by the convention, or by its committee appointed for that purpose. A nomination made by such a committee would be as much an "original" nomination as though made by the delegates in convention. (N. Y.) *Matter of Callahan*, 626.

11. **ELECTIONS—Nomination of Candidates—Powers of Committees.**—The provisions of the election laws that "when no nomination shall have been made by a political party or by an independent body for an office, or when a vacancy shall exist, it shall not be lawful for any committee of such party or independent body to nominate or

substitute the name of a candidate of another party or independent body for such office," etc., when construed with the other sections and provisions of the statute do not prohibit the nomination of a candidate of another party by a committee acting for the convention, in making nominations for offices upon their party's ticket. The inhibition applies in cases where a nomination has been declined, or an attempt to nominate has resulted in a tie, or a candidate regularly nominated dies or is found to be disqualified, or if a certificate of nomination is found defective, etc. (N. Y.) *Matter of Callahan*, 26.

12. ELECTIONS—Nominations by Committees, etc.—A Statute authorizing a committee of a political party, authorized to make nominations, to nominate for an office on the party ticket a person who is the candidate of another party for the same office is unconstitutional. (N. Y.) *Matter of Callahan*, 626.

13. ELECTIONS—Names not to Appear More Than Once on Ballot.—Section 4893, subdivision 6, Rem. & Bal. Code, providing that no candidate's name shall appear more than once upon the ballot, was not repealed by the amendment to the direct primary law (Laws 1909, p. 179, sec. 11, Rem. & Bal. Code, sec. 4842) providing that the names of judges shall appear upon the ticket of all parties holding joint convention. (Wash.) *State v. Superior Court for King County*, 925.

14. ELECTIONS—Political Parties not Recognized by Constitution. The constitution takes no concern of political parties. Both state and federal constitutions consider political parties evanescent things, born of political emotions and of uncertain tenure of life, and go no further than to protect the elector in his right to cast a ballot; not to coerce party ballot, but for the candidate of his choice, whether he is upon one ballot or another. (Wash.) *State v. Superior Court for King County*, 925.

15. ELECTIONS—Constitutional Law—Names not to Appear but once on Ballot.—Section 4893, subdivision 6, Rem. & Bal. Code, providing that no candidate's name shall appear more than once upon the ballot does not violate any express or implied guaranty of the constitution, and is a valid exercise of the power of the legislature. (Wash.) *State v. Superior Court for King County*, 925.

16. ELECTIONS—Mandamus—Premature Application—Public Importance of Questions.—A proceeding for a writ of mandamus to compel the placing of the name of a candidate under the party denomination of a certain political party upon an election ballot is prematurely brought where the names of candidates have not, at the time of the institution of the proceeding, been certified to the county auditor, but the questions raised may be considered and decided by the court when of great public importance. (Wash.) *State v. Superior Court for King County*, 925.

17. ELECTIONS—Construction of Primary Law.—The Word "Person," as used in the primary election law providing that the person receiving the greatest number of votes at a primary as the candidate of a party for office shall be the candidate of that party for such office, etc., does not include a dead man. It is used in its ordinary meaning, "a living human being." (Wis.) *State v. Frear*, 992.

18. ELECTIONS.—A Dead Man cannot Become a Candidate for office, although a plurality of the votes cast at a primary election were cast in his name, the law providing that the "person" receiving the greatest number of votes shall be the candidate. (Wis.) *State v. Frear*, 992.

19. ELECTIONS.—Where Electors Vote for an Ineligible Candidate, without knowledge of his disqualification, and he receives a

plurality of the vote cast, his disqualification does not result in electing the candidate receiving the next highest number of votes. (Wis.) *State v. Frear*, 992.

20. **ELECTIONS—Vacancy.—Where Electors Vote for an Ineligible Candidate**, without knowledge of his disqualification, and he receives a plurality of the votes cast, such votes must be counted, and there is a vacancy in the office instead of an election of the candidate receiving less than a plurality of the votes. (Wis.) *State v. Frear*, 992.

21. **ELECTIONS—Votes for Deceased or Ineligible Candidate.—**Votes cast for a candidate known to be dead or disqualified, or for a fictitious person, are ineffectual for any person, and cannot be counted in determining the result of the election. (Wis.) *State v. Frear*, 992.

22. **ELECTIONS.—Votes Knowingly Cast for an Ineligible Candidate**, who cannot possibly exercise the functions of the office if elected, are thrown away and cannot be counted. (Wis.) *State v. Frear*, 992.

23. **ELECTIONS—Death of Candidate—Knowledge of Voters Presumed.**—Where it appears that the candidate for nomination to an important state office—attorney general—at a primary election in a more or less acrimonious campaign, where factional lines were closely drawn, died after the printing of the ballots and prior to the day of the election; that the fact of his death was generally stated and published in the newspapers throughout the state, with the statement that if he received the greatest number of votes at the primary the state central committee could fill the vacancy; that such statements were repeated in circular letters addressed to many parts of the state; and that telegrams were sent out by a prominent supporter of one of the factions to one hundred and sixty-nine different prominent supporters of such faction in different parts of the state, calling upon them to urge voters to vote for the deceased candidate, and advising them that the committee could fill the vacancy,—the court is justified in assuming that a great majority of the electors read one or more newspapers and that enough of the vote cast which gave to the deceased candidate a plurality was cast by electors who knew the candidate was dead, to reduce the vote below that required for a plurality. (Wis.) *State v. Frear*, 992.

24. **ELECTIONS.—The Death of a Candidate for Nomination** by a party at a primary election held to enable the electors to select one of the few or many candidates to represent the party for some particular office cannot be said to create a vacancy where there are other patriots willing to secure the prize. (Wis.) *State v. Frear*, 992.

See Wills, 9.

ELECTRICITY.

Condition of Wires—Liability of Company.

1. **ELECTRIC COMPANIES—Negligence—Insulation of Wires.**—While the convenience of electric and telephone wires is obvious and their maintenance should not be burdened with excessive liabilities, still a company maintaining dangerous wires should not be relieved, on the ground of expense, from the affirmative duty of exercising a reasonable degree of care to maintain proper insulation and thereby prevent accidents reasonably to be apprehended to those lawfully coming in the neighborhood of the wires. (N. Y.) *Braun v. Buffalo General Elec. Co.*, 645.

2. **ELECTRIC COMPANIES—Uninsulated Wires Over Vacant Lot.**—The question whether an electric company is guilty of negligence in maintaining wires, without proper insulation, across a vacant lot in a thickly settled portion of a city, and liable for injury to a

workman engaged in erecting a building on the lot, occasioned by such wires, is one of fact for the jury. (N. Y.) *Braun v. Buffalo General Elec. Co.*, 645.

3. ELECTRIC COMPANIES—Unsafe Wires Over Vacant Lot—Notice.—Where an electric company maintains wires, defectively insulated, across a city lot, there being nothing to indicate to whom the wires belong or that they are dangerous, it is not necessary that the owner of the premises, or a workman engaged in the erection of a building thereon, should have noticed the wires and given the company notice to remove them or make them safe before the company can be held liable. (N. Y.) *Braun v. Buffalo General Elec. Co.*, 645.

4. ELECTRIC COMPANIES—Care of Wires Required.—An electric company, if reasonably chargeable with knowledge, or if in the exercise of reasonable prudence is bound to anticipate, that people may lawfully come in close proximity to its wires, either for purposes of business or pleasure, is under obligation to exercise care to keep the wires in safe condition. (N. Y.) *Braun v. Buffalo General Elec. Co.*, 645.

5. ELECTRIC COMPANIES—Defective Wires—Anticipated Use of Property.—An electric company maintaining its wires over a vacant city lot is bound to anticipate the use of the lot for building purposes and to keep the wires in a condition safe for workmen and others coming in proximity thereto. (N. Y.) *Braun v. Buffalo General Elec. Co.*, 645.

6. ELECTRIC COMPANIES—Defective Wires.—A Workman Erecting a Building over which electric wires are run is upon the premises by express permission and for a lawful purpose, and may recover damages from the electric company occasioned by a defective condition of the wires. (N. Y.) *Braun v. Buffalo General Elec. Co.*, 645.

7. ELECTRIC COMPANIES—Contributory Negligence of Workman.—Whether a workman engaged in erecting a building is guilty of contributory negligence in taking hold of an electric wire, not knowing the character thereof, nor noticing its defective insulation, is a question of fact for the jury. (N. Y.) *Braun v. Buffalo General Elec. Co.*, 645.

Liability of Municipal Corporation.

8. ELECTRICITY—Liability of Municipality—Res Ipsa Loquitur. In an action against a municipal corporation engaged in furnishing electricity for lighting purposes, for profit, to recover damages for the death of one caused by shock from an excessive current while turning on a light in his residence, the doctrine *res ipsa loquitur* should be applied to the fullest extent. (Wash.) *Abrams v. Seattle*, 916.

9. ELECTRICITY—Degree of Care.—A Municipal Corporation which contracts to furnish electric light for a house is under an implied contract to do so in the safest manner possible. It must exercise the highest degree of care, skill and diligence in its selection, construction and maintenance of devices and appliances. (Wash.) *Abrams v. Seattle*, 916.

10. ELECTRICITY—Liability to Patrons—Res Ipsa Loquitur.—One who has contracted for electric light for a house is entitled to assurance, while attempting to use the current in the customary manner, that he will not be subjected to personal injury. If he is electrocuted when so attempting to use it, a presumption of negligence on the part of the one furnishing the current immediately arises. The fact of the injury is itself sufficient to constitute a *prima facie* case. The doctrine of *res ipsa loquitur* applies, and casts the burden

of proof on the defendant, and an instruction that it must show by a fair preponderance of testimony that it was not negligent is not erroneous. (Wash.) *Abrams v. Seattle*, 916.

11. **ELECTRICITY—Municipality—Safety Appliances—Duty to Adopt.**—An instruction in an action against a municipal corporation, engaged in furnishing electricity for light, for death caused by an excessive current, due to the improper working of a ground, that it was the duty of the defendant to make every reasonable effort to adopt and use all proper means readily obtainable and known to science for the prevention of accidents, when read in connection with other instructions, is not improper. (Wash.) *Abrams v. Seattle*, 916.

12. **ELECTRICITY—Municipality—Negligence—Question of Fact.** In an action against a municipal corporation for damages for death caused by an excessive electric current while attempting to use an electric light, the current for which was furnished by the defendant, after the making of a *prima facie* case by the plaintiff, the question whether the defendant was negligent or whether it had exercised that high degree of care and diligence which the law required from a person dealing with such a deadly agency is one of fact for determination by the jury. (Wash.) *Abrams v. Seattle*, 916.

EMINENT DOMAIN.

Public Use.

1. **EMINENT DOMAIN—Public Use—How Determined.**—A constitutional provision that "whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public," does not mean that in the judicial determination of the question all other constitutional provisions shall be lost sight of, and such determination should not be made without reference to constitutional assertions upon the subject. (Wash.) *State v. Superior Court*, 893.

Irrigation—Condemning Property for.

2. **EMINENT DOMAIN—Irrigation.—The Constitutional Provision** that "private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic or sanitary purposes," includes ditches for irrigation purposes, in view of the vast extent of arid land within the state and the benefits of irrigation thereto. (Wash.) *State v. Superior Court*, 893.

3. **EMINENT DOMAIN—Irrigation—Single Land Owner.**—The exercise of the right of eminent domain for acquiring a right of way for irrigation ditches may be exercised by a single land owner, as the benefit to the public which supports the exercise of the right is not public service, but the development of the resources of the state, and the increase of its wealth generally, by which its citizens incidentally reap a benefit. (Wash.) *State v. Superior Court*, 893.

4. **EMINENT DOMAIN—Irrigation—Character of Land.**—Neither the constitution nor the statute limits the right of condemnation to owners of land which is entirely devoid of agricultural value without irrigation. It is sufficient if the value and usefulness of the land, from an agricultural standpoint, will be materially enhanced by its proposed irrigation. (Wash.) *State v. Superior Court*, 893.

5. **EMINENT DOMAIN—Irrigation by Gravity—Possibility of Other Means.**—In providing for the exercise of the power of eminent domain for the purpose of irrigation, the constitution and the statute law both contemplate irrigation by gravity, and the right should

not be withheld simply because water might be put upon the land by pumping. (Wash.) State v. Superior Court, 893.

6. EMINENT DOMAIN—Irrigation—Speculative Use of Land.—Where land and water to irrigate it are owned by one company, it is immaterial, in a proceeding to condemn a right of way for a ditch to irrigate the land for the purpose of enhancing its agricultural value, what purpose the company had in acquiring the land, or whether it proposes to farm the land itself or sell it off in tracts to others. (Wash.) State v. Superior Court, 893.

Damages.

7. EMINENT DOMAIN.—The Damage Clause of the Eminent Domain provisions of the constitution is limited to damages arising from some physical injury to property, or from some physical disturbance or interference with some property right, as distinguished from mere annoyance. (Utah) Twenty-second Corporation of Church of Jesus Christ v. Oregon Short Line R. R. Co., 819.

8. EMINENT DOMAIN—Noise of Railroad—Disturbance of Meetings.—Under the eminent domain law damages cannot be recovered for annoyance to the occupants of property, or the disturbance of religious or other meetings held in buildings on the property, caused by the noise of operating railroad trains. (Utah) Twenty-second Corporation of Church of Jesus Christ v. Oregon Short Line R. R. Co., 819.

9. EMINENT DOMAIN—Damages—Delay in Payment.—It is for the jury to say, in the exercise of a sound discretion, whether the parties in an eminent domain proceeding are entitled to compensation for delay in receiving their money. If the delay was not the fault of the land owner, compensation for the time lost may be given, but not if the delay was by reason of his own conduct. (Pa.) Rea v. Pittsburg etc. R. R. Co., 721.

10. EMINENT DOMAIN—Damages—Delay in Payment.—If the demands of the land owner are extortionate and inordinate, so that the corporation seeking condemnation is justified in contesting, then no damages for delay in payment should be allowed, but where there is an honest difference of opinion as to the value of the property, such may be recovered. (Pa.) Rea v. Pittsburg etc. R. R. Co., 721.

11. EMINENT DOMAIN—Appeal—Excessive Damages.—The power conferred upon the supreme court by the act of May 20, 1891 (Pub. Laws, 101), has never been exercised on the plea of the excessiveness of the verdict except in a most extreme case. (Pa.) Rea v. Pittsburg etc. R. R. Co., 721.

12. EMINENT DOMAIN—New Trial—Excessive Damages.—The question of the amount of the verdict in eminent domain is ordinarily for the trial court, and where a grossly excessive amount is returned, the trial court should never allow it to stand, no matter how many new trials it may be obliged to grant. (Pa.) Rea v. Pittsburg etc. R. R. Co., 721.

Evidence of Value of Property.

13. EMINENT DOMAIN—Evidence of Value—Cost of Property.—In an eminent domain proceeding, after one of the land owners has testified as to the value of the property, it is proper cross-examination to inquire what the father of the witness paid for the property some three years before. (Pa.) Rea v. Pittsburg etc. R. R. Co., 721.

14. EMINENT DOMAIN—Evidence of Value—Sales in Vicinity. A consideration of particular sales in the neighborhood, as fixing the value of property in an eminent domain proceeding, will not be allowed. (Pa.) Rea v. Pittsburg etc. R. R. Co., 721.

15. EMINENT DOMAIN—Evidence of Value—Particular Sales.—On cross-examination a witness as to the value of the property in an eminent domain proceeding may be questioned as to particular sales in the neighborhood, for the purpose of testing his good faith and accuracy and the extent of his knowledge. (Pa.) *Rea v. Pittsburg etc. R. R. Co.*, 721.

16. EMINENT DOMAIN—Evidence of Value—Sale of the Property.—The objection that evidence of particular sales of property in the neighborhood would lead to the investigation of collateral issues in fixing the value of the property in an eminent domain proceeding does not apply to testimony of a single sale of the property in controversy. Such testimony may be admitted, provided the sale in question is not too remote from the date of the appropriation. (Pa.) *Rea v. Pittsburg etc. R. R. Co.*, 721.

17. EMINENT DOMAIN—Evidence of Value—Sale of the Particular Property in Controversy.—Whether testimony of a sale of the property in controversy in an eminent domain proceeding is admissible necessarily depends upon the circumstances of each particular case, the disparity between the price paid and the value claimed, the length of time between the sale and the appropriation, and other elements which may present themselves tending to show the worth of the testimony as evidence affecting the importance, and throwing light upon the accuracy and good faith, of the opinion expressed by the witness. (Pa.) *Rea v. Pittsburg etc. R. R. Co.*, 721.

18. EMINENT DOMAIN.—The Market Value of a Particular piece of real estate is to be measured by the price usually given for such property in that neighborhood, making due allowance for differences of position, soil and improvements. (Pa.) *Rea v. Pittsburg etc. R. R. Co.*, 721.

19. EMINENT DOMAIN—Evidence of Value—Improvements.—In arriving at the value of the property in eminent domain proceeding, by showing the sale of other real estate in the neighborhood, testimony of the value of the improvements on the property sold should be admitted. (Pa.) *Rea v. Pittsburg etc. R. R. Co.*, 721.

20. EMINENT DOMAIN—Evidence of Value—Opinions of Witnesses.—While the market value of land is not a question of science and skill upon which only an expert can give an opinion, yet in each case the trial judge should see to it that every witness called to prove the value has a proper foundation of knowledge to make his opinion of some real worth. (Pa.) *Rea v. Pittsburg etc. R. R. Co.*, 721.

21. EMINENT DOMAIN—Words and Phrases.—"Neighborhood," as used in the law of eminent domain, regarding property in large cities, is a relative term, and the field which a witness may take into consideration in forming an opinion of the selling price of land in the vicinity of a particular property should not only be reasonably adjacent thereto, but should be of the same general character as the immediate locality in which the property is situated; otherwise the opinion is of little value. (Pa.) *Rea v. Pittsburg etc. R. R. Co.*, 721.

EMPLOYER'S LIABILITY.

See Master and Servant.

EQUITY.

1. EQUITY.—The Validity of Municipal Ordinances will not be passed upon by a court of equity, that being the peculiar province of the courts of common law. (N. J. Eq.) *Bayonne v. North Arlington*, 547.

2. EQUITY—Distribution of Estates of Decedents.—Jurisdiction of the distribution of an estate among the heirs of an intestate will not ordinarily be assumed by a court of equity. It will be done only under circumstances extraordinary or unusual in character. (Ill.) *Moore v. Brandenburg*, 206.

3. EQUITY—Administration of Estates—Full Relief.—In an action to recover certain property procured from a decedent in his lifetime by fraud and undue influence, a court of equity will not stop with a decree for the recovery of the property, but will retain jurisdiction for the purpose of adjusting all the rights of the parties, even though in doing this it may be, in part, administering purely legal remedies. (Ill.) *Moore v. Brandenburg*, 206.

4. LACHES—Prejudice or Disadvantage Essential.—Laches, in legal significance, is not mere delay, but delay that works a prejudice or disadvantage to another. (R. I.) *Stephens v. Dubois*, 741.

5. LACHES—Knowledge and Freedom of Action.—A party who is entitled to set a transaction aside cannot be charged with delay, acquiescence or confirmation, unless there has been full knowledge of all the facts, and perfect freedom of action. (R. I.) *Stephens v. Dubois*, 741.

Note.

Estates, severance of surface and mineral estates, 951.

ESTATES OF DECEDENTS.

See Descent and Distribution; Equity; Executors and Administrators; Wills.

ESTRAYS.

See Larceny, 2, 3.

EVIDENCE.

In General.

1. EVIDENCE—Physical Situations and Impossibilities sometimes speak much more weightily than the vocal utterances of any witness, or number of witnesses. The former cannot falsify. The latter can and often do. The one is indisputable—the other never is. (Wis.) *Houg v. Girard Lumber Co.*, 1012.

2. EVIDENCE—Weight and Sufficiency—Interest of Witness.—There are other tests of veracity than that of reputation or probity; the interest of the witness in the result of the trial, his bias and self-interest should be considered. (Ky.) *Star Mills v. Bailey*, 370.

3. EVIDENCE—Burden of Proof—Effect of Presumptions.—Presumptions of law must be given weight as evidence, and some evidence to overcome them is required, for if the evidence is otherwise equally balanced and the presumptions are against the party having the burden of proof, he must lose. (Ky.) *Star Mills v. Bailey*, 370.

4. EVIDENCE—A Witness' Prior Contradictory Statement cannot be used as substantive testimony tending to show the truth of the facts then stated; it may be shown only for the purpose of affecting the credibility of the witness. (Okl. Cr.) *Culpepper v. State*, 668.

Judicial Notice.

See Sunday Laws, 2.

5. JUDICIAL NOTICE—Reports of State Institutions.—The courts are authorized to take judicial knowledge of the reports of state institutions, such as the board of regents of the university of Utah. (Utah) *State v. Candland*, 834.

Failure to Call Witness—Presumption.

6. **EVIDENCE—Failure to Call Witness—Presumption.**—The failure of one to call a witness who participated with him in the transaction in litigation, or to explain his failure, is a circumstance from which it is allowed to infer that such witness would not sustain the party. (Ky.) *Star Mills v. Bailey*, 370.

Criminal Act in Civil Case.

7. **EVIDENCE—Criminal Act in Civil Case.**—Where in a civil action, a criminal act is charged, the authorities are in conflict upon the question whether the rule applicable to a criminal prosecution or that applicable to a civil suit should prevail in respect to the degree of proof required. In Illinois a criminal offense charged in a civil case must be proved beyond a reasonable doubt. (Ill.) *McInturf v. Insurance Co. of North America*, 153.

Testimony on Former Trial.

See Criminal Law, 14, 15.

8. **EVIDENCE—Testimony on Former Trial—Witness Since Deceased.**—Evidence given on a former trial of the same action, or a former action involving the same issues between the same parties, is admissible if it is established that the witness is dead. (Ill.) *McInturf v. Insurance Co. of North America*, 153.

9. **EVIDENCE—Testimony on Former Trial—Witness Since Deceased.**—In order to render the testimony of a deceased witness admissible on a second trial, it is necessary that there should be a substantial identity of parties, at least in interest, with the parties on the trial in which the testimony was given. (Ill.) *McInturf v. Insurance Co. of North America*, 153.

10. **EVIDENCE—Testimony on Former Trial.—A Criminal Proceeding** is not in any sense an action between the person instituting it and the prisoner, and testimony given in such a proceeding is not admissible in a subsequent civil suit between the party instituting the criminal proceeding and the defendant therein. (Ill.) *McInturf v. Insurance Co. of North America*, 153.

Value of Property.

See Eminent Domain, 13-21.

11. **EVIDENCE—Value of Real Estate.—Sales of Similar Property** in the same neighborhood and at about the time of the transaction in question is one of the most important factors in determining the value of real estate. (Ill.) *Crosby v. Dorward*, 230.

12. **EVIDENCE.—In Order to Show the Value of Property** it is not competent to prove offers for the property itself or other property similarly situated in the vicinity. (Ill.) *Crosby v. Dorward*, 230.

Expert and Opinion Testimony.

13. **EVIDENCE—Expert Testimony—Legitimate Use of Drugs.**—Whether the sale of opium for smoking purposes by a druggist to a confirmed user of the drug is for a legitimate purpose is the subject of expert testimony of physicians and druggists. (Ky.) *Katzman v. Commonwealth*, 359.

14. **EVIDENCE—Weight—Opinion of Mental Condition.**—The evidence of a witness that in his opinion the grantor in a certain deed was not competent to transact ordinary business, is weakened by the fact that the witness transacted business with him and admitted that he seemed to understand what he was about. (Ill.) *Crosby v. Dorward*, 230.

res Gestae.

15. EVIDENCE—Res Gestae—Declarations of Injured Party.—One exception to the rule excluding hearsay evidence is, that when something has occurred startling enough to produce nervous excitement, spontaneous utterances of parties present are admissible as a part of the *res gestae*. It is not always necessary that the statements be made at the exact time that the shock occurs. The material inquiry always is whether the statements offered as evidence were made at a time and under such circumstances as to induce the belief that they were not the result of reflection or premeditation. (Wash.) *Britton v. Washington Water Power Co.*, 858.

16. EVIDENCE—Res Gestae.—The Declarations of a Party Injured in an accident, by which he was rendered unconscious, made immediately upon his regaining consciousness, are as much a part of the occurrence as if they had been made immediately after the accident, and are therefore admissible in evidence as part of the *res gestae*. (Wash.) *Britton v. Washington Water Power Co.*, 858.

17. EVIDENCE—Res Gestae—Exclamations of Bystanders.—The exclamations and declarations of third parties and bystanders, contemporaneous with the occurrence, are as much a part of the *res gestae* as those of the parties, and are admissible in evidence under the same rule as allows the exclamations and declarations of the parties. (Wash.) *Britton v. Washington Water Power Co.*, 858.

See Constitutional Law, 12; Druggists, 1; Criminal Law, 12-17; Trial, 1-3; Witnesses.

Note.

Evidence, adjudication of insanity as showing want of capacity to contract, make a will, etc., 347-355.

existence of guardianship as showing want of capacity to contract, make a will, etc., 355-357.

EXCEPTIONS.

See Deeds, 10-15.

EXECUTION.

1. EXECUTION—Void Judgment—Justification of Officer.—An execution issued upon a void judgment is also void, but, if regular on its face, it justifies an officer in obeying its mandate. (Ark.) *Emerson v. Hopper*, 121.

2. VOID EXECUTION—Remedy of Owner.—Where property is seized under process apparently good but void in fact, the remedy of the owner is to attack the process and the proceeding under which it issued. If the property has been sold under the void proceeding, he can then successfully maintain replevin for it. (Ark.) *Emerson v. Hopper*, 121.

See Replevin, 1.

EXECUTORS AND ADMINISTRATORS.

1. ADMINISTRATOR WITH WILL ANNEXED—Authority in General.—Administrators with the will annexed have the same power and authority, under the Kentucky Statutes, as that possessed by the executors named in the will. (Ky.) *Dunevant v. Radford's Administrator*, 392.

2. ADMINISTRATOR WITH WILL ANNEXED—Power of Sale in Will.—An administrator with the will annexed may exercise an implied power to sell real property after the extinguishment of a life estate, for the purpose of dividing the proceeds among the devisees

in accordance with the terms of the will. (Ky.) *Dunevant v. Radford's Administrator*, 392.

3. ESTATES OF DECEDENTS—Claims—Check Given by Decedent.—The amount of a check given by the decedent for services rendered him, but not yet presented for payment or paid at the time of his death, may be recovered from his estate. (Ky.) *Cox's Exr. v. Walker*, 367.

4. ADMINISTRATION—Disputed Title.—In Summary Proceedings provided by statute for the discovery of concealed assets of an estate of a decedent, contested rights and title of property between the executors and others cannot be tried. (Ill.) *Moore v. Brandenburg*, 206.

5. ESTATES OF DECEDENTS—When Heirs may Recover Property.—Where there is an administrator the heirs are not entitled to sue for and recover property belonging to or demands due the estate; but where there are no debts or claims of any kind against the estate, and nothing for an administrator to do, if one should be appointed, except to distribute the personal estate to those entitled to it by law, the heirs may maintain necessary actions for the purpose of reducing the property to possession in order that it may be distributed. (Ill.) *Moore v. Brandenburg*, 206.

6. ESTATES OF DECEDENTS—Action by Heirs to Recover Property.—Where the statute fixes the shares of the heirs of an intestate, and there are no debts or claims of any kind against the estate, and no administrator has been appointed, the heirs may maintain an action in equity to recover property procured from the deceased by fraud and undue influence. (Ill.) *Moore v. Brandenburg*, 206.

See Equity, 2, 3.

EXPERT EVIDENCE.

See Evidence, 13, 14.

FALSE IMPRISONMENT.

FALSE IMPRISONMENT—Incompetent Kept from His Committee.—The committee of an incompetent person, suing in his behalf, may recover damages from one who takes and detains the incompetent from his committee, as such constitutes a false imprisonment. (N. Y.) *Barker v. Washburn*, 640.

FELLOW-SERVANTS.

See Master and Servant, 21-25.

FINDINGS.

See Trial, 9, 10.

FIRES.

See Damages, 12-15.

FOREIGN CORPORATIONS.

See Corporations, 12, 13.

FRANCHISES.

MUNICIPAL CORPORATIONS—Franchises—Construed in Favor of City.—Franchises granted by a municipal corporation, and contracts made in pursuance thereof, are, if doubtful, to be considered in favor of the city. (Wash.) *Peterson v. Tacoma Ry. & P. Co.*, 936.

FRATERNAL INSURANCE.

See Insurance, 25-28.

FRAUD.

See Contracts, 6-8.

FRAUDULENT CONVEYANCE.

1. FRAUDULENT CONVEYANCES.—Tort Claimants, as well as those whose claims arise on contract, are protected by the statutes against fraudulent conveyances, but a tort claimant, in order to render himself competent to maintain an action to set aside a conveyance as fraudulent, must reduce his claim to judgment, and thus establish a legal debt against the fraudulent grantor. (N. J. Eq.) *Washington Nat. Bank v. Beatty*, 555.

2. FRAUDULENT CONVEYANCES — Existing Creditors—Intention.—The statute for the prevention of frauds and perjuries, approved March 27, 1874, has the effect to make a voluntary deed fraudulent as against existing creditors, without regard to the intention with which it was executed. It is fraudulent in law. (N. J. Eq.) *Washington Nat. Bank v. Beatty*, 555.

3. FRAUDULENT CONVEYANCES — Subsequent Creditors.—When a voluntary conveyance is attacked by a subsequent creditor, the question to be determined is whether the conveyance was fraudulent. (N. J. Eq.) *Washington Nat. Bank v. Beatty*, 555.

4. FRAUDULENT CONVEYANCES — Existing and Subsequent Creditors—Evidence.—The question is the same whether a voluntary conveyance is attacked by an existing or a subsequent creditor; the only difference is the method of proof. When an existing creditor attacks the conveyance and shows that his debt was incurred before, and was existing at the time when the conveyance was made, the law, without further proof, raises a conclusive presumption of fraud so far as that creditor is concerned; but where the conveyance is attacked by a subsequent creditor, he must prove fraud as a fact, that is, "an actual fraudulent intent to defraud some creditor." (N. J. Eq.) *Washington Nat. Bank v. Beatty*, 555.

5. FRAUDULENT CONVEYANCES — Subsequent Creditors — "Showing" Necessary.—In order to set aside a conveyance a subsequent creditor must prove: A voluntary conveyance; an existing creditor or other person having a lawful claim or debt within the meaning of the statute; and an actual intent by means of the conveyance to delay or hinder some creditor, existing or subsequent. (N. J. Eq.) *Washington Nat. Bank v. Beatty*, 555.

6. FRAUDULENT CONVEYANCES — Existence of Claim.—A Subsequent Creditor who attacks a voluntary conveyance as in fraud of a person at the time of the conveyance, claiming damages based on the tort of the grantor, must make legal proof of the verity and legality of the claim. As against claims and demands, the verity of which is never established by any judgment or competent proof, the statute does not forbid conveyances or assignments or declare them to be void. (N. J. Eq.) *Washington Nat. Bank v. Beatty*, 555.

FUNERAL EXPENSES.

See Husband and Wife, 4-6.

Note.

Fruit Trees or Crops, damages for injury to, 318, 327.

GAME.

GAME—Shipment Out of the State.—Where the statute prohibits the shipment of game out of the state, the delivery of game to a carrier for transportation to a point beyond the boundary of the state constitutes a violation of the statute, though the game, while still in the state, is taken from the carrier by a deputy game warden of the state, acting under the authority of a search warrant. (*Iowa*) *State v. Carson*, 330.

GAMING.

1. **GAMING—Turf Exchange.**—Under an information charging a defendant with conducting a banking and percentage game, played with certain devices, for money and other representatives of value, a conviction cannot be had upon proof that the accused conducted a "Turf Exchange" where his patrons congregated and bet upon horse-races run at another place. (*Okl. Cr.*) *James v. State*, 693.

2. **GAMING—Banking or Exchange Games.**—To be guilty of violating section 2422 of Snyder's Compiled Laws of Oklahoma, the accused must deal, play, carry on, open or conduct the game upon which money or other representative of value is wagered, and the game which he so deals, plays, carries on, opens or conducts must be one of those specially mentioned in said section, or some banking or percentage game played with dice, cards or some other device. (*Okl. Cr.*) *James v. State*, 693.

3. **GAMING—Banking or Exchange Games.**—By the word "Device," as used in section 2422 of Snyder's Compiled Laws of Oklahoma, is meant the means, instrument, contrivance, or thing by which a banking or percentage game is played. (*Okl. Cr.*) *James v. State*, 693.

GARNISHMENT.

1. **GARNISHMENT—Nonresident.**—In Order for the Court to Obtain Jurisdiction to render judgment against a nonresident, where personal service is lacking, by the attachment of a debt by garnishment, two things are essential: (1) Jurisdiction of the person of the garnishee; and (2) jurisdiction of the debt owing by the garnishee to the defendant, which constitutes the res. (*Utah*) *Bristol v. Brent*, 804.

2. **GARNISHMENT—Nonresident.**—A Proceeding by Which Jurisdiction is sought by attaching property, whether tangible or intangible, such as a debt, is essentially a proceeding in rem; a proceeding against a thing which is brought into the custody of the law and hence within the jurisdiction of the court. To place it into the custody of the law and bring it within the jurisdiction of the court, the things which the law requires must be done. (*Utah*) *Bristol v. Brent*, 804.

3. **GARNISHMENT.**—Whether or not the Court has Jurisdiction over the res in case of a garnishment does not depend on whether the garnishee objects, but it depends entirely upon whether the statute by virtue of which alone the court is authorized to act has been complied with. (*Utah*) *Bristol v. Brent*, 804.

4. **GARNISHMENT—Jurisdiction—Waiver.**—A garnishee cannot waive jurisdictional defects, and a failure to comply with the statute in making service on the garnishee is jurisdictional. It is the mandate of the law, when complied with, and not the act of the garnishee, that confers jurisdiction upon the court over the res. (*Utah*) *Bristol v. Brent*, 804.

5. **GARNISHMENT—Objection to Jurisdiction.**—By a General Appearance a garnishee is precluded from objecting to a defect in service in so far as it relates to the jurisdiction over him, but in

so far as it relates to the jurisdiction over the debt, he can object at any time before the money is paid and applied to the discharge of any judgment obtained in the action. (Utah) *Bristol v. Brent*, 304.

6. GARNISHMENT—Objection to Jurisdiction After Payment.—After judgment and an application of the money, a garnishee will be held estopped from reclaiming it on the ground that the court had not acquired jurisdiction of the debt, the payment being tantamount to a voluntary payment, and the defendant may sue the garnishee and recover the amount so paid. (Utah) *Bristol v. Brent*, 804.

7. GARNISHMENT—Amendment of Return.—Where proper service of a writ of attachment or garnishment was in fact made, but the return fails to show it, the court may allow an amended return to conform to the facts. (Utah) *Bristol v. Brent*, 804.

8. GARNISHMENT—Return Only Evidence of Service.—The officer's return to the writ constitutes the evidence, and is the only proper evidence of the service of a garnishment. (Utah) *Bristol v. Brent*, 804.

9. GARNISHMENT—Service—Compliance With Statute.—The service of a garnishment, in order to invest the court with jurisdiction of the garnishee or the debt, must comply with the statute. (Utah) *Bristol v. Brent*, 804.

10. GARNISHMENT—Modes and Effect of Service.—Debts or credits may be attached in two ways: By leaving with the person owing the debt a copy of the writ of attachment with a notice that the debt has been attached, by which nothing is accomplished except to prevent the person who owes the debt or is in possession of property from disposing of it or surrendering possession thereof; or by having, in connection with the writ of attachment, a writ of garnishment issued and served upon the debtor of the defendant, and in that way not only attach the debt but place it in the custody of the law. (Utah) *Bristol v. Brent*, 804.

11. GARNISHMENT—Personal Service—Return must Show.—In order to confer jurisdiction upon the court to proceed against a garnishee, the writ of garnishment must be served by delivering a copy thereof to him, and the return to the writ must show such service. (Utah) *Bristol v. Brent*, 804.

12. GARNISHMENT—Service not Shown by Return.—Where the officer's return shows that a writ of attachment was not served, and it does not appear that a copy of a writ of garnishment was delivered to the garnishee, there is no such disclosure of "due service" as to give the court jurisdiction. (Utah) *Bristol v. Brent*, 804.

13. GARNISHMENT—Appearance—Effect of as Waiver of Service. A garnishee may, by appearance, waive such defects in process and service only as affect him personally, and cannot, by any act of his, either waive the rights of the defendant or confer jurisdiction over the res. (Utah) *Bristol v. Brent*, 804.

GAS.

See Deeds, 16.

GIFTS.

GIFTS OF CHECK—Revocation by Death.—The gift of a check is revoked by the death of the donor before the check is presented for payment or paid, and the donee cannot recover the amount of it from the estate of the donor. (Ky.) *Cox's Exr. v. Walker*, 367.

See Husband and Wife, 1, 2.

Note.

Growing Crops, damages to, 309-330.

GUARDIAN AND WARD.

1. **GUARDIANSHIP—Nonresident Incompetent.**—The Superior Courts have an inherent jurisdiction to protect estates of nonresident incompetent persons, and while it is generally said the power to appoint guardians is purely statutory, the power in fact lies in the sovereignty of the state, and the procedure only is statutory. (Wash.) In re Sall, 885.

2. **GUARDIANSHIP—Nonresident Incompetent.**—The Superior Court has Jurisdiction to appoint a guardian of the local estate of a nonresident incompetent, irrespective of any statute, by the application of general equitable powers and principles. (Wash.) In re Sall, 885.

3. **GUARDIANSHIP—Incompetent Person Whose Whereabouts are Unknown.**—The jurisdiction to appoint a guardian of the estate of an incompetent does not depend upon his domicile. The appointment may be made when he has disappeared and his whereabouts are unknown. (Wash.) In re Sall, 885.

4. **GUARDIANSHIP—Property Without the Borders of the State.** An order appointing a guardian of the estate of a nonresident incompetent is limited in its application to property within the state. (Wash.) In re Sall, 885.

5. **GUARDIANSHIP.**—A Nonresident may be Appointed Guardian of the estate of an incompetent, if the statute makes no reference to residential qualifications. (Wash.) In re Sall, 885.

Note.

Guardianship, admissibility of existence of, as showing want of capacity, 355.

conclusiveness of existence of, as showing want of capacity, 355-357.

existence of as showing want of capacity to contract, make a will, etc., 355-357.

Habeas Corpus, whether title of judge or legal existence of court can be tried on, 201.

HEALTH OFFICERS.

See Contracts, 1.

HIGHWAYS.

1. **HIGHWAYS—Conditions.**—A Municipal Corporation has No Right to impose conditions in an ordinance regarding the use of its highways which do not tend toward the protection of the interest which it has as guardian of the public easement in its highway. (N. J. Eq.) Bayonne v. North Arlington, 547.

2. **HIGHWAYS.**—Public Easements in Highways Extend not only to the use of the surface of the earth for the purposes of passage, but also to the portion which lies beneath the surface whenever it is needed for water-pipes, gas-pipes or any other legitimate street use. (N. J. Eq.) Bayonne v. North Arlington, 547.

3. **MUNICIPAL CORPORATIONS—Highways—Permit to Cross by Pipe-line.**—The denial of a permit to the owner of the fee of a highway to cross it by pipes or pipe-lines beneath the surface except upon conditions which the borough had no right to impose, and which in no way tend to protect its interests, must be held a mere capricious exercise of a discretion, and an injunction may issue to restrain the interference of the borough with the laying of such pipes, notwithstanding the denial of such permit. (N. J. Eq.) Bayonne v. North Arlington, 547.

4. HIGHWAYS—Ownership of Fee.—A person who owns lands across which a highway has been constructed owns the fee simple of the highway, subject only to the public easement. (N. J. Eq.) *Bayonne v. North Arlington*, 547.

5. HIGHWAYS—Rights of Owner of Fee.—In the absence of an interfering statute or ordinance the owner of the fee has a right, without a permit from anyone, to lay pipe-lines under a highway, so long as he does not unduly interfere with public travel or with the subsurface use to which the highway, as such, is subject. (N. J. Eq.) *Bayonne v. North Arlington*, 547.

6. HIGHWAY OBSTRUCTION—Action by Individual.—For the obstruction of a public and common right of way no private action will lie, unless it is alleged and shown that the plaintiff has thereby suffered injury peculiar to himself; that is, different in kind and degree from that suffered by the public. (Ala.) *Walls v. Smith & Co.*, 24.

7. HIGHWAY OBSTRUCTION.—If One's Access from His Property to the highway is so materially impaired by the obstruction of the highway as to affect its value, an action therefor will lie. (Ala.) *Walls v. Smith & Co.*, 24.

8. HIGHWAY OBSTRUCTION—Injury to Person or Property.—If, while attempting to use a public highway, one sustains a direct injury to his person or property by reason of an obstruction therein, an action will lie. (Ala.) *Walls v. Smith & Co.*, 24.

9. HIGHWAY OBSTRUCTION—Damages for Change of Route.—Where an obstruction of a highway merely drives one to a circuitous route on a longer road, the interference is only with the common right of passing and repassing, and there is no such peculiar injury as will justify a private suit. (Ala.) *Walls v. Smith & Co.*, 24.

10. HIGHWAY OBSTRUCTION—Loss of Business and Profits.—Damages for loss of business, the employment of extra teams and employees, and the building of a new road, are too speculative and remote to be recovered in an action for damages occasioned by the obstruction of a highway and the consequent interference with the plaintiff's business. They amount to nothing more than a claim for the profits of the business which might have been done without such additional aids, but for the obstruction. (Ala.) *Walls v. Smith & Co.*, 24.

11. HIGHWAY OBSTRUCTION—Private Suit—Pleading and Proof.—The gist of an action by an individual for the obstruction of a highway is the peculiar private injury. The entire claim is for special damages, and if no special damages are alleged in the complaint, nominal or general damages will not be presumed from the mere wrongful act alleged. (Ala.) *Walls v. Smith & Co.*, 24.

HOMESTEAD.

Defective Acknowledgment by Wife.

1. HOMESTEAD—Deed—Defective Acknowledgment by Wife.—A deed of the homestead, to which the separate acknowledgment of the wife does not comply with the requirements of the statute, is void, and cannot be made effective by any subsequent act short of an actual conveyance. (Ala.) *Gilbert v. Pinkston*, 89.

2. HOMESTEAD—Deed—Defective Acknowledgment—Reacknowledgment.—Where a conveyance of a homestead is void because of a defective acknowledgment by the wife, the land vests in the heirs of the husband on his death, and the reacknowledgment of the conveyance by the wife after her husband's death cannot give life to the conveyance. (Ala.) *Gilbert v. Pinkston*, 89.

Interest of Surviving Wife and Heirs.

3. **HOMESTEAD—Interest of Surviving Wife.**—Under section 2543 of the Alabama Code of 1886, the widow's right was only to occupy the homestead during her life, and it did not vest in her absolutely, unless the estate of her deceased husband was duly declared insolvent; and if she abandoned the homestead or attempted to convey it away, her rights ceased. (Ala.) *Gilbert v. Pinkston*, 89.

4. **HOMESTEAD—Succession—Who are "Heirs."**—According to section 1915 of the Alabama Code of 1886, the homestead of one who dies leaving a wife and brothers and sisters descends to the brothers and sisters, who are the decedent's heirs, and not to his wife. (Ala.) *Gilbert v. Pinkston*, 89.

See Public Lands, 1-4.

HOMICIDE.*Presumption of Innocence.*

1. **HOMICIDE—Presumption of Innocence—Instructions.**—Upon a trial for murder, where the defendant's plea was self-defense, the court gave the jury the following instruction: "You are instructed that the defendant in this case is presumed to be innocent of the crime charged in the indictment, and this is a presumption of law that remains with him and is thrown around him for his protection up to the moment when the killing is proved, or admitted. When the killing is proved or admitted by defendant and the plea of self-defense is interposed, as in this case, it then devolves upon defendant to show any circumstances of mitigation to excuse or justify it by some proof strong enough to create in the minds of the jury a reasonable doubt of his guilt of the offense charged, unless the proof on the part of the state shows that the defendant was justified in doing the act." Held, that under sections 6828 and 6854 of Snyder's Compiled Laws of Oklahoma, the instruction was not erroneous. (Okl. Cr.) *Culpepper v. State*, 668.

Indictment—Variance—Manner of Killing.

2. **HOMICIDE—Indictment—Manner of Killing—Variance.**—Under an information for manslaughter charging the death of the deceased to have been directly produced by a blow from the fist or foot of the defendant, a conviction cannot be had upon proof that the deceased was knocked down by the defendant and was killed by being trampled upon by a horse. (Okl. Cr.) *Elliott v. State*, 683.

3. **HOMICIDE—Indictment—Manner of Killing—Variance.**—Where the instrument of death alleged and that proved are substantially of the same character, capable of inflicting practically the same nature of injury in substantially the same manner, there is no variance. The question in each case is whether the nature and character of the injury and the manner and means of inflicting it as proved, are practically and substantially, though not identically, the same as that alleged. (Okl. Cr.) *Elliott v. State*, 683.

4. **HOMICIDE—Indictment—Manner of Killing—Variance.**—Where the allegation is that the accused directly inflicted the fatal wound, and the proof shows that the same was produced by some other different and independent agency, there is a fatal variance. (Okl. Cr.) *Elliott v. State*, 683.

5. **HOMICIDE—Indictment—Manner of Killing—Variance.**—Wherever there is doubt or uncertainty as to the means by which death was effected, all the different probable means should be alleged, either in separate counts in the indictment or information, or in the alternative in the same count, so as to provide against contingencies in the proof and prevent a variance. (Okl. Cr.) *Elliott v. State*, 683.

HOTELS.

See Constitutional Law, 27-30.

HUSBAND AND WIFE.*In General.*

1. HUSBAND AND WIFE—Gifts Between—Presumption.—Where husband and wife in humble circumstances conducted saloon businesses in common, and she kept boarders, while he worked the greater part of the time as a laborer, she taking all the money realized from the business, and he turning over to her all his earnings, the law will not presume that he intended a gift of the moneys to her. (N. J. Eq.) *Beck v. Beck*, 534.

2. HUSBAND AND WIFE—Joint Earnings and Funds.—Where the wife, among people of humble circumstances, acts as treasurer of the family, receiving and boarding the income from all sources, including the wages of the husband, it will be presumed that their intention is to have and hold such money, and any property purchased therewith, jointly, whether the title to property so purchased be taken in the name of one or both of them. (N. J. Eq.) *Beck v. Beck*, 534.

3. HUSBAND AND WIFE—Liability—Expenses of Family.—A statute making family expenses "chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately," enlarges the husband's common-law liability for necessities, and as to the creditors renders the wife equally liable with the husband. As to them both are principals. (Iowa) *Estate of Skillman*, 295.

Liability for Funeral Expenses of Wife.

4. HUSBAND AND WIFE—Funeral Expenses of Wife.—At Common Law, every husband was bound to bury his deceased wife in a suitable manner; that is, he was bound to defray all necessary funeral expenses. (Iowa) *Estate of Skillman*, 295.

5. HUSBAND AND WIFE—Funeral Expenses of Wife.—Under a Statute providing that "as soon as the executor or administrator is possessed of sufficient means over and above the expenses of administration, he shall pay off the charges of the last sickness and funeral of deceased," preference is given these expenses over all other claims, and, regardless of the obligations of the living or of that of the husband at the common law, the duty of meeting them is especially imposed upon the executor of every deceased person. (Iowa) *Estate of Skillman*, 295.

6. HUSBAND AND WIFE—Funeral Expenses of Wife.—Under a Statute requiring the executor or administrator to pay the expenses of the last sickness and funeral of every deceased person out of his estate, the estate of a deceased married woman is primarily liable for her expenses of this nature, and, if paid by the husband, he is entitled to recover therefor from her estate. (Iowa) *Estate of Skillman*, 295.

See Homestead, 1-4.

INDEPENDENT CONTRACTOR.

See Master and Servant, 25.

Note.

Indian Nation, specific enforcement of contract affecting, 61.

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INDICTMENT.

1. **INDICTMENT Found upon Testimony Coerced from Defendant.**—A plea in abatement to indictment for a misdemeanor, found upon evidence coerced from the defendant by order of court, and given against his will, should be sustained. (Ind.) *State v. Pence*, 240.

2. **INDICTMENT—Misdemeanor—Time of Commission.**—It is competent for the commonwealth, in indicting for a misdemeanor, to charge without respect to a particular date, that the offense was committed in the county within one year before the presentment by the grand jury. (Ky.) *Commonwealth v. Miles*, 401.

See *Homestead*, 2-5; *Larceny*, 4-7.

INJUNCTIONS.*In General.*

1. **INJUNCTIONS—Parties.**—The Joinder as Complainants of parties who suffer special injury by reason of the proximity of their properties to a nuisance which it is sought to restrain is proper. (N. J. Eq.) *Rider v. Clarkson*, 614.

2. **INJUNCTIONS—Bond on Issuance of Preliminary.**—Upon the issuance of a preliminary mandatory injunction requiring the removal of a building, it is appropriate to require a bond conditioned to pay the defendant such damages as he may sustain if it is ascertained the complainant was not entitled to the writ. (N. J. Eq.) *Pennsylvania E. R. Co. v. Kelley*, 541.

3. **INJUNCTION SUITS—Solicitors' Fees.**—A prima facie showing of the employment of certain solicitors by the defendants is shown where it appears from the record that such solicitors appeared in the injunction suit, in the preparation of the pleadings, the taking of evidence, and the arguing of a motion to dissolve the injunction, which was dissolved. (Ill.) *Howard v. Burke*, 159.

4. **INJUNCTION SUITS—Solicitors' Fees.**—When the statute makes it the duty of the state's attorney to appear for county officials, there is no law precluding the employment of other counsel or the allowance of fees for them. (Ill.) *Howard v. Burke*, 159.

5. **INJUNCTION—Conditional Relief, When Improper.**—Where the circuit court, after a trial on the merits, finds the complainant entitled to a permanent injunction, as prayed, it is error to make the granting of such relief conditioned on the filing of an undertaking that if on appeal judgment is awarded the defendants, the plaintiff will pay such damages as they have sustained by reason of the injunction. (Wis.) *Manitowoc v. Manitowoc & Northern Traction Co.*, 1056.

When will Issue.

6. **INJUNCTIONS to Prevent the Breach of Contracts** calling for personal services and running through an indefinite period of time are granted by the courts with great caution. (Ala.) *Boquemore v. Mitchell Bros.*, 52.

7. **ANIMALS—Vicious Dogs.**—An Injunction may Issue to restrain the keeping of a vicious dog in such a manner that he can escape and do bodily harm, and as renders it unsafe for neighbors to pass to and from their homes. (N. J. Eq.) *Rider v. Clarkson*, 614.

8. **INJUNCTION—Issuance in Legal Action.**—A Temporary Injunctiional order may be issued, under some circumstances, in a legal action. (Wis.) *Cline v. Whitaker*, 1039.

9. **INJUNCTIONS—Illegal and Excessive Use of Authority** may be restrained by injunction. (N. J. Eq.) *Bayonne v. North Arlington*, 547.

Against Enactment of Ordinance.

10. INJUNCTION—Whether Lies Against Enactment of Ordinance.—An action to restrain and enjoin the enactment of a municipal ordinance cannot be maintained, except where, by the mere enactment, irreparable damage to persons affected will immediately follow, cause a multiplicity of suits, or violate existing contract rights. (Minn.) *Basting v. Minneapolis*, 490.

11. INJUNCTION—Enactment of Ordinance.—Complaint in an Action to Restrain the passage of an ordinance by the city of Minneapolis held not to state a cause of action within the rule. (Minn.) *Basting v. Minneapolis*, 490.

How Far Binding When Erroneous.

12. INJUNCTION—Whether Binding When Erroneous.—However erroneous an injunctive order may be in the sense of wrong or inexcusable use of judicial power, it is binding on the person restrained and efficiently notified thereof till set aside in some proper proceeding. (Wis.) *Cline v. Whitaker*, 1039.

13. INJUNCTION—Whether Good Until Set Aside—Jurisdiction.—The saying that an injunctive order is good until set aside, if the court making it had jurisdiction of the subject matter, is to be understood, as to the word "jurisdiction," to refer to the existence or non-existence of judicial power, and as to the words "subject matter," to such subjects between the parties. (Wis.) *Cline v. Whitaker*, 1039.

Mandatory Injunction.

14. MANDATORY INJUNCTIONS are Rarely Granted before final hearing or before the parties have had full opportunity to present all the facts in such manner as will enable the court to see and judge what the truth may be. A preliminary mandatory injunction will be ordered only in case of extreme necessity. (N. J. Eq.) *Pennsylvania R. R. Co. v. Kelley*, 541.

15. MANDATORY INJUNCTIONS—Extreme Necessity—Dangerous Building.—The existence and maintaining of a brick building in so dilapidated a condition that it is likely at any time to fall upon the adjoining right of way or passing trains of a railroad company to the danger of the public, presents such a case of extreme necessity as warrants a preliminary mandatory injunction for its removal either by tearing down or repair. (N. J. Eq.) *Pennsylvania R. R. Co. v. Kelley*, 541.

See Contempt; Specific Performance, 3; Tenancy in Common, 5.

Note.

Injunction, when lies to prevent breach of contract calling for services of a personal nature, 57.
against de facto officer, 199, 200.

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See Constitutional Law, 27-30.

Note.

Insanity, adjudication of as showing want of capacity to contract, make a will, etc., 347-355.
admissibility of adjudication of, in other proceedings, 350.
conclusiveness of adjudication as showing want of capacity, 347-355.

INSTRUCTIONS.

See Trial, 4-8.

INSURANCE.***In General.***

1. **FIRE INSURANCE.**—**Executory Contracts** to insure in the future are valid. (Pa.) *Benner v. Fire Association of Philadelphia*, 706.

2. **LIFE INSURANCE.**—**Issuance and Delivery of Policy.**—The “issuing” of a policy of life insurance, within the meaning of a statute providing that an insurance company shall be estopped, in the absence of fraud, by the certificate of its medical examiner from setting up that the insured was not in the condition of health required by the policy at the time it was issued, includes a delivery of the policy to the assured. Until such delivery is made there is no “issuing” of the policy. (S. D.) *Cunningham v. Royal Neighbors of America*, 793.

3. **INSURANCE.**—**Construction of Contract.**—**Insurance Contracts**, like all other contracts, should be construed with reference to what the parties meant, when interpreted in the light not only of the language employed, but of the evident object of the contract, the benefits secured on one hand, the perils or risks sought to be avoided on the other. (Wash.) *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.*, 863.

4. **INSURANCE.**—**Construction—Doubtful Clauses.**—A stipulation in an application for fire insurance should be construed, in a doubtful case, most strongly against the insurer by whom it was framed; and in a doubtful case that construction of the contract which will save it is to be preferred to one which will destroy it. (Wash.) *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.*, 863.

5. **INSURANCE.**—**The Temporary Breach of a Stipulation** in a contract of insurance to which there is not attached a specific forfeiture, and which does not exist at the time of the loss and could in no way contribute to the loss, will not prevent a recovery on the policy. (Wash.) *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.*, 863.

6. **INSURANCE.**—**Forfeiture Abhorred.**—**Insurance Contracts** should not be so construed as to work a forfeiture of either party's rights, or to defeat the object of the contract, unless it plainly appears that such was the intention of the parties and that the effect of the language was well understood by them when the contract was entered into. Where the language is that of the insurance company, it is its duty to see to it that, when unreasonable and one-sided provisions are incorporated in the contract, it is understandingly entered into. (Wash.) *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.*, 863.

Oral Contracts.

7. **FIRE INSURANCE.**—**Oral Contracts** of insurance are permitted by the law of Pennsylvania. (Pa.) *Benner v. Fire Association of Philadelphia*, 706.

8. **FIRE INSURANCE.**—**Oral Contracts of Insurance** must be clearly established in every particular. The testimony must make clear the subject matter, the amount and elements of the risk, including its duration in point of time and extent of hazard assumed, the rate of premium, and generally all the circumstances peculiar to the contract, so that nothing remains to be done but to fill up the policy and deliver it on one hand and to pay the premium on the other. (Pa.) *Benner v. Fire Association of Philadelphia*, 706.

9. **FIRE INSURANCE.**—**Oral Preliminary Contract.**—A Presumption that the parties to an oral preliminary contract of insurance contemplated such a form of policy as has been usual between them, or is usual in such cases, may be applied in some instances. (Pa.) *Benner v. Fire Association of Philadelphia*, 706.

10. FIRE INSURANCE—Oral Contract—Certainty Required.—Evidence of a conversation between the owner of certain property and the agent of an insurance company about renewing certain insurance, during which the former said, "Don't forget the barn. Renew the barn as quick as that comes due," and received the reply, "I will attend to it; you don't need to worry"—is too vague and uncertain to constitute an oral contract to insure in the future. (Pa.) *Benner v. Fire Association of Philadelphia*, 706.

11. FIRE INSURANCE—Oral Contract—Authority of Agent.—A commission from an insurance company to its agent to act within certain territory, "with full power to receive proposals for insurance against loss or damage by fire, . . . with authority to issue and countersign policies and renewal receipts, . . . to collect premiums . . . and to transact such other business as may be intrusted to his care," is not sufficient evidence of the agent's authority to bind the company by an unusual oral contract of future insurance. (Pa.) *Benner v. Fire Association of Philadelphia*, 706.

12. FIRE INSURANCE—Oral Contract—Authority of Agent.—An offer to prove that insurance agents are accustomed to agree to renewals in advance of the expiration of current policies and give credit for premiums properly refused when offered to establish the authority of the agent to make an oral contract for future insurance or the renewal of insurance. (Pa.) *Benner v. Fire Association of Philadelphia*, 706.

13. FIRE INSURANCE—Oral Contract—Prohibition of Charter.—Where the charter of an insurance company, after granting the right to make contracts of insurance, provides, "and every such contract, bargain, agreement and policy to be made by the said corporation shall be in writing or in print," any attempted oral contract of insurance by an agent is, in the absence of an estoppel, not binding on the company. (Pa.) *Benner v. Fire Association of Philadelphia*, 706.

Warranties—Sprinkler System.

14. INSURANCE—Construction.—The Term "Warranted" adds nothing to the force of a stipulation in an insurance contract. The expression of the word "warranty" does not necessarily constitute a warranty; there may be warranties without the use of the word, and there may not be warranties when the word is used. (Wash.) *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.*, 863.

15. INSURANCE—Sprinkler System—Statement not a Warranty.—A clause in a policy of insurance, "warranted by the assured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order," should be given its ordinary signification. It does not constitute a warranty the breach of which at any time will forfeit the insurance, notwithstanding the fact that the breach in no way contributed to the loss. (Wash.) *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.*, 863.

16. INSURANCE—Contract Construed as a Whole—Warranties.—In determining whether or not a certain statement or stipulation in an insurance contract constitutes a warranty, other parts of the contract may be considered; and where other statements and stipulations are coupled with an express and specific provision that a violation thereof shall work a forfeiture, it is evidence showing that the parties did not intend the same result from the violation of the statement or stipulation not containing such provision for a forfeiture. (Wash.) *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.*, 863.

17. INSURANCE—Sprinkler System—"Due Diligence."—A stipulation in an insurance contract to use "due diligence" to keep a sprinkler system in working order is not violated by a temporary closing down

of the same necessary for alterations and repairs, and no forfeiture ensues therefrom where such alterations were completed and the system in good working order prior to and at the time of the fire. (Wash.) *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.*, 863.

Ownership and Insurable Interest.

18. **INSURANCE—Sole Ownership—Effect of Divorce.**—A man is not divested of the "sole and unconditional" ownership of property by a decree of divorce awarding possession thereof temporarily to his wife and reserving the question of division for future determination. (Ark.) *Hix v. Sun Ins. Co.*, 138.

19. **FIRE INSURANCE—Insurable Interest—Ownership of Property.**—A building situated upon a patented mining claim constitutes a part of the real estate. Hence it is the property of the owner of the mining claim, and in the absence of a lease or contract permitting one claiming to be the owner of the building to retain possession or remove the same, it is not the property of or owned by such claimant within the terms of an insurance policy prohibiting and rendering void insurance upon property not owned by the insured. (S. D.) *Milison v. Mutual Cash G. F. Ins. Co.*, 788.

20. **FIRE INSURANCE—Ownership of Property—Waiver of Condition.**—Where an insurance company accepts and retains the premium and issues its policy without requiring a written application, or without making inquiry into the condition of the title to the land on which the insured property stands, and where the insured is guilty of no fraud or concealment, it is conclusively presumed that the company waived that condition of the policy providing for a forfeiture if the building insured stands on land not owned by the insured in fee simple. (S. D.) *Milison v. Mutual Cash G. F. Ins. Co.*, 788.

21. **FIRE INSURANCE—Ownership of Property—False Representations.**—Where, in answer to inquiries of an insurance agent, an applicant for insurance upon a building stated that he owned the property, when in fact he did not own the land upon which the building was situated, such statement was a misrepresentation sufficient to work a forfeiture of the insurance. (S. D.) *Milison v. Mutual Cash G. F. Ins. Co.*, 788.

Accident Insurance.

22. **ACCIDENT INSURANCE—Limitation of Liability—"Beyond the Seas."**—If an indemnity policy of insurance covers only injuries received "within the United States (not including its parts beyond the seas), Mexico and Canada," there is no liability for an injury to, and the death of, the insured occurring in the Canal Zone on the Isthmus of Panama. (Iowa) *Currie v. Continental Casualty Co.*, 300.

23. **ACCIDENT INSURANCE—Waiver by Insurer, What is.**—A waiver is the intentional relinquishment of a known right, and any conduct relied upon which warrants the belief that such relinquishment has been made constitutes in law a waiver. (Iowa) *Currie v. Continental Casualty Co.*, 300.

24. **ACCIDENT INSURANCE—Waiver—Question for Jury.**—The question of waiver is generally one of fact for the jury. The questions as to whether an indemnity policy sued upon had been absolutely canceled, and whether a provision therein, in the light of evidence concerning it, limited liability for injuries to places within the United States, should be submitted to the jury. (Iowa) *Currie v. Continental Casualty Co.*, 300.

Fraternal Insurance.

25. **FRATERNAL INSURANCE—Reinstatement of Delinquent—Estoppel.**—A fraternal insurance society is estopped from denying that

a member was reinstated under a by-law providing that a member whose certificate has been voided by nonpayment of assessments shall be reinstated by the payment of all arrearages within sixty days, "provided that he be in good health at the time of reinstatement," by the acceptance of such arrearages within the sixty days, and the retention of the money for about a year. (Wash.) *Schuster v. Knights and Ladies of Security*, 905.

26. FRATERNAL INSURANCE—Reinstatement of Delinquent.—A By-law of a fraternal insurance society, in relation to the reinstatement of delinquent members upon payment of arrearages, which provides that "the receipt and retention of such assessments or dues in case the suspended member is not in good health shall not have the effect of reinstating said member or of entitling him or his beneficiaries to any rights under his benefit certificate," cannot be upheld, and by the receipt and retention of the delinquent assessments and dues the society estops itself from questioning the reinstatement of the member. (Wash.) *Schuster v. Knights and Ladies of Security*, 905.

27. FRATERNAL INSURANCE—Retention of Delinquent Assessments—Waiver.—The retention of delinquent assessments, received with knowledge of the circumstances and that the delinquent member was not then in good health, is a waiver of a condition that a delinquent member must be in good health to be entitled to reinstatement. (Wash.) *Schuster v. Knights and Ladies of Security*, 905.

28. FRATERNAL INSURANCE—Local Officers—Agents of the Society.—Cunningly contrived provisions in policies, to the effect that local officers are the agents of the home lodge only, and that solicitors of insurance are the agents of the insured, may be ignored by the courts. The local secretary of a fraternal insurance society with power to receive assessments and dues is the agent of the society. (Wash.) *Schuster v. Knights and Ladies of Security*, 905.

Arbitration.

29. FIRE INSURANCE—Condition for Arbitration—Pleading.—A provision in a policy of fire insurance that, in the event of loss and disagreement as to its amount, the same shall be determined by appraisers and umpire, constitutes a contract and makes it obligatory upon the plaintiff, in an action on the policy, to aver, in the absence of a reasonable excuse for failure so to do, that such an award has been made. (R. I.) *Early v. Providence etc. Ins. Co.*, 750.

30. FIRE INSURANCE—Arbitration—Impeachment of Award.—The award of appraisers and umpire appointed under a provision of a fire insurance policy cannot be impeached in an action at law on the policy because of alleged misconduct of the appraisers or of their incompetency. (R. I.) *Early v. Providence etc. Ins. Co.*, 750.

31. FIRE INSURANCE—Arbitration—Second Appraisal.—The fact that a first appraisal under an arbitration clause of a fire insurance policy failed because of misconduct of the appraisers, or the appointment of incompetent and interested appraisers, does not excuse the assured from requesting a second appraisal, where it is not shown that the disqualification was known to the insurer at the time it appointed the disqualified appraiser, or that it was in any way responsible for the alleged misconduct. (R. I.) *Early v. Providence etc. Ins. Co.*, 750.

Actions—Testimony of Witness at Former Criminal Trial.

32. INSURANCE—Action on Policy—Testimony of Witness on Former Criminal Trial.—The testimony of a witness in a prosecution of the owners of insured property for burning it to defraud the in-

insurance company is not admissible, after his death, in a subsequent civil action by the owners on the policies of insurance. (Ill.) *McInturff v. Insurance Co. of North America*, 153.

See Mortgages, 2-4.

INTERSTATE COMMERCE.

See Commerce.

INTERURBAN RAILWAY.

See Carriers, 17, 18; Municipal Corporations, 12.

INTOXICATING LIQUORS.

1. **INTOXICATING LIQUORS**—Nature of License to Sell.—A license to sell intoxicating liquor is not a vested or property right, but a matter of purely legislative grace which may be extended or denied. (Ind.) *State v. Williams*, 261.

2. **LOCAL OPTION LAW**—Construction.—“After the Passage of This Act.”—The phrase, “after the passage of this act,” as used in the provision of the Indiana local option law of 1908, providing that licenses issued “after the passage of this act” shall be void ninety days after the holding of an election at which the sale of intoxicating liquors shall be prohibited, is used in a technical sense, and means the time at which the act took effect. (Ind.) *State v. Williams*, 261.

3. **LIQUORS**—Sale by Druggist—Prescriptions are Private Records.—The prescription and applications required by statute to be kept by druggists upon the sale of intoxicating liquors are private papers and not public records or documents. (Ind.) *State v. Pence*, 240.

4. **LIQUORS**—Sale by Druggists—Restrictions.—The Legislature has Power to impose such reasonable restrictions upon the sales of liquor by druggists as it deems necessary to the public good. (Ind.) *State v. Pence*, 240.

IRRIGATION.

See Eminent Domain, 2-6.

ISSUE, POSSIBILITY OF.

See Wills, 22.

JOINT TENANCY.

See Wills, 4, 5.

JUDGMENTS.

1. **JUDGMENTS**—Parties Concluded by.—Under the rule that judgments and decrees are conclusive only as between the parties and privies to the litigation, the term “parties” includes all who are directly interested in the subject matter and who have a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment; and where a person not a party to an action will be liable to one of the parties if the latter’s claim or defense shall fail, and he has notice and an opportunity to participate in the action, in defense or maintenance of his position, he will be bound by the result the same as if he were a party to the action. (S. D.) *Goldberg v. Sisseton Loan & T. Co.*, 775.

2. **VACATION OF JUDGMENT**—Whether Purchaser may Apply for.—One who, after a judgment against a defendant in an action to quiet title, purchases defendant’s title, succeeds to all his interest

and rights, and may properly apply for a vacation of the judgment. In such case the applicant's rights are those the original defendant would have had, if the application had been made by him. (Minn.) *Long v. Long*, 495.

3. DEFAULT JUDGMENT—Right to Open—Laches.—Where judgment is entered by default upon substituted service of summons, a defendant is entitled as a matter of right to have the judgment opened and be allowed to defend upon application, if made within one year, unless by his laches he has lost such right. The claim that defendant's right has been so lost is addressed to the discretion of the court in which the judgment was entered. (Minn.) *Long v. Long*, 495.

JUDICIAL NOTICE.

See Evidence, 5.

JURISDICTION.

See Courts; Venue.

JURY.

Exclusion of Negroes from Jury.

1. JURY—Exclusion of Negroes.—When a Negro is Charged with violating the criminal laws of a state, and when under oath he challenges the panel of the jury upon the ground that the commissioners who selected such jury and the sheriff who summoned them had excluded from the jury all persons of African descent, solely on account of their race and color, and offers evidence to sustain this ground of challenge, the trial court should hear the evidence, and if it is of the opinion that as a matter of fact negroes were intentionally excluded from the panel, solely upon the ground of their race and color, said motion should be sustained. This has been repeatedly decided by the supreme court of the United States, and all state tribunals are bound thereby. The mere fact that the jury was composed solely of white men will not be ground for challenge in such case. There is no law requiring that negroes shall be selected to sit upon juries. The only law upon this subject is, they must not be excluded therefrom solely on account of their race or color. Officers charged with the duty of selecting and summoning jurors can exercise their own discretion in selecting those persons who, in their judgment, are competent and qualified to serve as such jurors, provided, that they do not exclude competent persons who are negroes, solely on account of their race and color. (Okl. Cr.) *Smith v. State*, 688.

Opinion as Disqualifying Juror.

2. JUROR—Opinion as Disqualifying in Criminal Case.—A juror in a criminal case is not necessarily incompetent simply because of his having an impression or opinion respecting the merits of the case, formed from reading newspaper accounts and from other hearsay information. (Wis.) *Burns v. State*, 1081.

3. JUROR—Opinion in Criminal Case.—In Case of a Challenge in a criminal case of a juror who has formed an opinion as to the merits of the case, the issue presented is one of fact to be determined with reference to the evidence of the juror, his general characteristics as appears thereby, and impressions upon the court created by the opportunity of seeing him and witnessing and participating in his examination. (Wis.) *Burns v. State*, 1081.

4. JUROR—Opinion as Disqualifying—Review on Appeal.—That the action of a trial court in a criminal case in holding a juror competent who has formed an opinion may be disturbed on appeal, it must

clearly appear that the court ought to have found that the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest that the law left nothing to the conscience or discretion of the court. (Wis.) *Burns v. State*, 1081.

5. **JUROR—Opinion as Disqualifying in Criminal Case.**—Generally speaking, trial administration in a criminal case is to be commended which excuses a juror upon his testifying, on the voir dire, that he has heard and read about the case and therefrom formed an opinion upon the merits thereof which will persist until removed by evidence, notwithstanding he may testify that in his opinion he can act impartially upon hearing the evidence. (Wis.) *Burns v. State*, 1081.

Misconduct in Reading Newspaper.

6. **JURORES—Misconduct in Reading Newspaper.**—Where the officer in charge of a jury in a criminal case permits a newspaper to be possessed by the jurors, from which they learn that the conditions of their deliberations are known to the public, the conduct of the officer and the jury as well, and the newspaper too, are reprehensible to a high degree; but if the appellate court is unable to conclude that, had the improper conduct not occurred, the result might, within reasonable probability, have been different, the misconduct does not call for a reversion. (Wis.) *Burns v. State*, 1081.

Tampering With Juror.

7. **CRIMINAL TRIAL—Tampering With Jury—Practice.**—Where, during the trial of a criminal case, knowledge of an attempt to tamper with a juror comes to the judge, he should inform counsel and leave it to them to introduce evidence of the fact, by competent means, before the jury. If the evidence connects the prisoner with the matter, it is relevant in his case. If he was not connected with it, he is entitled to have the jury know that fact. (Ky.) *Turpin v. Commonwealth*, 378.

8. **CRIMINAL TRIAL—Tampering With Juror—Practice.**—Where, during the trial of a criminal case, knowledge of an attempt to tamper with a juror comes to the judge, and it is not brought before the jury by evidence in the case, he may issue a rule against the alleged offenders, and try them, letting it have such effect on the trial of the principal case as it may, controlling its application by appropriate instructions to the jury. (Ky.) *Turpin v. Commonwealth*, 378.

Publishing Secrets of Jury-room.

9. **FREEDOM OF PRESS—Publication of Secrets of Jury-room.**—The publication by a newspaper of the secrets of the jury-room in a pending criminal case is highly reprehensible, and should be rebuked or punished by the court. (Wis.) *Burns v. State*, 1081.

LACHES.

See Equity, 4, 5.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT—Venue of Action for Waste.**—An action may be brought by a lessor against his lessee, on the lease, to recover for waste in violation of his contract. Such cause of action follows the person of the lessee, and he may be sued where he may be found. (Ky.) *Campbell v. W. M. Ritter Lumber Co.*, 385.

2. **LANDLORD AND TENANT.—A Tenant must Take Ordinary Care of the demised premises, and turn them over at the end of the term in as good condition as when received, ordinary wear and tear**

excepted, so far as can be done by ordinary care. (Ky.) *Campbell v. W. M. Ritter Lumber Co.*, 385.

3. **LANDLORD AND TENANT.**—When a Tenant Puts His Sex-
wants in the demised houses, it is his duty to see that they do not
injure the property, and he is responsible for their use of it. (Ky.)
Campbell v. W. M. Ritter Lumber Co., 385.

See Mines and Minerals, 4-7.

LARCENY.

1. **LARCENY BY BAILEE.**—The Purpose of Section 4415, Stat-
utes of 1898, was to abolish the distinction between conversion by a
bailee of an entire thing, as property in a package, and the unlawful
breaking of the package and conversion of part or all of the con-
tents—whether preceded by the element of breaking bulk with intent
to permanently deprive the owner of the thing appropriated or not—
making the latter a statutory class of larcenies, differing only from
ordinary larcenies by absence in the former of the element of tres-
pass. And where the evidence shows that the accused broke a pack-
age of money and extracted a part of the contents, his acquittal
under a count charging larceny of the money is not inconsistent with
his conviction of the offense of larceny as bailee. (Wis.) *Burns v.*
State, 1031.

2. **LARCENY—Estrayed Animals.**—The Taking Up of an estray
with the felonious intent to convert it to one's own use is larceny.
An effort, but failure, to comply with the estray law would be evi-
dence to be considered as tending to prove the absence of a felonious
intent in making a conversion, but that is as far as it could go.
(Ark.) *Blackshare v. State*, 144.

3. **LARCENY—Estrayed Animals—Rule as to Lost Goods.**—The
rule that if the finder of lost goods neither knows nor has any imme-
diate means of ascertaining the owner, and appropriates them to
his own use, he is not guilty of larceny, does not apply to estrayed
animals. (Ark.) *Blackshare v. State*, 144.

4. **LARCENY—Indictment—Ownership by Corporation.**—An in-
dictment charging grand larceny in feloniously appropriating the
property of the "People's Mutual Life Insurance Association and
League" is not demurrable because it fails to allege that the league
is an association or corporation. (N. Y.) *People v. Mead*, 616.

5. **LARCENY—Pleading Ownership.**—It is Proper in a prosecu-
tion for larceny to describe the property as that of the real owner,
or of the person in possession. (Ind.) *State v. Tillett*, 246.

6. **LARCENY—Pleading Ownership—Special Property.**—In a
prosecution for larceny the property may be alleged to be that of
one who is in possession as bailee, agent, trustee, executor or admin-
istrator, without describing his trust character; that is, the property
may be described as his individually. (Ind.) *State v. Tillett*, 246.

7. **LARCENY—Proof of Ownership.**—Evidence of Possession is
sufficient proof of ownership of property held by a bailee, agent, trust-
ee, executor or administrator. (Ind.) *State v. Tillett*, 246.

8. **LARCENY—Ownership—Directing Verdict of Acquittal.**—An
instruction to the jury to find a verdict of not guilty in a prosecution
for larceny, because the evidence showed he who was alleged to be
the owner of the property held it as an executor, is erroneous. (Ind.)
State v. Tillett, 246.

9. **LARCENY—Evidence—Character of Money Stolen.**—Upon a
trial under an indictment for the larceny of one twenty dollar gold
piece, one ten dollar gold piece, one ten dollar bill and other coins,
all money of the United States, where the evidence shows the larceny

of money of the denominations alleged, but fails to show it was money of the United States, or of any other sovereign power, it is open to the jury to infer, if it is not their duty to do so, that the money stolen was lawful money of the United States. (Ala.) *Johnson v. State*, 19.

Note.

Legacies, specific, demonstrative, and general. See Wills.

LIFE ESTATES.

See Remainders.

LIMITATION OF ACTIONS.

See Adverse Possession; Pleading, 5, 6.

Note.

Limitation of Actions, possession of surface estate as adverse possession of severed mineral estate, 951.

LIS PENDENS.

1. **LIS PENDENS—Transfer of Interest.**—An Appeal will not be Dismissed upon a showing of a transfer of the appellant's interest in the property affected, subsequent to the filing of a lis pendens, where no claim was predicated upon the transfer in the court below, and during a trial upon the merits the movant treated the appellant as the party in interest. (Wash.) *Trumbull v. Jefferson County*, 943.

2. **LIS PENDENS—Transfer of Interest.**—An Action to Vacate a tax foreclosure sale, brought against a county, does not abate by a transfer of the interest of the county subsequent to the filing of a lis pendens. Under the doctrine of lis pendens the transferee, if he so elects, should be permitted to obtain, in the name of his grantor, by appeal if necessary, any benefit resulting from the litigation. (Wash.) *Trumbull v. Jefferson County*, 943.

MALICIOUS PROSECUTION.

1. **MALICIOUS PROSECUTION—Probable Cause.**—A Judgment of Conviction by a court of competent jurisdiction is conclusive evidence of the existence of probable cause, even though the judgment is subsequently reversed and set aside, unless it is shown that the judgment was procured by fraud or undue means. (Ark.) *Casey v. Dorr*, 124.

2. **MALICIOUS PROSECUTION—Probable Cause—Indictment.**—The finding of an indictment is only prima facie evidence of probable cause for a prosecution, and may be overcome by other evidence. (Ark.) *Casey v. Dorr*, 124.

3. **MALICIOUS PROSECUTION—Sufficiency of Complaint.**—A complaint alleging that the defendants did willfully and maliciously, and without probable cause, induce the grand jury to find an indictment against the plaintiff, and did willfully and maliciously, and without probable cause, instigate, aid and abet, advise and encourage, the prosecution of the charge under the indictment, states a cause of action. (Ark.) *Casey v. Dorr*, 124.

MANDAMUS.

1. **MANDAMUS—Defense of Unconstitutionality of Law.**—A ministerial officer, who is directly responsible for his official acts, may attack a law in a mandamus proceeding, and justify his refusal to act, upon the ground that the law requiring the act is unconstitutional. (Utah) *State v. Candland*, 834.

2. MANDAMUS.—Exercise of Discretion by municipal officers cannot be compelled by mandamus. (N. J. Eq.) *Bayonne v. North Arlington*, 547.

3. MANDAMUS—Continuing Duty.—Where a legal duty is clear, mandamus will not be denied because the duty is a permanent continuing one and not of a mere temporary character. (Wis.) *State v. Milwaukee Elec. Ry. & L. Co.*, 1025.

See Elections, 16.

Note.

Mandamus to determine title to office and oust usurpers, 196–198.

MARRIAGE.

See Divorce; Husband and Wife.

Note.

Marriage, specific performance of contracts relating to, 80–82.

MASTER AND SERVANT.

Discharge of Employee.

1. MASTER AND SERVANT—Discharge by Requiring Additional Services.—As long as a servant is permitted to perform the services he contracts for, he cannot treat a mere request or direction to perform additional services as a discharge; but when there is a refusal to permit him to perform the substantial or principal services he agreed to perform, and a direction to substitute a different service, then he may treat such refusal and direction as a discharge. (Wis.) *Loos v. Geo. Walter Brewing Co.*, 1052.

2. MASTER AND SERVANT—Breach of Duty, Whether Warrants Discharge.—Where a brewing company, which contemplates loaning money to one of its customers to enable him to purchase a saloon, sends an employee to assist in making the purchase, and the employee receives a commission from the vendor for making the sale, the question whether any wrong was intended by the employee, or any real injury resulted to the employer, warranting the discharge of the employee, is for the jury. (Wis.) *Loos v. Geo. Walter Brewing Co.*, 1052.

3. MASTER AND SERVANT—Discharge of Employee.—If Misconduct on the part of an employee amounting to a breach of contract exists at the time of his discharge, the master can justify under it irrespective of whether or not he knew it at the time of the discharge. (Wis.) *Loos v. Geo. Walter Brewing Co.*, 1052.

Statute Regulating Payment of Wages.

See Constitutional Law, 21–23.

4. MASTER AND SERVANT—Act Regulating Payment of Wages. The act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state, is for the public good, and any contract made in violation of its terms is void as against public policy. (Ark.) *Arkansas Stave Co. v. State*, 103.

5. MASTER AND SERVANT—Act Regulating Payment of Wages—Penal Statute.—The act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state is a penal statute and must be strictly construed. (Ark.) *Arkansas Stave Co. v. State*, 103.

6. MASTER AND SERVANT—Act Regulating Payment of Wages. The act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state, being a penal statute, can be violated only by a corporation failing or refusing to pay the wages of employees that may have been earned semi-monthly; and it cannot thus fail or refuse unless a request or demand has been

made for the payment of such wages, or unless by its acts and conduct it shows that it will so fail or refuse if such request or demand should be made. (Ark.) *Arkansas Stave Co. v. State*, 103.

7. **MASTER AND SERVANT—Act Regulating Payment of Wages.** Any contract made between a corporation and its employee in violation of the act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state, is void, but the mere making of the contract does not subject the corporation to a fine under the act. (Ark.) *Arkansas Stave Co. v. State*, 103.

8. **MASTER AND SERVANT—Act Regulating Payment of Wages.** A reasonable construction of the act of February 1, 1909, requiring the semi-monthly payment of wages by all corporations doing business in the state, requires that the corporation have the opportunity to make such payment. If the employee does not desire and refuses to accept the payment, there is no violation of the act, the evident intention of the legislature being to benefit those who need and desire payments to be made semi-monthly. (Ark.) *Arkansas Stave Co. v. State*, 103.

Safe Place and Appliances.

9. **MASTER AND SERVANT—Safe Place and Appliances—Independent Contractor.**—Where the master or owner of rolling-mills undertakes to furnish the place and the appliances with which an independent contractor is to perform his contract, and retains possession and control over them, the contractor and his employees have the same right as any servant to demand that they be reasonably safe for the purpose for which they were furnished. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

10. **MASTER AND SERVANT—Safe Place and Appliances—Instructions.**—Where there is a conflict in the evidence as to whether a master has been guilty of negligence in furnishing a safe place and appliances for the servant, the question should be left to the jury under appropriate instructions, and the court should not peremptorily charge the jury on the subject. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

11. **MASTER AND SERVANT—Safe Place and Appliances—Question of Fact.**—Where the evidence shows that it is usual and customary in rolling-mills to have an iron post firmly set in the floor in a certain position for the protection of workmen, that such a post had been maintained at one time in the mill of the defendant, but had been removed and superseded by an iron spool or spindle, the question whether such device was an adequate substitute for the post and whether the defendant was guilty of negligence in removing the post, etc., should be submitted to the jury, and where there is a conflict in the evidence the court should not give a peremptory instruction to the jury to find for either party. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

12, 13. **MASTER AND SERVANT—Duty to Guard Machinery.**—Neither the common law nor the statutory rule requiring the master to guard machinery so located as to be dangerous to employees in the discharge of their duties applies to a situation where the employee must necessarily go out of any way which he would be reasonably expected to take in order to reach it. (Wis.) *Houg v. Girard Lumber Co.*, 1012.

14. **MASTER AND SERVANT—Dangerous Machinery—Contributory Negligence.**—Where a workman is injured while oiling machinery, he having taken a position dangerously near the wheel which caused the injury, which position it was unnecessary to take and different from the one prepared by the master and ordinarily taken, it

cannot be held that the master was liable by reason of a failure to furnish a safe place to work, and it must be held that the servant was guilty of contributory negligence in so unnecessarily exposing himself to danger. (Wis.) *Houg v. Girard Lumber Co.*, 1012.

Contributory Negligence.

15. MASTER AND SERVANT—Contributory Negligence—Pleading and Proof.—Ordinarily, contributory negligence is a defense which must be charged in the answer, and established by the defendant by a preponderance of the evidence to the reasonable satisfaction of the jury. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

16. MASTER AND SERVANT—Contributory Negligence—Assumption of Risk.—When a peril of a servant in the performance of his duty is augmented by the negligence of the master, and the servant, if knowing that the master has been thus negligent, and that such negligence has rendered the performance of his duty more hazardous, continues in the performance of that duty, there arises a question of contributory negligence and not a question of assumption of risk. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

17. MASTER AND SERVANT—Contributory Negligence—Absence of Safeguard.—Where the evidence shows that an iron post set in the floor in a certain position is customary and usual in rolling-mills for the protection of workmen, that an employee in the defendant's mill complained to the foreman of the absence of the post, but was told the other men did not object to working without it, and that other employees had worked there for years without sustaining any injury, it cannot be said the danger of working there without the post would be so obvious that a reasonably prudent person would not attempt to work thereat, or that doing so would, as matter of law, constitute contributory negligence. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

18. MASTER AND SERVANT—Contributory Negligence—Direction of Master to Proceed With Work.—Where the evidence shows an employee in a rolling-mill complained to the foreman of the absence of an iron post usually placed in a certain position in rolling-mills for the protection of employees, but was told that other men did not object to working without it, and if he did not wish to do likewise he knew what he could do, meaning that he could quit the work, the remark of the foreman was even more than an order to continue in the performance of the work in the absence of the post, and hence it must be held that the employee did not voluntarily assume the perils caused by the absence of the post, and that his conduct in remaining at his work was not such as to warrant the court in declaring as matter of law that he was guilty of such contributory negligence as would bar his right of recovery. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

Assumption of Risk.

18a. MASTER AND SERVANT—Assumed Risk.—The Negligence of the Master cannot, under any circumstances, become an incident to the servant's employment, and the doctrine of assumed risk does not apply to injuries caused by the negligence of the master. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

19. MASTER AND SERVANT—Assumption of Risk.—A Servant, by entering the service of the master, assumes all dangers incident to that service, and when injured in consequence thereof he cannot recover from the master on account of such injuries; but he assumes only such risks as are incident to that employment. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

20. MASTER AND SERVANT—Assumption of Risk.—Negligence of the Master is in no sense incident to the servant's employment. The servant can neither by express or implied contract release the master from liability for injuries sustained in consequence of the master's negligence. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

Fellow-servants.

21. EMPLOYERS' LIABILITY — Fellow-servants — Railroad Employees.—Employees engaged in or about a railroad, including therein employees brought by their employment into such close relation to the operation of the railroad as that it may be said, in a reasonable sense, that danger therefrom constitutes an ordinary danger of the service in which they are engaged, though they are not strictly railroad employees, as well as those engaged in the actual operation of the railroad, are fellow-servants with those employees who operate signals, locomotives, trains, etc., on the railroad, and fall under the influence of subdivision 5 of the employers' liability law. (Ala.) *Boggs v. Alabama Con. Coal & Iron Co.*, 28.

22. EMPLOYER'S LIABILITY—Assumption of Risk—Fellow-servants.—Except as modified by the employers' liability act, a servant undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of injury caused by the negligence of a fellow-servant while acting within the scope of his employment. But a servant stands in the position of assuming the risk only when he has received injury while acting in his master's service by a fellow-servant also so acting: both must have been engaged in a common employment. (Ala.) *Boggs v. Alabama Con. Coal & Iron Co.*, 28.

23. EMPLOYERS' LIABILITY ACT—Fellow-servants.—The employers' liability law was not intended to deprive servants injured by the negligence of other servants of any right of action they had at common law. A servant injured by the negligent act of another servant acting for the common master within the scope of his employment cannot be denied the right of recovery in an action under the statute, on the ground that he was not employed in a common employment with the delinquent, without conceding to him the right to recover under the common law as a stranger. (Ala.) *Boggs v. Alabama Con. Coal & Iron Co.*, 28.

24. EMPLOYERS' LIABILITY ACT—Fellow-servants.—The employers' liability law deals only with those cases which at the common law were affected by the doctrine of common employment, for only in such cases was the servant denied the right to recover of the master for the negligence of another servant. Unless they were engaged in a common employment, as affecting the master's liability, they stood to each other in the relation of strangers, although they may have been employed by a common master. (Ala.) *Boggs v. Alabama Con. Coal & Iron Co.*, 28.

Vice-principal—Independent Contractor.

25. MASTER AND SERVANT—Vice-principal or Independent Contractor.—Where there is evidence tending to show a certain person to be a servant or vice-principal of another, and also evidence tending to show him to be an independent contractor, the question is one of fact for the jury. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

26. MASTER AND SERVANT—Independent Contractor—Negligence.—Servants of an independent contractor engaged in the manufacture of iron bars in a rolling-mill may recover from him their damages for personal injuries caused by his negligence in not having

~~The~~ iron properly prepared for the rollers. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

Liability of Foreman.

27. MASTER AND SERVANT—Negligence—Liability of Foreman.—The foreman in a mill is not liable in damages for personal injuries sustained by a servant of the master in consequence of the foreman's nonfeasance or mere neglect of duty, but he is liable jointly with the master for a positive wrong or misfeasance. (Mo.) *Jewell v. Kansas City Bolt etc. Co.*, 515.

Employers' Liability Act.

28. EMPLOYERS' LIABILITY ACT.—It was No Part of the Purpose of the employers' liability act to codify the whole law as to the liability of employers or to destroy any common-law right of servants. All servants are still entitled to maintain actions against their employers in all cases where they could formerly have done so. (Ala.) *Boggs v. Alabama Con. Coal & Iron Co.*, 28.

29. EMPLOYERS' LIABILITY ACT—Purpose and Construction.—The employers' liability law (sec. 3910, Code 1907) does not make that negligence which was not negligence before; it does not make the master responsible for acts or things which do not constitute a breach of duty; it does not create a cause of action where none previously existed; it merely adds a remedy against a person other than the actual wrongdoer; it takes away from the master one defense, placing the employee, where the conditions of the statute have been satisfied, in the position of one of the public. (Ala.) *Boggs v. Alabama Con. Coal & Iron Co.*, 28.

30. EMPLOYERS' LIABILITY ACT—Constitutionality—Class Legislation.—It may be that section 5 of the employers' liability law affects employees only who are engaged in the operation of railroads, as only those persons, natural or artificial, operating railroads, make use of signals, locomotives, cars and the like upon railways, but the classification is based upon the fact that the operation of railroads, by whomsoever operated, involves great and peculiar hazards. The statute is in part a police regulation. It does not violate the constitution. (Ala.) *Boggs v. Alabama Con. Coal & Iron Co.*, 28.

31. EMPLOYERS' LIABILITY ACT—Pleading.—In Declarations under the employers' liability law it seems to have been the rule to treat an allegation of employment by a common master as a sufficient allegation of an employment common in respect to the risk assumed under the common-law status, and it has been required that a complaint so framed must exclude the master's defense arising at the common law out of the relation, by stating with some particularity a case falling under some subdivision of the statute. (Ala.) *Boggs v. Alabama Con. Coal & Iron Co.*, 28.

32. EMPLOYERS' LIABILITY ACT—Pleading.—Where It is Uncertain just what the relation between the plaintiff and the negligent employee was at the time of the injury complained of, or rather, how the facts will turn out, good practice seems to require that, to avoid a variance, counts under the statute be joined with others on the common-law liability of the master as to a stranger. (Ala.) *Boggs v. Alabama Con. Coal & Iron Co.*, 28.

Tort of News Agent on Train.

33. MASTER AND SERVANT—Tort of News Agent on Train.—A Rule of a News Company requiring the discharge of a train agent upon complaint by a conductor can in no way tend to exculpate it from a wrong of the agent or exempt it from liability for the acts

of the agent committed before his discharge. (Ala.) *Cleaney v. Parker*, 21.

34. MASTER AND SERVANT—Tort of News Agent on Train.—A train agent of a news company is acting within the general scope and line of his authority when he compels a passenger to pay the second time for articles purchased, using threats and an attempt to retake the articles to compel such payment, so as to render his principal or master liable for the tort, although he may have exceeded his authority and violated the instructions of his principal. (Ala.) *Cleaney v. Parker*, 21.

35. MASTER AND SERVANT—Tort of News Agent on Train—Damages.—In an action for damages for the tort of a train agent of a news company in compelling a passenger to pay twice for articles purchased, the damage to the estate of the plaintiff is the amount so paid, and the question whether he is entitled to any other actual damage is for the jury under all the evidence in the case. (Ala.) *Cleaney v. Parker*, 21.

Liability of Master to Third Person of Tort of Employee.

36. LIABILITY OF MASTER to Third Persons for Torts of Servant.—In its early history, the law as to the liability of the master to third persons for the tort of his servant passed from holding the master absolutely liable to holding him liable in case of particular command only. Later the liability was enlarged, and determined by general authority, express or implied, and was subsequently extended so as to result in the rule that the master is responsible for the tort of his servant, done in the scope of his authority with the view to the furtherance of the master's business, and not for a purpose personal to himself, whether committed negligently or willfully and in excess of his authority or contrary to his express instructions. The English courts now recognize a still larger responsibility in cases where the wrong complained of was not within the scope of the servant's authority, but was done in the course of employment. The American cases have correspondingly extended the master's liability, and have considered it, not only from the master's point of view, but also from that of the person injured, and have placed emphasis, not so much on authority, real or apparent, as upon the violation by the servant of the duty owed by the master to the person complaining. (Minn.) *Penas v. Chicago etc. Ry. Co.*, 470.

37. LIABILITY OF MASTER to Third Persons for Torts of Servant.—Liability may attach to the master under one or more of two different classes of circumstances, namely, first, by virtue of personal commission, singular or joint, or by consent before or after the wrong; and, second, by virtue of relationship subsisting between the master and the person injured, or because of creation, ownership, custody, or control of instrumentalities intrinsically or potentially dangerous, or where the master's conduct, his implements and premises and facilities for doing business, or the course of his business generally, or of dealing with the party complaining, have a natural tendency to create, or to determine the extent of, damage involved, or by estoppel. Many reasons, often divorced from the resulting standard, concur in imposing liability on the master. (Minn.) *Penas v. Chicago etc. Ry. Co.*, 470.

38. LIABILITY OF MASTER to Third Persons for Torts of Servant.—The master's responsibility in the first class of cases rests on personal culpability through participation or authority, including ratification. In the second class of cases it is largely independent of personal fault, and rests essentially on reasons of public policy, the principal ones of which are here referred to. (Minn.) *Penas v. Chicago etc. Ry. Co.*, 470.

39. LIABILITY OF MASTER to Third Persons for Torts of Servant.—The equivocation and uncertainty of the terminology of the subject is necessarily a prolific source of inconsistency in decision. Authority is used in the sense of (1) real or actual authority, express or naturally implied; (2) fictitious or imputed authority, of which (3) apparent authority is really one variety. Scope of authority and course of employment, and their congeners, are often used indiscriminately and interchangeably, and sometimes as representing, respectively, the more restricted and the more enlarged and usually the most enlarged criterion of liability of the master. (Minn.) *Penas v. Chicago etc. Ry. Co.*, 470.

40. LIABILITY OF MASTER to Third Persons for Torts of Servant.—The master's liability is conditioned on proof of damage consequent on the wrong committed by one who at the time is a servant of the master and under such circumstances that liability is attached to the master under the criterion prevailing in the jurisdiction and appropriate to the circumstances involved. (Minn.) *Penas v. Chicago etc. Ry. Co.*, 470.

41. LIABILITY OF MASTER to Third Persons for Torts of Servant.—Liability may attach under the test of authority, the test of motive and benefit, or the test of duty violated. No one rule of liability is the sole or invariable standard. Different specific torts, or the same tort committed under different circumstances, may involve the application of different principles. (Minn.) *Penas v. Chicago etc. Ry. Co.*, 470.

42. LIABILITY OF MASTER to Third Persons for Torts of Servant.—Plaintiff's minor, who was really, but not apparently, a trespasser, claimed to have been thrown from a moving train by defendant's brakeman and injured. It is held that defendant's liability was for the jury, under proper instructions from the court. *Barrett v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 106 Minn. 51, followed and applied. (Minn.) *Penas v. Chicago etc. Ry. Co.*, 470.

See Constitutional Law, 21-23.

Note.

Master and Servant, remedy of employees for injuries in the service, unsatisfactory state of the law, 1024.

MECHANICS' LIENS.

1. MECHANICS' LIENS—Title of Act.—Contractors are not within those entitled to mechanics' liens under the Indiana statute of 1883, and its amendments, they not being within the terms "laborers" as used in the title of the act. (Ind.) *Fleming v. Greener*, 254.

2. MECHANICS' LIENS—Persons Entitled to.—The mechanics' lien law of 1883, with its amendments, confers the right to a lien upon mechanics, laborers and materialmen only. Contractors are not given the right. (Ind.) *Fleming v. Greener*, 254.

3. MECHANIC'S LIEN—Filing Notice.—There is No Lien for labor done or material furnished until notice has been filed in the proper office of the proper county as required by the statute. (Ind.) *Fleming v. Greener*, 254.

4. MECHANICS' LIENS—Right to not Assignable.—The right to a mechanic's lien is personal to the laborer, mechanic or materialman, and cannot be assigned prior to the perfecting of the lien. (Ind.) *Fleming v. Greener*, 254.

MERGER.

1. A MERGER is the Annihilation by Act of Law of the less in the greater of two vested estates meeting, without any intervening estate, in the same person and in the same right. (R. I.) *Bowlin v. Rhode Island Hospital Trust Co.*, 758.

2. **MERGER**—Legal and Equitable Estates.—Equity will not establish an equitable merger by analogy to law, where the effect would be to defeat its own rules and practice in the protection of married women from marital control. (R. I.) *Bowlin v. Rhode Island Hospital Trust Co.*, 758.

MINES AND MINERALS.

Oil and Gas.

1. **OIL AND GAS**—Mere Possession of the Surface of Land as to which the title to the oil and gas in place thereunder has been severed is not possession of that oil and gas. (W. Va.) *Kiser v. McLean*, 948.

2. **OIL AND GAS**—Possession by Owner of Surface.—Oil and gas severed in title from that of the land under which they lie are not in the possession of the owner of the surface, unless he takes actual physical possession of them, as by drilling wells into the same. (W. Va.) *Kiser v. McLean*, 948.

3. **OIL AND GAS**—Forfeiture for Nonentry—Payment of Taxes. On a claim of forfeiture for nonentry of oil and gas which have been severed in title from that of the land under which they lie, it will be presumed that the land was assessed and taxed as a whole at the time of the severance, that it has since been carried on the land books in the same manner, and that the taxes have been paid on the land as a whole, when the contrary does not appear. (W. Va.) *Kiser v. McLean*, 948.

Mining Leases.

4. **MINING LEASES** Form a Distinct Class of Instruments, creating special and peculiar legal relations and rights. (Wis.) *Loveland v. Longhenry*, 1068.

5. **MINING LEASE**—Diligence in Prospecting, Necessity of.—Where a mining lease is granted upon the consideration that the lessee shall observe the covenants and conditions thereof, and the lessee covenants to prospect the land and in case he discovers a mine pay the lessor rent, royalty, or tribute based upon the ore mined from such mine if discovered, the covenant to prospect the mine is in the nature of a condition, and the lessee must proceed with and persist in prospecting with reasonable diligence and continuity of effort. (Wis.) *Loveland v. Longhenry*, 1068.

6. **MINING LEASES**—Diligence in Prospecting—What is not.—Where a mining lessee, before having made a discovery, discontinues prospecting for fourteen months, his delay is unreasonable, and lack of means to carry on the work is not a sufficient excuse. He does not prospect with the reasonable diligence and continuity necessary to prevent a forfeiture. (Wis.) *Loveland v. Longhenry*, 1068.

7. **MINING LEASE**—Forfeiture—Waiver.—The Lessor in a mining lease may, without waiving a forfeiture resulting from the lessee failing to prospect with reasonable diligence, offer to allow the lessee to retain part of the demised tract on condition that the lessee acquiesce in the forfeiture of the remainder. (Wis.) *Loveland v. Longhenry*, 1068.

See Deeds, 10-15.

Note.

Mines and Minerals, conveyance of lands carries mineral therein, 953
minerals in place may be severed in title from that of surface, 952.

minerals, when not severed, are deemed part of land, 952.

owner of surface is prima facie owner of minerals, 953.

possession of surface as adverse possession of severed mineral estate, commencement after severance, 954.

- Minerals and Minerals**, possession of surface as adverse possession of severed mineral estate, commencement before severance of mineral estate, 954, 955.
- possession of surface as adverse possession of severed mineral estate, constructive possession, 956-958.
- possession of surface as adverse possession of severed mineral estate, continuous acts necessary, 956-964.
- possession of surface as adverse possession of severed mineral estate, hostility of acts necessary, 958.
- possession of surface as adverse possession of severed mineral estate, mere possession of surface insufficient, 956.
- possession of surface as adverse possession of severed mineral estate, must be actual not constructive possession, 956, 958.
- possession of surface as adverse possession of severed mineral estate, must be hostile to rights of mineral owner, 958, 959.
- possession of surface as adverse possession of severed mineral estate, must be open and continuous, 959-964.
- possession of surface as adverse possession of severed mineral estate, nonuse by mineral owner, whether divests title, 964-967.
- possession of surface as adverse possession of severed mineral estate, payment of taxes, 968, 969.
- possession of surface as adverse possession of severed mineral estate, what acts of surface owner constitute, 956-961.
- severance of minerals from surface estate, how accomplished, 952.
- severance of mineral and surface estates, nature of the estates, 951.
- specific performance of contracts relating to, 78, 79.
- when minerals in place are severed in title from surface, each estate is freehold and may be transferred accordingly, 952.

MISCONDUCT OF ATTORNEY.

See Criminal Law, 19-21.

MORTGAGES.

Assumption by Grantee.

1. **MORTGAGE—Assumption by Grantee—Effect of Satisfaction.**—When real estate is conveyed subject to a mortgage, and the grantee assumes payment of the mortgage debt, the relation of principal and surety is established between the parties, the grantee becoming the principal and the mortgagor the surety; and the satisfaction of the mortgage by the mortgagee, with knowledge of such conveyance, releases the mortgagor from the mortgage debt. (Minn.) *Heidahl v. Geiser Mfg. Co.*, 493.

Covenant to Insure.

2. **MORTGAGES—Breach of Covenant to Insure.**—Notice of the Election of a mortgagee to consider the whole amount of the debt and interest due upon breach of a condition to keep the mortgaged premises insured to his satisfaction, is not required. (Iowa) *Moore v. Crandall*, 276.

3. **MORTGAGES—Covenant for Insurance—Breach.**—Under a covenant of a mortgage to furnish insurance satisfactory to the mortgagee, the mortgagor must tender some insurance, and until such tender is made it is not incumbent upon the mortgagee to state what will be satisfactory. (Iowa) *Moore v. Crandall*, 276.

Breach of Condition—Foreclosure.

4. **MORTGAGES—Breach of Covenant.**—Commencement of an Action to foreclose a mortgage for breach of a covenant thereof is

an election to consider the whole debt due under an option given by the mortgage. (Iowa) *Moore v. Crandall*, 276.

5. **MORTGAGES—Breach of Condition.**—A Tender After the Commencement of an Action to foreclose a mortgage for breach of a condition thereof cannot abate the action or excuse the breach. (Iowa) *Moore v. Crandall*, 276.

6. **MORTGAGES—Foreclosure.**—Attorney's Fees should not be allowed upon foreclosure of a mortgage for breach of a covenant or condition, upon the election of the mortgagee, without a demand upon or notice to the mortgagor. (Iowa) *Moore v. Crandall*, 276.

7. **MORTGAGES—Foreclosure.**—Waiver of Right to Foreclose a mortgage for breach of a covenant or condition cannot be taken advantage of unless pleaded. (Iowa) *Moore v. Crandall*, 276.

8. **MORTGAGES—Foreclosure—Alternative Decree.**—A decree of foreclosure directing sale on special execution against the premises and general execution for any unsatisfied balance, or, at plaintiff's option, a general execution against all the defendant's property upon waiver of any right under foreclosure, is, so far as the option is concerned, contrary to section 4289 of the Iowa code. (Iowa) *Moore v. Crandall*, 276.

See Chattel Mortgages.

MUNICIPAL CORPORATIONS.

In General.

1. **MUNICIPAL CORPORATIONS.**—The Powers of a Municipal Corporation are only those granted by express words; those fairly implied in, or incident to, the powers expressly granted; and those indispensable to the declared objects and purposes of the incorporation. (Okl. Cr.) *In re Jones*, 655.

2. **MUNICIPAL CORPORATIONS.**—Guarding the Potable Waters of the State is no part of the duty of a municipal corporation nor within the power of its chief executive. (N. J. Eq.) *Bayonne v. North Arlington*, 547.

3. **MUNICIPAL CORPORATIONS—Extension of Limits.**—Where the limits of a municipal corporation are extended and new territory brought in, general ordinances control the new as well as the old territory. (Wash.) *Peterson v. Tacoma Ry. & P. Co.*, 936.

4. **MUNICIPAL CORPORATIONS—Appropriation of Money or Creation of Debt.**—An ordinance of a city, owning its own waterworks, requiring street railway companies to sprinkle certain streets adjacent to their tracks, and providing that the city will furnish the necessary water free of charge, is not an ordinance creating a debt or liability against the city or a charge on any fund thereof, within a charter provision requiring the "aye" and "no" vote to be taken and recorded on all ordinances creating a debt or liability against the city or a charge on any fund thereof. (Wis.) *State v. Milwaukee Elec. Ry. & L. Co.*, 1025.

Ordinances and Their Adoption.

See Injunction, 10, 11.

5. **MUNICIPAL ORDINANCES.**—Rules and Regulations Adopted by a Board of public works, under the provisions of an ordinance, and ratified and approved by the council enacting the ordinance, become to all intents and purposes a part of the ordinance and make it complete. (Wis.) *State v. Milwaukee Elec. Ry. & L. Co.*, 1025.

6. **MUNICIPAL ORDINANCES—Revision—Effect as Repeal.**—Where an ordinance requiring a railroad company to sprinkle certain parts of certain streets in accordance with rules and regulations

adopted by the board of public works is retained in a revision of ordinances, but the rules and regulations are not mentioned in the revision, which, however, provided that all ordinances prescribing any rules, regulations, or restrictions upon street railway companies are not repealed, the rules and regulations adopted in pursuance of the ordinance requiring the sprinkling are not repealed but remain in force and effect. (Wis.) *State v. Milwaukee Elec. Ry. & L. Co.*, 1025.

7. MUNICIPAL ORDINANCES—Method of Adoption—"Aye" and "No" Vote.—Laws requiring the "aye" and "no" vote to be taken on certain questions and entered upon the permanent record of the council of a city are mandatory, and the requirement that the record be kept stands on no different footing from that relating to the manner of voting. (Wis.) *State v. Milwaukee Elec. Ry. & L. Co.*, 1025.

Municipal Contracts.

8. MUNICIPAL CONTRACT—Recovery for Extra Work.—Within certain limits a contractor, ordered by the proper representatives of a municipality to furnish materials or do work as covered by his contract which he thinks are not called for by the contract, may, under protest, do as directed and subsequently recover damages because he has been so required, even though it should turn out that he was right and that the officials had no right to call on him to furnish such material and do such labor. (N. Y.) *Borough Construction Co. v. New York*, 633.

9. MUNICIPAL CONTRACT—Recovery for Extra Work.—Where a representative of a municipality directs a contractor to furnish material or do labor which is clearly beyond the limits of the contract, the contractor is not justified in doing it, even under protest, and cannot subsequently recover therefor. (N. Y.) *Borough Construction Co. v. New York*, 633.

Streets—Easements—Prescription.

See Highways, 1-3.

10. STREETS—Easement Acquired by City by Prescription.—The occupation of a strip of land lying between the street line and a building by foundations beneath the surface and the extension of cornices over it by the owner of the fee, which in no way interferes with the use for street purposes, will not prevent the city from acquiring an easement in the strip by prescription. (Ill.) *Dallenbach v. Burnham*, 228.

11. STREETS—May be Acquired by Prescription.—Where lands have been thrown open for public use and have been used by the public for a street for the statutory period, the public right in the premises for street purposes is established by prescription. (Ill.) *Dallenbach v. Burnham*, 228.

Interurban Railway—Right of Way.

12. INTERURBAN RAILWAY—Right of Way.—A City may Refuse, if it sees fit, to grant an interurban railway company the right to run cars over its streets. (Wis.) *Manitowoc v. Manitowoc & Northern Traction Co.*, 1056.

Sprinkling Streets—Requiring Railroad to.

13. PUBLIC STREETS—Duty to Sprinkle is Public.—The sprinkling of the streets of a municipality is a public duty and benefit, and an ordinance providing therefor is one to preserve the public health and promote its comfort. (Wis.) *State v. Milwaukee Elec. Ry. etc. Co.*, 1025.

14. **PUBLIC STREETS—Sprinkling by Railroad.—Mandamus** will lie to compel a railroad company to perform its duty to sprinkle certain streets of a municipality. (Wis.) *State v. Milwaukee Elec. Ry. etc. Co.*, 1025.

15. **PUBLIC STREETS—Sprinkling by Railroad.—A Resolution** Providing for the sprinkling of certain streets between July and October of a certain year and during the pendency of legal proceedings to compel a railroad company to sprinkle parts of such streets under an ordinance which it had refused to obey, does not effect a repeal of the ordinance. (Wis.) *State v. Milwaukee Elec. Ry. etc. Co.*, 1025.

16. **PUBLIC STREETS—Sprinkling by Railroad, Right to Require.** Under a statute providing for the use of the streets of cities by street railway companies and providing that "Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may, by ordinance, from time to time prescribe," a municipal corporation may, by ordinance, require a street railway company to sprinkle parts of the streets occupied by it. (Wis.) *State v. Milwaukee Elec. Ry. etc. Co.*, 1025.

17. **PUBLIC STREETS—Sprinkling by Railroads.—An Ordinance** Requiring a street railway company to sprinkle the streets immediately adjacent to its tracks is valid, and an ordinance providing that such sprinkling be done in such a manner as will keep the surface continually moist and prevent the dust from arising at all times each day when the work is done, "but not in such a manner as to create mud or pools of water," is not unreasonable when properly construed. (Wis.) *State v. Milwaukee Elec. Ry. etc. Co.*, 1025.

18. **PUBLIC STREET—Sprinkling by Railroad.—An Ordinance** Requiring street railway companies to sprinkle the streets immediately adjacent to their tracks is not void as discriminating against such companies and in favor of other users of the streets, as by reason of the constant use of the street and the large amount of dust stirred up by street-cars, such use of the streets may be put in a class by itself. (Wis.) *State v. Milwaukee Elec. Ry. etc. Co.*, 1025.

19. **PUBLIC STREETS—Sprinkling by Railroad—Mandamus—Moot Question.**—It cannot be said in a mandamus proceeding to compel a railroad to perform its duty to sprinkle certain streets of a city, that the question is a moot one, because the proceeding is heard at a time during certain months when such sprinkling is not required, upon the ground that when next required the company may do its duty, where it appears that it has refused to do so for over five years. (Wis.) *State v. Milwaukee Elec. Ry. etc. Co.*, 1025.

20. **PUBLIC STREETS—Sprinkling by Railroad—Mandamus—Interest of City.**—It cannot be said that a city has not sufficient financial interest in the controversy to maintain mandamus to compel a railroad company to sprinkle certain streets, because it might compel abutting owners to do the sprinkling, as it is not compelled to do so, and in any event would retain the obligation to sprinkle the crossings. (Wis.) *State v. Milwaukee Elec. Ry. etc. Co.*, 1025.

21. **PUBLIC STREETS—Sprinkling by Railroad.—A Statute** Authorizing the Common Council of any city of a certain class to provide whether the streets thereof should be sprinkled during the current year, and to charge the cost thereof, with certain exceptions, to the abutting owners in case it decided to sprinkle, being made amendatory to existing charters only so far as they were inconsistent with the act, and providing that it should expire by limitation at the end of that year, does not have the effect to repeal an ordinance requiring street railway companies to sprinkle certain portions of the

streets occupied by them, as the authority conferred by the statute was merely cumulative and supplementary to the existing rights and powers of the city. (Wis.) *State v. Milwaukee Elec. Ry. etc. Co.*, 1025.

See Electricity, 8-12; Equity, 1; Highways; Franchises; Nuisance, 10-12; Officers, 8-10.

NEGLIGENCE.

In General.

1. **NEGLIGENCE—Contributory Negligence of Deceased.**—Where the injured person is deceased, wider latitude should be allowed to the jury in passing upon the question of contributory negligence. (N. Y.) *Braun v. Buffalo General Elec. Co.*, 645.

2. **NEGLIGENCE.—Mere Conjecture or Weight of Mere Possibility** cannot support a verdict in an action for damages suffered through negligence. Reasonable certainty, at least, must be established in the plaintiff's favor in such a case as well as in any other. (Wis.) *Houg v. Girard Lumber Co.*, 1012.

Sale of Impure or Poisonous Oil.

3. **NEGLIGENCE.—The Sale of Adulterated or Poisonous Cooking Oil by a Wholesale dealer** is prima facie evidence of negligence in failing to ascertain its true character, although the package was properly labeled as cotton seed oil. (Minn.) *Neiman v. Channellene Oil & Mfg. Co.*, 458.

4. **NEGLIGENCE.—A Manufacturer, or Dealer, Who Sells Adulterated or Poisonous Cooking Oil to a retail merchant**, is liable to the vendee for his consequent loss of business in selling the oil to his customers. (Minn.) *Neiman v. Channellene Oil & Mfg. Co.*, 458.

5. **NEGLIGENCE—Sale of Impure Oil by Merchant.**—The court did not err in instructing the jury as to the degree of care required of the merchant to ascertain the quality of the oil before selling it to his customers, and the verdict is sustained by the evidence. (Minn.) *Neiman v. Channellene Oil & Mfg. Co.*, 458.

See Animals, 2, 3; Electricity; Master and Servant.

NEGROES.

See Juries, 1.

NEWS AGENT.

See Master and Servant, 33-35.

NEW TRIAL.

NEW TRIAL—Motion for, Waived by Motion in Arrest of Judgment.—Any question depending for presentation upon a motion for a new trial is waived by filing and procuring a ruling on a motion in arrest of judgment before filing the motion and causes for a new trial, there being no showing either of a cause not existing or not known when the motion in arrest was filed. (Ind.) *Hammer v. State*, 248.

See Appeal, 24, 25.

NUISANCE.

What Constitutes.

1. **NUISANCE—What Constitutes.**—Under section 4751 of Snyder's Compiled Laws and by the common law, anything which annoys, injures or endangers the comfort, repose, health or safety of others, is a nuisance. (Okl. Cr.) *In re Jones*, 655.

2. NUISANCE—Annoyance Common to All—Dammum Absque Injuria.—Where all suffer from the same kind of interference and annoyance, and the difference of annoyances as between communities and individuals is one of degree merely, not of kind, and the annoyance is caused by something that is a necessary part of some lawful enterprise which is in its nature public and cannot be shifted from place to place, all must bear the annoyance as best they may. (Utah) *Twenty-second Corporation of Church of Jesus Christ v. Oregon Short Line R. R. Co.*, 819.

3. ANIMALS—Vicious Dogs.—It is a Nuisance for a neighbor to keep a vicious dog without appropriate restraint, and in such manner that it can and will escape and do bodily harm. (N. J. Eq.) *Rider v. Clarkson*, 614.

4. NUISANCE—Turf Exchange.—A House or Place Kept for the purpose of enabling persons to place bets or wagers upon horseraces is a common gambling-house, is a nuisance per se, and those who conduct it are indictable and punishable under section 2654 of Snyder's *Compiled Laws of Oklahoma*. (Okl. Cr.) *James v. State*, 693.

5. NUISANCE.—The Operation of a Billiard Hall or a Poolroom for gain is not recognized by the law as necessary or useful, or as a business which a person has an inherent right to engage in; and a municipal ordinance declaring them a nuisance and forbidding them, passed under statutory authority to declare what shall constitute a nuisance and to prevent the same, is valid. (Okl. Cr.) *In re Jones*, 655.

6. NUISANCE—Public—Dangerous Building.—A building which, by reason of its inherent weakness or its dilapidated condition, is liable to fall into a highway and injure passers-by or persons lawfully thereon is a public nuisance. (N. J. Eq.) *Pennsylvania R. R. Co. v. Kelley*, 541.

7. NUISANCE—Private—Dangerous Building.—A building which, by reason of its inherent weakness or its dilapidated condition, is liable to fall and injure adjoining property, is a private nuisance. (N. J. Eq.) *Pennsylvania R. R. Co. v. Kelley*, 541.

8. NUISANCE—Noise of Trains—Disturbance of Meeting.—The noise of operating railroad trains in the usual manner and with ordinary care, which noise affects all who are similarly situated along the line of the railroad, does not constitute a nuisance, either public or private, nor does the fact that such noise interferes with and annoys those attending a religious or other meeting alter the rule. (Utah) *Twenty-second Corporation of Church of Jesus Christ v. Oregon Short Line R. R. Co.*, 819.

Power of City to Declare.

9. NUISANCE—Power to Declare—Billiard and Pool Rooms.—Within constitutional limitations the legislature has the power to declare what shall constitute a nuisance; and in the exercise of that power it is not restricted to declaring only such things a nuisance as were so at common law or are so per se. It may declare billiard and pool halls and bowling-alleys nuisances and forbid them. (Okl. Cr.) *In re Jones*, 655.

10. NUISANCE—Power of Municipal Corporation to Declare What Is.—The legislature may lawfully delegate to municipal corporations, to be exercised within their corporate boundaries, the power to declare what shall constitute a nuisance and to prevent the same. (Okl. Cr.) *In re Jones*, 655.

11. NUISANCE—Power of Municipal Corporation to Declare What Is.—A statutory grant of power to a municipality to declare what shall constitute a nuisance does not empower the municipality to

declare a thing a nuisance which is clearly not one; but it does empower the municipality to declare anything a nuisance which is so per se, or which by reason of its location, management or use, or of local conditions and surroundings, may or does become such within the common-law or statutory definition of a nuisance, or those things which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. (Okl. Cr.) In re Jones, 655.

12. NUISANCE—Power of Municipal Corporation to Declare What Is.—Where a thing may or may not be a nuisance, depending upon its location, management or use, and the conditions existing in the municipality, thus requiring judgment and discretion in determining the matter, the determination of the question by a municipality having power to declare what shall be a nuisance is conclusive upon the courts. (Okl. Cr.) In re Jones, 655.

See Highways, 6-11.

OFFICERS.

In General.

1. OFFICERS.—Color of Office is That Which in Appearance is title, but which in reality is no title. It is authority derived from an election or an appointment, however irregular or informal, so that the incumbent is not a mere volunteer. (Ill.) Howard v. Burke, 159.

2. PUBLIC OFFICERS—Delegation of Power.—A public officer, charged with the performance of official duties, cannot delegate his authority to a person not authorized by law to act, nor can he bind the public by any such authorization, or by any attempt at ratification. (Minn.) Town of Buyck v. Buyck, 464.

Compensation—Change in—Change of Duties.

3. OFFICERS—Compensation, Change During Term.—Under a constitutional provision that "the compensation of any city, county, town or municipal officer shall not be changed after his election or appointment or during his term of office," the compensation of such officers may be fixed after their election, if not fixed before, but when once fixed cannot be changed so as to affect the then incumbent. (Ky.) James v. Duffy, 404.

4. OFFICERS—Compensation, Change During Term—Change of Duties.—A constitutional provision that "the compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office," does not prohibit the legislature from changing the duties of public officers by either adding to or taking from them. (Ky.) James v. Duffy, 404.

5. OFFICERS.—Compensation of an Official Means pay for doing all that may be required of him. (Ky.) James v. Duffy, 404.

6. OFFICERS—Change of Compensation.—A Constitutional Provision forbidding the change of the compensation of an official during his term of office is inexorable. It admits of no exceptions. It affords no opportunity for evasion by the legislature or other body. Its purpose cannot be defeated by indirection. It is a complete barrier to change of compensation, whether salary, scale of fees or both. It operates on the office and the official, not upon his duties. (Ky.) James v. Duffy, 404.

7. OFFICERS—Compensation—Change of Duties.—A public official has not a contract with the public or the state that he may perform all the duties imposed on the office at the time of his election or appointment. He is privileged to perform only such as may be imposed on it from time to time during his incumbency. If the duties of the office are diminished, he is entitled to the same salary, if it

is a salaried office, or to the same scale of fees for what he may do if the compensation is based upon that plan. But if new duties are added he must perform them for the same salary. (Ky.) *James v. Duffy*, 404.

Payment of Illegal Claims—Unlawful Expenditures.

8. PUBLIC OFFICER—Payment of Illegal Claims—Liability.—A town treasurer, who pays out the money of his town upon orders issued in payment of illegal claims, presented to and allowed by the town board, knowing all the facts disclosing the illegality of the claims, is liable in an action by the town for a return of the money, notwithstanding the fact that the orders may have been fair on their face. (Minn.) *Town of Buyek v. Buyek*, 464.

9. PUBLIC OFFICER—Expenditures in Violation of Law.—The supervisors of a town, of which defendant was treasurer, and with his full knowledge, co-operation, and assistance, entered upon an elaborate plan for the construction of a public road at a point where no highway had ever been, legally or otherwise, laid out, established a laborers' camp, which they supplied with tools and implements suitable for the purpose, provisioned the camp with necessities for both laborers and their teams, employed themselves to perform work upon the road at a specified compensation, hired the town clerk as time-keeper at a fixed per diem and board, designated the town treasurer as purchasing agent of the town, who, as such, purchased for the town goods and property used and employed at the camp. It is held that the acts of the supervisors were not only unauthorized by law, but in violation thereof, and that town orders issued in payment of obligations thus incurred were illegal. (Minn.) *Town of Buyek v. Buyek*, 464.

10. PUBLIC OFFICER—Unlawful Expenditures—Estoppel.—There existed no highway at the place where the work was performed. The town received no benefit from the expenditures mentioned, and is not estopped from demanding a return of the money from the treasurer, who, with knowledge of all the facts, and an active participant in the unlawful transactions, paid the same out upon the unauthorized town orders. (Minn.) *Town of Buyek v. Buyek*, 464.

Officers De Facto.

See Schools, 1, 2.

11. OFFICERS DE FACTO—What Constitutes.—A Mere Claim to be a public officer and exercising the office will not constitute one an officer de facto. There must be at least a fair color of right or an acquiescence by the public in his official acts so long that he will be presumed to act as an officer either by right of election or appointment. (Ill.) *Howard v. Burke*, 159.

12. OFFICERS DE FACTO—Validity of Acts.—The acts of officers de facto, so far as they affect third parties or the public, in the absence of fraud, are as valid as those of officers de jure. (Ill.) *Howard v. Burke*, 159.

See Constitutional Law, 9-11; Contracts, 1; Elections; Execution, 1.

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OIL AND GAS.

See Deeds, 16; Mines and Minerals, 1-3.

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Orchards, damages for injury to, 318, 327.

Parent and Child, specific performance of agreements for support, 83.

Partnership, specific performance of agreement to form or carry on, 87.

PERJURY.

1. **PERJURY**.—Swearing to What One Does not Know, and has no probable ground to believe, may constitute perjury, although the statement may be, in fact, true. (Ky.) *Commonwealth v. Miles*, 401.

2. **PERJURY**—Indictment—Statement Without Knowledge.—An indictment charging that the defendant falsely swore a certain party was not at a certain church on a certain Sunday, when in fact the defendant was not at such church on such Sunday, and did not know whether or not he was there, is sufficient, the last pronoun evidently relating to the third party and not to the defendant. (Ky.) *Commonwealth v. Miles*, 401.

Note.

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PIPE-LINE.

See Highways, 3.

PLEADING.

1. **PLEADING**—General and Special Damages.—Where a complaint sets forth a valid claim for general or nominal damages, it is not laid open to demurrer by the addition of a claim for special damages, though the special damages are not recoverable. Defendant's response to the improper element of damages claimed should be by motion to strike, objections to evidence, or by requests for instructions to the jury. (Ala.) *Walls v. Smith & Co.*, 24.

2. **PLEADING**—Complaint—Statutory Actions.—Where All the Facts necessary to bring the case within a statute are alleged, the complaint is sufficient as one under the statute without a reference to it. (Pa.) *Allen v. Tuscarora Valley R. R. Co.*, 714.

3. **PLEADING**.—A General Demurrer to a Complaint, however well the allegations thereof may be stated, raises the question whether the facts pleaded entitle the plaintiff to the relief demanded. (Minn.) *Basting v. Minneapolis*, 490.

Amendment—Statute of Limitations.

4. **PLEADING**—Amendment—Change of Cause of Action.—One of the tests in determining whether an amendment introduces a dif

ferent cause of action is whether proof of the existence of additional facts will be required. (Pa.) *Allen v. Tuscarora Valley R. R. Co.*, 714.

5. PLEADING—Amendment—Statute of Limitations.—The amendment of a complaint for damages for personal injuries by a railroad employee, sustained while coupling cars, so as to seek damages under the provisions of the act of Congress requiring all cars to be equipped with automatic couplers, is a change in the cause of action, and should not be allowed after the statute of limitations has barred the action on the statute. (Pa.) *Allen v. Tuscarora Valley R. R. Co.*, 714.

6. PLEADING—Amendment—Change of Cause of Action.—Where a complaint, containing all the allegations essential to a cause of action under a statute, is founded on a common-law liability, an amendment seeking a recovery upon the liability imposed by the statute constitutes a departure from the original cause of action, not from fact to fact, but from law to law, which is equally effective to prevent an allowance of the amendment where the cause of action on the statutory liability is barred by the statute of limitations. (Pa.) *Allen v. Tuscarora Valley R. R. Co.*, 714.

PLEDGE OF STOCK.

See Corporations, 11.

POISONS.

See Constitutional Law, 24-26; Druggists, 2-4; Negligence, 3-5.

POOLROOMS.

See Nuisance, 5, 6.

POSSIBILITY OF ISSUE.

See Wills, 22.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRESENCE OF ACCUSED.

See Criminal Law, 10.

PRIMARY ELECTIONS.

See Elections.

PRINCIPAL AND AGENT.

PRINCIPAL AND AGENT—Validity of Transactions Between. A sale of property by a principal to his agent is not necessarily voidable; it will be sustained where the transaction is open, honest and fair. (Ill.) *Crosby v. Dorward*, 230.

See Brokers.

PRINCIPAL AND SURETY.

BUILDING CONTRACTS—Bond of Contractor.—The Surety on a bond given by a contractor to secure the faithful performance of a building contract is not liable to laborers for work done, or to materialmen for material furnished the contractor. (Ind.) *Fleming v. Greener*, 254.

PRIVATE PAPERS.

See Constitutional Law, 12; Druggists, 1.

PROBATE LAW.

See Descent and Distribution; Executors and Administrators; Guardian and Ward; Wills.

PROCESS.

PROCESS—Service by Publication—Judgment in Rem.—The statute (sections 11, 12 and 13, chapter 124, Code of 1906) providing for service of process on a nonresident by publication, or by personal service out of the state, cannot authorize the rendition of a personal judgment or decree against a nonresident so served; but it does authorize any court, whether of law or of equity, to pronounce a judgment or decree binding in rem in any case in which such court would otherwise be competent to do so if the defendant were personally served within the state. (W. Va.) *Tennant v. Fretta*, 979.

See Execution, 1; Quieting Title.

Note.

Prohibition to test title to office, 200, 201.

PROSTITUTES.

1. COMMON PROSTITUTE.—The Idea of Gain is not Essential to constitute one a common prostitute. A woman who submits herself to indiscriminate intercourse with men, without hire, is as much a common prostitute as one who does so solely for hire. (Wash.) *State v. Thuna*, 902.

2. COMMON PROSTITUTE—Time of Offense of Living With—Indictment.—The offense of living with a common prostitute is a continuing one, and may be charged as between certain dates; but the living together of the parties for a single day with an intention of remaining together is sufficient to constitute the offense, and an indictment charging its commission on a certain day is therefore sufficient. (Wash.) *State v. Thuna*, 902.

PUBLICATION OF SUMMONS.

See Process; Quieting Title.

PUBLIC LANDS.

1. PUBLIC LANDS—When Title Acquired by Homesteader.—An entryman secures no title to the land he desires to homestead until he has complied with the law and has earned his patent. (Wis.) *Knapp v. Alexander-Edgar Lumber Co.*, 1091.

2. PUBLIC LANDS—Trespass Before Patent—Action by Entryman.—Where, between the time when a person applies for a homestead entry on public lands and the time when he establishes his residence on the land, a trespass thereon by cutting timber is committed, the right of action therefor is in the United States as owner; and if the trespasser settles with the United States, the cause of action is extinguished, and is not revived in favor of the entryman by the subsequent issuance of a patent to him. (Wis.) *Knapp v. Alexander-Edgar Lumber Co.*, 1091.

3. FEDERAL HOMESTEAD.—The Matter of the Exemption from debts of lands acquired under the federal homestead laws, prior to the patent thereof, is beyond the control of the state legislature. A federal homestead is in no event liable for a debt contracted prior

to the issuance of a patent therefor, although the equitable title may have passed to the entryman. And this exemption is a condition running with the land, so that it remains exempt from such debts when title has passed to other parties, or its homestead character has been abandoned after final proof. (S. D.) Blair v. Mayer, 797.

4. FEDERAL HOMESTEAD—Transfer Before Patent.—The Exemption of a federal homestead from any debt contracted prior to the issuance of patent is not affected by a transfer from an entryman to his wife prior to patent. Such transfer does not have the effect of rendering a judgment against the husband and wife for a debt contracted prior to the issuance of the patent a lien upon the land. (S. D.) Blair v. Mayer, 797.

QUIETING TITLE.

1. QUIETING TITLE—Removal of Cloud—Burden of Proof.—In an action to quiet title and remove a cloud therefrom, where the defendant relies upon a conveyance from the complainant to his grantor, the burden of proving such conveyance is on him. (Ala.) Gilbert v. Pinkston, 89.

2. QUIETING TITLE—Equity has Jurisdiction, at the Suit of an Owner of land who is in possession thereof under a good legal title, to remove a cloud from his title by a decree canceling and expunging from the records of the county in which the land is situate a void deed or writing constituting a cloud upon, or menace to, his title. (W. Va.) Tennant v. Fretts, 979.

3. QUIETING TITLE.—The Power of a Court of Equity to Grant Relief in such case is independent of any statute conferring jurisdiction, and rests on general equity principles and practice. (W. Va.) Tennant v. Fretts, 979.

4. QUIETING TITLE—Venue.—A Suit to Remove Cloud and Quiet Title is local in its nature, and the jurisdiction of the court is determined by the situs of the land. (W. Va.) Tennant v. Fretts, 979.

5. QUIETING TITLE—Operation of Decree in Rem or in Personam.—The decree for relief in such suit operates generally, if not always, in rem, and need not be in personam. (W. Va.) Tennant v. Fretts, 979.

6. QUIETING TITLE—Service on Nonresident by Publication.—Equity may, upon service of process on a nonresident by publication, remove cloud from title to land within its jurisdiction by a decree, binding only in rem. (W. Va.) Tennant v. Fretts, 979.

Note.

Quo Warranto to test title of de facto officer, 195, 196.

RAILROADS.

1. RAILROADS—Injury in Car Coupling—Federal Statute.—Prior to the act of Congress requiring the use of automatic car couplers, railway employees assumed the risks and dangers naturally and ordinarily incident to their employment, including those arising from the performance of their duty in coupling cars. But this act changes the liability of the carrier while engaged in interstate commerce, imposing a liability different from that imposed by the common law, and depriving the carrier of the protection and risk assumed by the employee which it had at the common law. (Pa.) Allen v. Tuscarora Valley R. R. Co., 714.

2. RAILROADS—Safety Appliances—Federal and Illinois Statutes.—The federal statute requiring railroads to equip cars with
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automatic couplers and the Illinois statute on the same subject are substantially the same, and there is no repugnancy between their provisions. The act of Congress applies to all interstate carriers in moving interstate commerce, but it does not deprive the state of power to regulate intrastate commerce, although it is carried by a railroad doing an interstate business. (Ill.) *Luken v. Lake Shore & M. S. Ry. Co.*, 220.

3. RAILROADS—Automatic Coupler Statutes—Assumption of Risk.—Both the federal and the Illinois statute, requiring railroad cars to be equipped with automatic couplers, abolish the doctrine of assumed risk in all cases to which the statute is applicable. (Ill.) *Luken v. Lake Shore & M. S. Ry. Co.*, 220.

4. RAILROADS—Automatic Couplers—Statutory Duty to Provide. Under both the federal statute and the statute of Illinois, requiring all cars to be equipped with automatic couplers, it is the absolute duty of common carriers to equip and maintain such safety appliances in such condition and state of repair that they will operate in the manner and for the purposes intended; and the carrier cannot be heard to say in defense of an action brought by one injured in consequence of its failure to perform its duty, that the plaintiff is bound to prove that the carrier did not use reasonable care to maintain the safety appliances in good condition and repair. (Ill.) *Luken v. Lake Shore & M. S. Ry. Co.*, 220.

5. RAILROADS—Defective Automatic Coupler—Knowledge.—In an action by a switchman, injured by reason of a defective condition of an automatic car-coupler, it is not incumbent upon the plaintiff to show that the defendant knew, or by the exercise of reasonable care might have known, of the defective condition of the coupler. (Ill.) *Luken v. Lake Shore & M. S. Ry. Co.*, 220.

6. RAILROADS—Defective Coupler—Action—Election Between Counts.—In an action for damages suffered by reason of a defective automatic car-coupler, it is error for the court, at the trial, to compel the plaintiff to elect between the first count of his complaint, based upon the state statute, and the second count, based upon the federal statute, when the evidence justifies the submission of the case to the jury. (Ill.) *Luken v. Lake Shore & M. S. Ry. Co.*, 220.

7. RAILROADS—Safety Appliances.—Empty Cars. as well as loaded ones, are affected by the law requiring the equipment of cars with safety appliances. (Ill.) *Luken v. Lake Shore & M. S. Ry. Co.*, 220.

See Carriers; Master and Servant; Municipal Corporations; Street Railways.

Note.

Railroads, specific performance of contracts relating to, 64-72.

REASONABLE DOUBT.

See Criminal Law, 2.

RECEIVING STOLEN PROPERTY.

RECEIVING STOLEN PROPERTY—Sufficiency of Verdict.—Under an indictment charging that the defendant "did unlawfully, feloniously and knowingly" receive certain stolen property, a verdict, "We, the jury, find the defendant guilty of receiving stolen property and fix his punishment at one year in the penitentiary," is sufficient, as, when taken in connection with the indictment, the evidence and the charge of the court, it leaves no room for doubt as to the intent of the jury. (Ark.) *Blackshare v. State*, 144.

RELIGIOUS CORPORATIONS.

1. RELIGIOUS CORPORATIONS—Grant to, for Special Use—Diversion and Reverter.—Where land is granted to a religious corporation, or to trustees for its benefit, to be held for a specified use, neither the corporation nor the trustees have a right to divert it from such use. If they attempt to do so, the grantor, or his heirs, immediately become reinvested with the title to the land. (Md.) *Phillips v. Insley*, 408.

2. RELIGIOUS CORPORATIONS—Adverse Possession—Land Granted for Special Use.—Where land granted to a religious corporation for a certain specified use is openly diverted from such use, an adverse possession thereof, as against the grantor and his heirs, commences at the time of such diversion, and, if continued for the requisite length of time, will ripen into a title in the corporation independently to the grant. (Md.) *Phillips v. Insley*, 408.

3. RELIGIOUS CORPORATIONS—Title by Adverse Possession—Marketable Title.—Where a religious corporation to which a grant of property for a certain specified use was made openly diverted the property from such use and held it to another and different use for forty-five years, and then sold it after procuring a decree in equity upon service by publication against the heirs of the grantor for a sale of the land and reinvestment of the proceeds, the title thereby passed is marketable. (Md.) *Phillips v. Insley*, 408.

4. RELIGIOUS CORPORATIONS—Adoption of Seal.—Religious corporations, as well as individuals, may adopt any seal, and they need not say that it is their common seal. (Md.) *Phillips v. Insley*, 408.

5. RELIGIOUS CORPORATIONS—How Constituted.—Under the Maryland system of incorporating religious societies the trustees, not the congregation, constitute the corporation. (Md.) *Phillips v. Insley*, 408.

6. RELIGIOUS CORPORATIONS—Necessity of Seal.—The general incorporation law authorizes trustees who have become incorporated on behalf of religious societies or congregations to adopt a corporate seal, it does not require them to adopt one. (Md.) *Phillips v. Insley*, 408.

7. RELIGIOUS CORPORATIONS—Conveyances by—Sufficiency of Execution—Seal.—A deed by trustees of a religious corporation, who declare on the face of the instrument their intention to act in their corporate capacity, signed by them as such trustees with a scroll seal affixed to each signature, must be held the deed of the corporation, it not appearing that any formal seal had ever been adopted by the corporation. (Md.) *Phillips v. Insley*, 408.

REMAINDERS.

1. CONTINGENT REMAINDERS—Alternative upon Life Estate—When Vest.—A devise of a life estate with remainder to any child or children of the life tenant, or if she die without issue living then to the heirs at law of the testator, creates alternative conditional remainders, dependent upon a contingency with a double aspect, which cannot vest until the happening of the contingency. (Md.) *Schapiro v. Howard*, 414.

2. CONTINGENT REMAINDERS—Alternative upon Life Estate—In Whom Vest.—In case of alternative conditional remainders to a class, those only of the class who are living at the time of the vesting of the remainder take, and not those living at the creation thereof. Therefore, a devise to the testator's wife with remainder to any child or children she might have, or in case she die without issue to the heirs at law of the testator, vests upon the death of the

wife, without issue, in the heirs living at her death, and not in those living at the death of the testator. (Md.) *Schapiro v. Howard*, 414.

3. CONTINGENT REMAINDERS—Conveyance Before Vesting.—Where an alternative contingent remainder is to a class, a voluntary conveyance by one of the class of all her property, including all interest in the estate of the creator of the remainder "which under his will, or otherwise, is now or may hereafter be vested" in the grantor, made prior to the vesting of the remainder, does not pass the property upon the subsequent vesting of the remainder. (Md.) *Schapiro v. Howard*, 414.

4. CONTINGENT REMAINDERS—Conveyance Before Vesting—Equity may Enforce.—Where a grantor, in return for a substantial and valuable consideration, attempts to convey property thereafter to be acquired in a contingent remainder, a court of equity will enforce the conveyance in a proper case; but where the consideration is merely nominal, equity will not interfere. (Md.) *Schapiro v. Howard*, 414.

REPLEVIN.

1. REPLEVIN—Property Seized Under Void Execution.—Under the statute of Arkansas requiring, prior to an order of delivery in replevin, an affidavit showing that the property has not been seized under an execution, replevin will not lie against an officer for property seized under a void execution regular on its face. Such property should be considered in custodia legis. (Ark.) *Emerson v. Hopper*, 121.

2. REPLEVIN—Timber Cut by Trespasser.—Replevin will lie for timber cut by one from the land of another under a mistaken belief as to the boundary line, and an agreement fixing the line according to such mistake. (Ark.) *Randleman v. Taylor*, 141.

3. REPLEVIN—Timber Cut by Trespasser.—The Measure of Damages where timber has been cut by an innocent trespasser and delivery cannot be had is the value of the property in its converted form, less the labor expended on it, provided such expense does not exceed the increase in value. (Ark.) *Randleman v. Taylor*, 141.

Note.

Replevin for property of officer in possession of de facto officer, 202.

RESERVATIONS.

See Deeds, 10-15.

RES GESTAE.

See Evidence, 15-17.

SALES.

In General.

1. SALE—Goods for Bawdy-house—Immoral Consideration.—A sale of furnishings, on credit, to the keeper of a bawdy-house, the seller knowing the character of the house and that the furnishings were to be used therein, but having no interest in the house or the business there conducted, is not void, and recovery may be had for the purchase price. (Ark.) *Belmont v. Jones House Furnishing Co.*, 112.

2. SALE—Reservation of Title—Destruction of Property.—Where goods are sold at a certain fixed price and title is retained solely for security, and passes immediately upon the payment of the purchase money, the vendee in the meantime having the absolute dominion and control over the property, the loss occasioned by a destruction

of the goods falls upon the vendee, and the vendor may recover the purchase price. (Ark.) *Roach v. Whitfield*, 131.

3. **SALE—Waiver of Seller's Breach of Contract.**—Under a contract for the purchase of lumber in different lots, the purchaser, after accepting and paying for one lot, cannot urge objections to the manner of the performance of that part of the contract by the seller as ground for refusal to perform the remainder of the contract. (Ark.) *Thomas-Huycke-Martin Co. v. Gray*, 93.

Sale by Sample—Inspection and Acceptance.

4. **SALE BY SAMPLE—Right of Inspection.**—In a sale by sample, where the seller selects the goods and there is no express warranty, a right of inspection exists as a condition precedent to the passing of title. (Utah) *Wall Rice Milling Co. v. Continental Supply Co.*, 815.

5. **SALE BY SAMPLE—Buyer Bound by Inspection and Acceptance.**—Where the buyer of goods, sold by sample, inspects and accepts the bulk, he is bound to pay the purchase price without right to recoup damages for any defect in quality thereafter discovered. (Utah) *Wall Rice Milling Co. v. Continental Supply Co.*, 815.

6. **SALE BY SAMPLE—Opportunity of Inspection.**—The buyer in a sale of goods by sample is entitled to a reasonable opportunity to make an inspection of the bulk and a reasonable time within which to make it. (Utah) *Wall Rice Milling Co. v. Continental Supply Co.*, 815.

7. **SALE BY SAMPLE—Acceptance—Removal for Inspection.**—A removal of the bulk of goods sold by sample from the railroad car in which they were shipped to the warehouse of the buyer, for the sole purpose of inspection, does not constitute an acceptance. (Utah) *Wall Rice Milling Co. v. Continental Supply Co.*, 815.

8. **SALE BY SAMPLE—Inspection and Acceptance—Questions of Fact.**—In the case of a sale by sample the questions whether the receipt of the goods by the buyer was for the purpose of inspection only, whether the inspection was made within a reasonable time and in the proper manner, and whether what was actually done amounted to an acceptance, are all questions of fact. (Utah) *Wall Rice Milling Co. v. Continental Supply Co.*, 815.

Rescission by Buyer.

9. **SALES—Rescission by Buyer—Delivery.**—Upon a sale of jewelry and a showcase, the purchaser is not entitled to rescind or repudiate the sale for a failure of the seller to deliver the showcase at the same hour or on the same day the jewelry is delivered, in the absence of a provision or stipulation to that effect. (Ala.) *McAllister-Coman Co. v. Mathews*, 43.

10. **SALES—Action for Price—Plea of Rescission.**—In an action of assumpsit a plea that the debt was contracted for certain jewelry, and that as a part of the contract the plaintiffs agreed to furnish the defendants a showcase, which agreement induced the defendants to make the purchase; that the plaintiffs failed to ship the showcase with the jewelry, and that the defendants thereupon returned the jewelry; that plaintiffs then sent to defendants a showcase, which they refused to accept, is subject to demurrer as not showing any sufficient ground for a rescission of the contract of sale. (Ala.) *McAllister-Coman Co. v. Mathews*, 43.

11. **CONTRACTS—Rescission and Repudiation, How Made.**—A contract is made by the joint will of two parties and can be rescinded only by the joint will of the two parties; but one party may so wrongfully repudiate the contract as to authorize the other to renounce it

and refuse to be longer bound thereby. (Ala.) *McAllister-Coman Co. v. Mathews*, 43.

12. **CONTRACTS—Rescission and Repudiation, When Authorized.** One party may renounce and refuse to be longer bound by a contract when the acts and conduct of the other party evinces an intention to no longer be bound by it. (Ala.) *McAllister-Coman Co. v. Mathews*, 43.

See *Contracts*, 2; *Negligence*, 3-5.

SCHOOLS.

De Facto Officers—Levy of Tax.

1. **SCHOOL DISTRICTS—Officers De Jure and De Facto.**—Where an election for a board of education is held at two polling places and two boards are elected, one at each place, both of which qualify, one not attempting or assuming to do any business after qualifying, but the other assuming to act and transact the business of the board, the latter will be held to be the board de facto, although the former may be the board de jure. (Ill.) *Howard v. Burke*, 159.

2. **SCHOOL DISTRICTS—Levy of Tax by De Facto Board.**—Injunction does not lie to restrain the collection of a school tax on the ground that it was levied by a board of education composed of de facto but not de jure officers. (Ill.) *Howard v. Burke*, 159.

Contract With Teacher.

3. **SCHOOLS—Contracts With Teacher—Statute Controls.**—In making contracts with teachers, a school district is controlled by the statute. It must strictly follow the statute, and has no power to contract otherwise than as provided by it. (Wis.) *Pearson v. School District No. 8 of Greenfield*, 1043.

4. **SCHOOLS.**—**Oral Contracts With Teachers** are valid unless a statute provides that they shall be in writing. (Wis.) *Pearson v. School District No. 8 of Greenfield*, 1043.

5. **SCHOOLS—Oral Contracts With Teachers.**—A statute providing that a contract of a school board with a teacher shall specify certain things and that it, with a copy of the teacher's certificate, shall be filed with the clerk, is directory merely, relates to a detail respecting the keeping of a record, and does not preclude the making of a valid oral contract with a teacher. (Wis.) *Pearson v. School District No. 8 of Greenfield*, 1043.

Free Tuition—Incidental Fees.

6. **SCHOOLS—Free Tuition.**—Chapter 41 of the Code of 1907, which relates to the public school system of the state, contemplates that tuition shall be absolutely free to all minors of the state over the age of seven. (Ala.) *Bryant v. Whisenant*, 41.

7. **SCHOOLS—Free Tuition.**—**Incidental Fees, Right to Exact.**—There is a well-defined distinction between tuition and a reasonable incidental fee for heating and lighting the school-room, and when the statute makes no provision for a fund for this purpose, the county boards have the right to prescribe a reasonable method for the raising and collecting of such fund. (Ala.) *Bryant v. Whisenant*, 41.

8. **SCHOOLS—Incidental Fees—Reasonableness and Enforcement.** The assessment of an incidental fee of thirty-five cents against each of the pupils, except those of indigent parents, attending a public school, to provide a fund for lighting and heating the school-room, is a reasonable regulation, and the making of the payment thereof a condition precedent to attendance is a reasonable method of enforcing the same. (Ala.) *Bryant v. Whisenant*, 41.

SEALS.

See Religious Corporations, 4-7.

SECRET SOCIETY BADGES.

See Constitutional Law, 17-20.

SIGNATURE.

See Corporations, 10.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—Pleading—Accuracy Required.—

In bills for specific performance great accuracy of averment is required. Where under the contract certain amounts are required to be paid and security furnished for deferred payments in a certain manner and within a certain time, performance, or an offer to perform, such conditions as provided in the contract must be alleged and cannot rest in inference. (Ala.) Roquemore v. Mitchell Bros., 52.

2. SPECIFIC PERFORMANCE—Pleading—Accuracy Required.—

Where the consent of a third party is necessary before a contract becomes binding, or can be performed, a bill for the specific performance thereof must allege such consent. (Ala.) Roquemore v. Mitchell Bros., 52.

3. SPECIFIC PERFORMANCE.—An Injunction is Granted in a

suit for specific performance only as auxiliary to the execution of the decree; and where the decree itself cannot be enforced, the court will not attempt to restrain, but will leave the party complaining of the breach to his remedy at law. (Ala.) Roquemore v. Mitchell Bros., 52.

4. SPECIFIC PERFORMANCE—Contract for Personal Services.

Courts of equity will not undertake to enforce the specific performance of a contract for personal services which are material or mechanical, and not peculiar or individual; but where the contract stipulates for special, unique, or extraordinary services, or where the services to be rendered are purely intellectual and individual in their character, the courts will grant an injunction in aid of specific performance. (Ala.) Roquemore v. Mitchell Bros., 52.

5. SPECIFIC PERFORMANCE—Contract for Continuous Duties.

A court of equity can decree specific performance only when it can dispose of the matter in controversy by a decree capable of present performance. It cannot decree a party to perform a continuous duty, extending over a series of years, but will leave the aggrieved party to his remedies at law. (Ala.) Roquemore v. Mitchell Bros., 52.

Note.

Specific Performance, administering complete relief after jurisdiction acquired, 62.

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SPRINKLER SYSTEM.

See Insurance, 15-17.

SPRINKLING STREETS.

See Municipal Corporations, 13-21.

STATE DECISIONS.

See Appeal and Error, 26.

STATES.

1. **CONSTITUTIONAL LAW**—Debt of State—Loan to University.
 The statute directing the state board of land commissioners to con-

vert part of the permanent land fund of the University of Utah into cash and pay the same to the university as a loan, and providing that such loan shall be a debt of the university and not of the state, was one, notwithstanding the latter provision, creating a debt of the state, and therefore in violation of the constitution. (Utah) *State v. Candland*, 834.

2. CONSTITUTIONAL LAW—"Shall Never Contract Any Indebtedness."—The phrase "shall never contract any indebtedness," as used in section 1 of article 14 of the constitution, limiting the amount of indebtedness which a state may lawfully contract, includes any obligation which the state undertakes or is obligated to pay or discharge out of future appropriations; that is, appropriations not made by the legislature creating the debt or obligation, and to be paid from moneys to be derived from levies other than those made by the then existing legislature, which must necessarily be raised by levying a tax upon the property of the entire state, as distinguished from a mere city, county or district levy. (Utah) *State v. Candland*, 834.

STATUTES.

In General.

1. STATUTES—Incorporating Parts of One Law in Another.—In order to have as little confusion as possible in statutes, where an attempt is made to incorporate parts of a former law into one that is being presently made, the language used should be such as to indicate with a reasonable degree of certainty what was in the legislative mind. A careful and intelligent reading of the two acts should be sufficient to indicate to the reader what parts of the old law were applicable to and were incorporated in the new. (Wis.) *State v. Frear*, 992.

Passage of Act—When Takes Effect.

2. STATUTES—"Passage of Act."—In Ordinary Usage the passage of an act is understood as that time when it is stamped with the approval of the requisite vote of both houses, in the constitutional manner, signed by the presiding officer of each house, and approved by the governor, or passed over his veto, or becomes a law by lapse of time. (Ind.) *State v. Williams*, 261.

3. STATUTES—When Take Effect.—A Legislative Enactment can go into effect only by the declaration of an emergency in the act itself, or upon distribution of the session laws to the various counties, and the proclamation of the governor. (Ind.) *State v. Williams*, 261.

4. STATUTES—When Take Effect.—Repealing or Saving Clauses in an act do not take effect at a different time from the act as a whole, though expressed in the present tense. (Ind.) *State v. Williams*, 261.

Construction.

5. STATUTES—Construction by Federal Courts—How Affects State Courts.—In construing a federal statute a state court is bound by the construction placed upon the act by the federal courts. In construing a similar state statute a state court is not bound to follow the construction of the federal courts in construing the federal statute, but where the two acts are nearly identical and the state act was passed after the federal statute had been construed, and both acts were intended to accomplish the same object, the state court will be naturally inclined to follow the construction that the federal courts have given the federal statute. (Ill.) *Luken v. Lake Shore & M. S. Ry. Co.*, 220.

6. **STATUTES—Strict Construction.**—Statutes Which are Criminal or penal in their nature, or which are in derogation of a common-law right, must be strictly construed. (Ind.) *State v. Pence*, 240.

7. **STATUTES in Derogation of the Common Law must be Strictly Construed**, and courts cannot, by judicial construction, read into statutes provisions not found there for the purpose of changing the rules of the common law. (Wis.) *Pearson v. School District No. 8 of Greenfield*, 1043.

8. **STATUTES—Construction—When Province of Jury.**—If it is shown by the evidence that words and phrases used in a statute are susceptible of two meanings, depending on the state of facts it is attempted to apply them to, the court may instruct the jury in the words of the statute and leave them to find from the evidence whether it has been violated. (Ky.) *Katzman v. Commonwealth*, 359.

Repeal by Implication.

9. **STATUTES—Conflicting Laws—Repeal by Implication.**—A statute will not be held unreasonable or in conflict with another, or repealed by implication, unless the legislative intent can be gathered from the later enactment. (Wash.) *State v. Superior Court for King County*, 925.

10. **STATUTES—Repeals by Implication are not Favored.**—An earlier act remains in force unless it is clearly inconsistent with or repugnant to the later one, or unless some express notice is taken of the former act in the later one which plainly indicates an intention to abrogate it. (Wis.) *State v. Milwaukee Elec. Ry. & L. Co.*, 1025.

11. **STATUTES—Repeal by Implication—Revision and Codification.** Where the legislature legislates upon a given subject, and it is manifest that it intended to revise and codify all existing laws and to cover the entire subject, former acts dealing with such subject will be deemed to have been impliedly repealed, although there is an absence of an express repealing clause. (Wis.) *State v. Milwaukee Elec. Ry. & L. Co.*, 1025.

See Constitutional Law; Criminal Law, 6-8.

STREET RAILWAYS.

Ordinance Fixing Fares—Extension of City Limits.

1. **STREET RAILWAYS—Franchise in Territory Annexed to City.** A county franchise to operate a street railway in territory subsequently annexed to a city dies with the annexation, and the right to operate must thereafter be held to be amenable to the will of the city authorities. (Wash.) *Peterson v. Tacoma Ry. & P. Co.*, 936.

2. **STREET RAILWAYS—Ordinance Fixing Fare—Extension of City Limits.**—A franchise ordinance, enacted pursuant to an agreement between a city and a street railway company, requiring the company to transport passengers to or from any point on its lines within the city limits for a single fare of five cents, includes a line of such company running outside the city limits at the time of the making of the contract and enactment of the ordinance but subsequently brought within the city by extension of its corporate limits. (Wash.) *Peterson v. Tacoma Ry. & P. Co.*, 936.

3. **STREET RAILWAYS—Ordinance Fixing Fare—Extension of City Limits.**—The requiring of a street railway company to transport passengers over one of its lines which formerly ran without the limits of the city, but was subsequently brought within the city by an extension of its limits, for a single fare, under a franchise ordinance enacted pursuant to an agreement between the city and the company

requiring the transportation of passengers for one fare on any line or lines within the city limits, does not impair the obligation of a contract within the meaning of the federal constitution. (Wash.) *Peterson v. Tacoma Ry. & P. Co.*, 936.

Care Toward Child Approaching Car.

4. **STREET RAILWAYS—Care Toward Child Approaching Track.** The rule that there must be something noticeable in the conduct of a person who leaves the sidewalk and approaches a street railway track so as to apprise the motorman that such person is about to enter into a place of danger, before it becomes incumbent upon the motorman to stop the car, is not applicable when such person is a child four years of age. When a motorman sees a child of such tender years leave the sidewalk and approach the tracks in front of the moving car, he sees the child in a position of danger and must act accordingly. (Mo.) *Simon v. Metropolitan St. Ry. Co.*, 498.

5. **STREET RAILWAYS—Care Toward Child Approaching Track.** Where a child four years of age leaves the sidewalk and approaches a street railway upon which a car is running, it is the duty of the motorman to stop the car, although the child may have made a momentary pause after leaving the sidewalk. To give him the right to proceed, the child must have made such a stop as would give the idea that the child does not intend to go forward. (Mo.) *Simon v. Metropolitan St. Ry. Co.*, 498.

6. **STREET RAILWAYS—Care Due to Child Approaching Track.** The size of a child four years old, its extreme infancy, its position in a public street upon which ponderous cars are constantly running, its having left a place of safety on the sidewalk, and started to cross the street, is enough to warn a motorman that it might capriciously proceed in its journey, and is enough to cast upon him the duty of stopping his car until the danger to the child is passed. (Mo.) *Simon v. Metropolitan St. Ry. Co.*, 498.

7. **STREET RAILWAYS—Care Due Child Approaching Track.**—The danger line for children is farther away from a street railway track than for adults, and it is the duty of a motorman to begin to stop his car sooner for children than for adults approaching the track. The danger to a child of four years begins the instant it leaves the sidewalk, bound headlong for the track, and the law requires a motorman in charge of a ponderous car on a public street to stop until the danger to the child is averted. He is not to speculate that it may not run upon the track, and cannot indulge the presumption, as in case of adults, that it may not go into further danger; it has already entered into the danger zone. (Mo.) *Simon v. Metropolitan St. Ry. Co.*, 498.

8. **STREET RAILWAYS—Care Due Child Approaching Track.**—Where the testimony showed that a child four years of age left the sidewalk, and approached a moving car; that it momentarily stopped after leaving the curb, and again momentarily stopped nearer the car and then "toddled on toward the track"; and where there was testimony that the motorman was looking the other way and did not see the child until the accident, or until it was close to the car, an instruction that if the motorman, after seeing the child start toward the track after making "its last stop" in the street, used ordinary care with the means at his command to stop the car and prevent a collision with the child, there was no negligence, is erroneous, as eliminating from the consideration of the jury every other fact—the negligence of the motorman if failing to see the child, failing to ring the bell, or to heed the warnings of bystanders, and as giving the jury to understand the motorman was under no

obligation to stop the car until after the "last stop" of the child, although it was but momentary. (Mo.) *Simon v. Metropolitan St. Ry. Co.*, 498.

SUCCESSION.

See Descent and Distribution.

SUMMONS.

See Process.

SUNDAY LAWS.

1. **SUNDAY LAWS—Recovery for Advertisement in Sunday Paper.**—In an action on the quantum meruit to recover what the publication of advertising articles in a Sunday newspaper was reasonably worth, a recovery is barred by a statute which prohibits "labor, business or work, except only works of necessity and charity," on a Sunday. (Wis.) *Sentinel Co. v. A. D. Meiselbach Motor Wagon Co.*, 1007.

2. **SUNDAY LAWS—Work Done on Sundays—Judicial Notice.**—In an action to recover on a quantum meruit for advertising in a newspaper upon certain dates, the court will take judicial notice that such dates were Sundays, if that is the fact. (Wis.) *Sentinel Co. v. A. D. Meiselbach Motor Wagon Co.*, 1007.

SURETYSHIP.

See Principal and Surety.

TAXATION.

In General.

1. **TAXATION.—Claims Under a Fire Insurance Policy** after the destruction of the property are taxable under a statute providing for the taxation of every claim or demand due or to become due, and this although their payment depends upon whether there has been a breach of the conditions of the policy, whether proofs of loss are made, and whether the insurer exercises his option to rebuild. (Iowa) *Tally v. Brown*, 282.

2. **TAXATION.—Intentional Omission by the Assessor** of certain property interposes no obstacle to its subsequent assessment by the board of review. (Iowa) *Tally v. Brown*, 282.

3. **TAXATION.—Omission of Property by Assessor—Assessment by Other Officers.**—The act of the assessor in assessing property is not a judicial act, nor is it a final adjudication, and property omitted by him, intentionally or otherwise, may thereafter be assessed by the board of review, and thereafter, as to property not called to its attention, by the county auditor or treasurer, subject to appeal to the courts. (Iowa) *Tally v. Brown*, 282.

4. **TAXATION.—Construction of Statutes.**—The various sections of the code upon the subject of taxation manifest the legislative purpose of taxing all property, not expressly excepted as exempt, and, in construing them, this design is not to be ignored. (Iowa) *Tally v. Brown*, 282.

Exemption of Property.

5. **TAXATION.—The Power to Exempt Property from taxation**, as well as the power to levy taxes, is an essential element of sovereignty and can be surrendered or diminished only by plain and explicit terms of a statute. (Ill.) *People v. Bennett Medical College*, 237.

6. TAXATION—Exemption, Construction of Statutes Granting.—When words exempting property from taxation are susceptible of two constructions, courts will resolve any doubt as to the meaning of the language in favor of the state and hold the property not exempt. (Ill.) *People v. Bennett Medical College*, 237.

7. TAXATION—Exemption.—The Words "Belonging to," as used in a statute exempting from taxation property "belonging to" a medical college, mean "to be the property of," and denotes title or ownership. (Ill.) *People v. Bennett Medical College*, 237.

8. TAXATION—Exemption—Property Leased by Medical College.—Under a statute exempting from taxation the property belonging to a medical college, property held by it under a lease for a period of ninety-nine years is not exempt. (Ill.) *People v. Bennett Medical College*, 237.

Inheritance Tax.

9. COUNTY ATTORNEY—Collection of Inheritance Tax—Increase of Compensation.—The statute allowing county attorneys a certain percentage of the moneys recovered by the prosecution of suits for delinquent taxes does not apply to county attorneys in office at the time of the adoption of the statute, where there is a constitutional provision prohibiting changing the salaries of officials during their terms of office. (Ky.) *James v. Duffy*, 404.

Note.

Taxation of mineral estate severed from surface, 968.

TEACHERS.

See *Schools*, 3-5.

TELEPHONE COMPANY.

1. TELEPHONE COMPANIES—Duty to Provide Safeguards.—It is the duty of a telephone company upon installing its telephones to equip them with known devices for the prevention of the wires conducting lightning and excessive currents of electricity into the building where its telephone is installed. It must exercise the care of a prudent man under like circumstances, and its failure to do so is negligence rendering it liable to one injured thereby. (Ark.) *Southwestern Telegraph & Tel. Co. v. Abeles*, 115.

2. TELEPHONE COMPANIES—Personal Injuries to Patron.—A telephone company is liable for personal injuries to one using its instrument in the ordinary manner during an ordinary electrical disturbance, such injuries being caused by the failure of the company to properly install safety devices for protection against lightning. (Ark.) *Southwestern Telegraph & Tel. Co. v. Abeles*, 115.

3. TELEPHONE COMPANIES—Negligence—Question of Fact.—The question whether a telephone company has furnished proper safety devices, and properly connected the same, upon installing its instruments, is one of fact for the jury. (Ark.) *Southwestern Telegraph & Tel. Co. v. Abeles*, 115.

4. TELEPHONE COMPANIES—Negligent Equipment—Evidence. In an action for damages for injuries alleged to have been caused by failure of a telephone company to equip an instrument with a ground wire, printed specifications or rules with reference to ground wires issued by the defendant are admissible in evidence as tending to show that the absence of such wires was dangerous and that the defendant knew it to be so. (Ark.) *Southwestern Telegraph & Tel. Co. v. Abeles*, 115.

TENANCY IN COMMON.

1. **COTENANCY—Erection of Power Line.**—One Cotenant cannot use the common property for the purposes of a telephone and electric power transmission line to the exclusion of his cotenant. (Md.) *Susquehanna Transmission Co. v. St. Clair*, 452.

2. **COTENANCY—Right of Possession—Ouster.**—Tenants in common are jointly seised of the entire estate, and each has an equal right of entry and possession; the possession of one is the possession of all, and ouster will not be presumed from exclusive possession by one cotenant, but actual ouster must be proved. (Md.) *Susquehanna Transmission Co. v. St. Clair*, 452.

3. **COTENANCY.**—One Cotenant cannot Divert the Property from its former use to a use that will interfere with its enjoyment and use by his cotenant. (Md.) *Susquehanna Transmission Co. v. St. Clair*, 452.

4. **COTENANCY—Public Use of Property.**—The Fact That One Cotenant is a Public Service corporation does not give it a right to put the common property to public use without exercising the right of eminent domain, and such use may be enjoined by its cotenant. (Md.) *Susquehanna Transmission Co. v. St. Clair*, 452.

5. **COTENANCY—Waste.**—An Injunction may Issue in favor of one cotenant against the commission of waste by another. (Md.) *Susquehanna Transmission Co. v. St. Clair*, 452.

See Wills, 475.

TIMBER.

See Damages, 12-15; Replevin, 273.

TOWN TREASURER.

See Officers, 8-10.

TRADE MARKS AND NAMES.

1. **TRADE MARKS AND NAMES—Descriptive Words.**—Neither the adjective "nonfluid" nor the noun "oil" is capable of exclusive appropriation by any manufacturer, if used in their proper sense. (N. J. Eq.) *New York etc. Lub. Co. v. Young*, 560.

2. **TRADE MARKS AND NAMES—False Representations—Injunction.**—Where the owner of a trademark applies for an injunction to restrain the defendants from injuring his property by making false representations to the public, it is essential that he should not in his trademark, or in his advertisements and business, be himself guilty of any false or misleading representations. (N. J. Eq.) *New York etc. Lub. Co. v. Young*, 560.

3. **TRADE MARKS AND NAMES—False Statements by Claimant.**—If one seeking to protect a trademark makes any material false statement in connection with the property he seeks to protect, he loses his right to claim the assistance of a court of equity. (N. J. Eq.) *New York etc. Lub. Co. v. Young*, 560.

4. **TRADE MARKS AND NAMES—False or Misleading Statements.**—Where a symbol or label claimed as a trademark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be claimed. (N. J. Eq.) *New York etc. Lub. Co. v. Young*, 560.

5. **TRADE MARKS AND NAMES—False or Misleading.**—The rule which denies relief in equity to the claimant of a trademark which is in itself false or misleading is of universal application, and

does not apply to any particular class of cases. The courts will deny their aid to every attempt to mislead the public as to the real character of the thing to be sold. (N. J. Eq.) *New York etc. Lub. Co. v. Young*, 560.

6. TRADE MARKS AND NAMES—False and Misleading—"Non-fluid Oil."—A label designating a composition of grease as a "non-fluid oil" and advertisements asserting the composition to be an oil and not a grease will bar any right to an injunction to prevent the use of the term "nonfluid oil" by another, it being in itself false and misleading. (N. J. Eq.) *New York etc. Lub. Co. v. Young*, 560.

7. TRADE MARKS AND NAMES.—False and Misleading Advertisements of an article sought to be protected by a trademark will bar relief against infringement in a court of equity, and the frequency and extent of the advertising is immaterial. (N. J. Eq.) *New York etc. Lub. Co. v. Young*, 560.

8. TRADE MARKS AND NAMES—Actions for Infringement—Costs.—Where relief is denied in an action for infringement of a trademark upon the ground that it is false and misleading, but it is found that the defendant has also been guilty of false and misleading statements, costs will be denied him. (N. J. Eq.) *New York etc. Lub. Co. v. Young*, 560.

TREASURER.

See Officers, 8-10.

TREES.

See Damages, 12-15.

TRESPASS.

1. TRESPASS—Action Maintainable Only by One in Possession.—An action of trespass *quare clausum* can be maintained only by one in the actual or constructive possession of the premises on which the trespass is committed. (Wis.) *Knapp v. Alexander-Edgar Lumber Co.*, 1091.

2. TRESPASS—Action for Injury to Possessory Right.—A cause of action for trespass for injury to the possessory right may be maintained by a person in the actual possession of land against another who holds no paramount right or title, or against a mere intruder, by proving such possession, unlawful entry and damage. (Wis.) *Knapp v. Alexander-Edgar Lumber Co.*, 1091.

3. TRESPASS—Action by One not in Actual Possession.—A plaintiff in an action *quare clausum* who is not in the actual possession of the land, and is therefore obliged to rely on constructive possession, must establish that possession by showing that he has good title. The constructive possession follows the title. (Wis.) *Knapp v. Alexander-Edgar Lumber Co.*, 1091.

4. TRESPASS.—A Trespasser on Unoccupied Lands can be made to respond in damages but once, and then to the owner. (Wis.) *Knapp v. Alexander-Edgar Lumber Co.*, 1091.

See Public Lands, 2.

TRIAL.

In General.

1. TRIAL—Objections to Evidence—Grounds must be Stated.—The specific grounds of an objection or motion must be stated. The objection that an answer of a witness was not responsive will not be considered, where the only objection made was as to the competency of the evidence. (Wash.) *Britton v. Washington Water Power Co.*, 858.

2. TRIAL—Objections to Evidence—Statement of Grounds.—The grounds of an objection to the reception of evidence, or the competency of a witness, must be specifically stated at the time the objection is made. It is not sufficient to object generally that the evidence is illegal or the witness incompetent. (S. D.) *Goldberg v. Sisseton Loan & T. Co.*, 775.

3. TRIAL—Immaterial Issues.—It is not Error to refuse to submit an immaterial issue to the jury. (Utah) *Wall Rice Milling Co. v. Continental Supply Co.*, 815.

Instructions.

4. INSTRUCTIONS.—A Specific Objection must be made to the form of an instruction in the trial court or it will not be considered on appeal. (Ark.) *Southwestern Telegraph & Tel. Co. v. Abeles*, 115.

5. INSTRUCTIONS—Request Incorrect in Part.—It is not error to refuse a requested instruction which is in part incorrect. (Ark.) *Randleman v. Taylor*, 141.

6. INSTRUCTIONS—Error in Those Requested.—A party cannot complain of an error in instructions when the same error is found in the instructions offered by him. (Ill.) *McInturff v. Insurance Co. of North America*, 153.

7. INSTRUCTIONS.—It is not Error to Refuse to give a requested instruction, the subject matter of which is substantially covered by the court's general charge. (Utah) *Wall Rice Milling Co. v. Continental Supply Co.*, 815.

8. EVIDENCE—Weight and Sufficiency.—Special Instructions regarding the weight to be given certain evidence must be requested by the party who desires them. (N. Y.) *Barker v. Washburn*, 640.

Findings.

9. TRIAL—Special Findings.—Evidentiary Facts and Conclusions in special findings must be disregarded. (Ind.) *Fleming v. Greener*, 254.

10. TRIAL—Findings Outside the Issues are nullities and must be disregarded. (Ind.) *Fleming v. Greener*, 254.

See Criminal Law.

TRUSTS.

1. WILLS—Trusts.—Certainty is Necessary to the Creation of a valid testamentary trust, and any words by which it is expressed, or from which it may be implied, that the first taker has the power of withdrawing any part of the subject from the object of the request or wish of the testator, applying it to his own use, will prevent the subject of the gift or trust from being considered certain. (Ill.) *Wilce v. Van Anden*, 212.

2. TRUSTS—Termination by Equity.—Where an attempted trust in the residue of a fund, if any, remaining at the death or remarriage of the testator's widow and the death of his daughter is void, and the corpus of the property is being consumed by annuities in favor of the widow and daughter, charged thereon, the daughter being the sole heir of the testator, and all parties interested being sui juris and requesting and consenting to a termination of the trust, the same may be decreed by a court of equity and the corpus of the estate vested in the daughter, subject to the rights of the widow. (Ill.) *Wilce v. Van Anden*, 212.

3. TRUSTS—Termination in Equity.—Where all the parties are capable of acting and desire to terminate a trust, courts can decree its termination, and when all those who have the entire legal and

beneficial interest in the property agree to dispose of it in a particular manner, courts will give effect to their agreements. (Ill.) *Wilce v. Van Anden*, 212.

4. **TRUSTS—Distribution, When Determined.**—The Persons to Whom trust property shall be distributed will not be determined in advance of the termination of the trust. (R. I.) *Bowlin v. Rhode Island Hospital Trust Co.*, 758.

See Charities.

TUITION.

See Schools, 6-8.

TURF EXCHANGE.

See Gaming; Nuisance, 4.

UNIVERSITY.

See Colleges and Universities.

VENDOR AND VENDRE.

See Deeds; Mortgages, 1.

VENUE.

1. **VENUE—Realty in Another State.**—Damages for the Breach of a contract may be recovered in the courts of Kentucky, regardless of the fact that land to which the contract relates is situated in another state. (Ky.) *Campbell v. W. M. Ritter Lumber Co.*, 385.

2. **VENUE—Land Situated in Another State.**—The judgments of the courts of one state cannot directly act upon the title to land situated in another state, or in any way affect it, but judgments imposing mere personal obligations enforceable by attachment, execution and the like, where they do not operate directly upon the property, are valid. (Ky.) *Campbell v. W. M. Ritter Lumber Co.*, 385.

See Bastardy; Landlord and Tenant, 1.

VICE-PRINCIPAL.

See Master and Servant, 25-27.

VOTING.

See Elections.

WAGES.

See Constitutional Law, 21-23.

WASTE.

See Landlord and Tenant, 1; Tenancy in Common, 5.

WATERS AND WATERCOURSES.

SURFACE WATERS—Obstructing Natural Flow.—In filling a passageway for surface water, usually and naturally flowing beneath a railroad bridge, the railroad company is bound to the exercise of ordinary care not to unnecessarily dam up and throw the water back to the injury of neighboring land owners. (Iowa) *Tretter v. Chicago & Great Western Ry. Co.*, 304.

See Municipal Corporations, 2.

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Note.

Waterworks, specific performance of contract to install and maintain, 73.

WILLS.**In General.**

1. **WILLS—Intention of Testator—How Determined.**—When a court is expounding a will either at law, sitting as a jury, or in equity, the language of the testator, where plain and unambiguous, must govern, and therefore extrinsic evidence is inadmissible to show that he meant something different from what his language imports; the question is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words. The court cannot by intendment reconstruct the will. (Md.) *Schapiro v. Howard*, 414.

2. **WILLS—Construction—"Children of Wife."**—A bequest that "in the event of my said wife having any child or children at the time of her death, I devise and bequeath the whole of said estate to said child or children," is not confined to any issue of the then present marriage, but includes any children the wife might have by a second marriage. (Md.) *Schapiro v. Howard*, 414.

3. **WILLS—Title to Property.**—In a Proceeding for the Construction of a Will, questions of the title of property bequeathed will not be adjudicated, in the absence of some special reason therefor. (N. J. Eq.) *Kearns v. Kearns*, 575.

4. **WILLS—Joint Tenancy not Created.**—A Devise of a piece of real estate and one-half the testator's personal property to one daughter, and of another piece of real estate and the remaining one-half of his personalty to another daughter, providing that the property shall not absolutely vest in them but be held in trust and the income paid to them for life, and in the event of the decease of one her share to go to the survivor, with a devise over to a third person in case she survive the daughters, does not create a joint tenancy but makes specific devises in severalty, with the right to the entire beneficial use in the survivor. (R. I.) *Bowlin v. Rhode Island Hospital Trust Co.*, 758.

5. **WILLS—Joint Tenancy—Merger of Estates.**—A devise of one piece of real estate and one-half the testator's personal property to one daughter, and of another piece of real estate and the remaining half of the personal property to another daughter, providing the property shall not absolutely vest in them but be held in trust, the income being paid to them for life, and the whole thereof to the survivor, and providing further that such property and income shall be free from the control and debts of the husbands of the daughters, with a devise over to a third person should she survive the daughters, shows a dominant purpose to create an equitable joint tenancy, and is a positive prohibition against the vesting of the estate in the daughters, and the equitable or trust estate is not merged in the legal estate upon the death of the person to whom the devise over was made, the two daughters being the sole heirs of their father, so as to vest the title in them absolutely. (R. I.) *Bowlin v. Rhode Island Hospital Trust Co.*, 758.

6. **WILL CONTEST—Offer of Judgment in Evidence—Review.**—If the abstract shows that the proponents of a will identified and offered in evidence, separately, the notice, petition, and answer in proceedings to have the testator adjudged mentally incompetent to care for his estate and to appoint a guardian for that purpose, and the record of the proceedings was also offered, among such proceedings being a judgment dismissing the petition on the merits, it must be held that there was a sufficient offer of the judgment to

permit a review of the ruling excluding it. (Iowa) *In re Will of Van Houten*, 340.

7. **WILLS**.—The Law Favors the Vesting of Estates, and, in the absence of any intention of the testator appearing to the contrary, the estate will vest at the time of his death. (Ill.) *Wilce v. Van Anden*, 212.

8. **WILLS**.—Charge Against Legatee.—A Provision in a Codicil to a will reciting that the testator had determined to make a certain charge annually against one of the legatees because of advances for her board operates from the date of the codicil and not from the date of the will. (Md.) *Smith v. Smith*, 435.

Doctrine of Election.

9. **WILLS**.—Election.—Under the Doctrine of Election one cannot take what is devised to him, and at the same time what is devised to another, although but for the will it would be his. But this principle has no application where there is no attempt to defeat any of the provisions of the will; hence it does not apply where a will erroneously recites that certain property, belonging to the testator, belongs to another, there being no sufficient bequest to that other. (Md.) *Smith v. Smith*, 435.

Undue Influence.

10. **WILL**.—Undue Influence.—The Existence of Meretricious Relations between a testator and a married woman for some time before, at the time of, and continuing after the execution of the will, taken in connection with the fact she is the sole devisee to the exclusion of an only daughter against whom no other grievance existed than that she had declined to receive this woman into her home, is evidence of an undue influence affecting the dispositions of the will and sufficient in itself to carry the case to the jury. (Pa.) *Snyder v. Erwin*, 737.

11. **WILL**.—Undue Influence—Meretricious Relations.—Evidence that the sole beneficiary under a will, a married woman, was persistent in following the testator, a man of seventy-five, to his different boarding places, and in accompanying him to public places, daytime and night; that she was most assiduous in showering her attentions upon him in various ways, unbecoming in the wife of another; that she carried on adulterous commerce with him; and that she addressed him in terms of dearest affection, to which he replied in equally ardent terms, is sufficient to establish undue influence. (Pa.) *Snyder v. Erwin*, 737.

Testamentary Capacity.

12. **WILL CONTEST**.—Mental Capacity—Judgment in Guardianship as Evidence.—Where proceedings were instituted for the appointment of a guardian of the estate of a testator, on the ground of mental incompetency, a judgment dismissing the proceedings is admissible on a contest of the testator's will, made before such proceedings, as bearing upon his mental condition at the time of the execution of the will. (Iowa) *In re Will of Van Houten*, 340.

13. **WILLS**.—Mental Capacity—Evidence.—When the Sickness of a testator at the time of the execution of his will was wholly physical, proof of his condition as to lethargy, suffering or unconsciousness on days preceding or following the execution of the will is entitled to very little consideration; the sole question being whether at the time of its execution he was conscious and able to understand what he was doing. (Iowa) *Speer v. Speer*, 268.

14. **WILLS**.—Mental Capacity.—Mere Mental Weakness not due to mental disease, but solely to physical infirmity, does not constitute

mental unsoundness; but there may be testamentary incapacity without actual insanity or unsoundness of mind. (Iowa) *Speer v. Speer*, 268.

15. **WILLS—Mental Capacity.—**Testimony as to the Suffering and stupor of a testator, who was suffering from a progressive illness, on the day following the execution of the will, cannot be considered to show his condition on the day the will was executed. (Iowa) *Speer v. Speer*, 268.

16. **WILLS—Mental Capacity.—**Testimony of a Witness that on the day a will was executed the testator "could not indicate that he could understand what I said to him," is a mere inference and is properly stricken out. (Iowa) *Speer v. Speer*, 268.

17. **WILLS—Mental Capacity.—**Opinions of the Mental Condition of a testator, who was suffering with a progressive physical illness, based upon his condition at other times than when the will was executed, either on that day or other days, have no probative force with reference to his condition when the will was made, and are therefore inadmissible. (Iowa) *Speer v. Speer*, 268.

18. **WILL CONTEST—Testamentary Capacity—Review.—**In considering whether a verdict should have been rendered in favor of the proponents of a will, the court on appeal will assume the truth of the contestant's evidence that there was a want of testamentary capacity. (Iowa) In re Will of Van Houten, 340.

19. **WILL CONTEST—Mental Capacity and Undue Influence—Review.—**In a will contest, where the questions of mental incompetency and undue influence are both submitted to the jury, and both are determined affirmatively, the fact that the finding upon one of them is without support in the evidence does not entitle the proponent to a reversal if there is evidence on which the other finding can be upheld. (Iowa) In re Will of Van Houten, 340.

Mental Capacity—Testimony of Subscribing Witnesses.

20. **WILLS—Testimony of Subscribing Witness—Presumptions.—**The admission of a will to probate gives rise to no presumption of testimony, express or implied, by a subscribing witness that the testator was of mental capacity. The law affords the necessary evidence of that fact by way of a presumption as long as the presumption remains uncontroverted. (Iowa) *Speer v. Speer*, 268.

21. **WILLS—Mental Capacity.—**Declarations of a Subscribing Witness, made after the execution of a will, to the effect that the testator was mentally incompetent are hearsay and not admissible. (Iowa) *Speer v. Speer*, 268.

Possibility of Issue.

22. **WILLS.—**A Possibility of Issue is Always supposed to exist in law, and there is no age beyond which, as matter of law, the having of issue is impossible. (R. I.) *Bowlin v. Rhode Island Hospital Trust Co.*, 758.

Abatement of Legacies.

23. **WILLS—Payment of Debts—Abatement of Legacies.—**Resourse must be first made to the personal property not specifically devised, for the payment of the debts of the decedent, and if that is found insufficient, then the specific legacies will abate proportionately. (N. J. Eq.) *Kearns v. Kearns*, 575.

Bequest by Implication.

24. **WILLS—Bequest by Implication.—**An Erroneous Recital in a will to the effect that certain life insurance is in favor of certain persons who will receive the proceeds, when in fact it was payable

to the testator's estate, cannot operate as a bequest thereof by implication. (Md.) *Smith v. Smith*, 435.

25. WILLS—Bequest by Implication.—If an Erroneous Recital in a testamentary instrument is of a gift contained in the instrument, the recital may operate as being in itself a devise or bequest by implication of that very property; but if the erroneous recital refers to an estate created by another instrument, the recital cannot operate to create an estate by implication. (Md.) *Smith v. Smith*, 435.

Specific or General Legacies.

26. WILLS—Specific or General Legacies.—A bequest of "my household goods, cash on hand or in bank, life insurance and all other personal property of every description, is a specific legacy so far as the household goods, cash and insurance are concerned, and a general legacy so far as any other property passing by it is concerned. (N. J. Eq.) *Kearns v. Kearns*, 575.

27. WILLS—Specific Legacies.—If a Thing Bequeathed is, by the terms of the will, individuated, so that it is distinguished from all others of the same kind, it is a specific legacy. (N. J. Eq.) *Kearns v. Kearns*, 575.

See Annuities; Charities.

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WITNESSES.

1. WITNESS—Competency of One Mentally Impaired.—A person is not necessarily incompetent to testify because of mental impairment. The decision of the trial court receiving his testimony cannot be disturbed unless manifestly wrong. Ordinarily, such infirmity goes to the weight of evidence by the witness, not to the competency to testify, unless the impairment is substantially total, or such as to render him wholly unconscious of the obligation of an oath. (*Wis.*) *Burns v. State*, 1081.

2. WITNESSES—Person Adjudged Incompetent.—It does not follow that a person adjudged incompetent and unable to manage his own affairs is incompetent as a witness, for he may possess sufficient intelligence to be truthful and to describe simple occurrences as they were. (*N. Y.*) *Barker v. Washburn*, 640.

3. WITNESS—Transaction With Decedent.—An Heir who is contesting a will, and who took part or participated in a transaction in which the testator gave or renewed a promissory note, is incompetent to testify concerning it. (*Iowa*) *In re Will of Van Houten*, 340.

4. EVIDENCE—Refreshing Memory.—Reference to a Diary kept by a witness may be made by him to refresh his recollection as to where he was on a certain day, and if, when so refreshed, he can remember and say that he was not at the place testified to by an adverse witness, the testimony is not only relevant, but the circumstance indicates a carefulness of habit, and a ready and generally reliable means of refreshing the recollection. (*Ky.*) *Star Mills v. Bailey*, 370.

5. WITNESS.—A Party cannot Impeach His Own Witness by proof of a prior contradictory statement, where such party has not been misled by the witness, and where the witness has testified to no fact injurious to such party but has only failed to testify to matters beneficial to him. (*Okl. Cr.*) *Culpepper v. State*, 668.

See Criminal Law, 9; Evidence.

WORDS AND PHRASES.

1. WORDS AND PHRASES.—"Minerals," speaking generally, signify all natural inorganic bodies. (*N. Y.*) *White v. Miller*, 618.

2. WORDS AND PHRASES.—"Money," in its strict technical sense, is coined metal, usually gold or silver, upon which the govern-

ment stamp has been impressed to indicate its value; in its more popular sense, any currency, token, bank-notes or other circulating medium in general use as the representative of value; a generic term, covering everything which by consent is made to represent property and passes as such currently from hand to hand. The word designates the whole volume of the medium of exchange, regardless of its character or denomination. (Ala.) *Johnson v. State*, 19.

3. **WORDS AND PHRASES.**—"Retail," as Used in a Statute regulating the sale of drugs and poisons, is used in its ordinary sense, the sale of commodities in small quantities or parcels. (Ky.) *Katzman v. Commonwealth*, 359.

4. **WORDS AND PHRASES.**—The Words "Ship" and "Shipment" are used to express the idea of goods delivered to carriers for the purpose of being transported from one place to another. (Iowa) *State v. Carson*, 330.

5. **WORDS AND PHRASES.**—The Ordinary Meaning of the Word "Shipped" is to load for transportation. (Iowa) *State v. Carson*, 330.

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